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Bill C-78 – The Long-awaited Overhaul of the Federal Divorce Act

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Overview

Bill C-78, *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act,* received Royal Assent on June 21, 2019. The Bill represents the first major change to Canada's federal family laws related to divorce, separation, and parenting since the *Divorce Act* came into force in 1986 over twenty years ago.

History

Bill C-78 was first introduced by the Liberal government in May 2018 to address four key objectives:

- to promote the best interests of the child;
- to address family violence;
- to help reduce child poverty; and
- to make Canada's family justice system more accessible and efficient by streamlining processes and reducing the need for court intervention.

Despite early criticisms that the proposed changes "did not go far enough", the Bill has significant support from family lawyers, judges and scholars, as well as mediators and mental health professionals, as was reflected in the submissions before the Standing Committee on Justice and Human Rights in November, 2018. Laurie H. Pawlitza and Daniel S. Melamed, senior partners at Torkin Manes LLP, were both invited to speak at the Committee hearings.

Key provisions

Doing away with the outdated terms of "custody" and "access"

One of the most widely discussed reforms in Bill C-78 relates to replacing the terms "custody" and "access" with the more modern terms "parenting time" and "parental decision-making". The provisions of the *Divorce Act* related to parenting currently refers to the term "custody" to describe a parent's ability to make decisions affecting a child and "access" to describe the time a child spends with a parent. In order to promote the *Divorce Act*'s primary objective, which is the best interests of the child, Bill C-78 has replaced these terms with words and phrases that focus on parental relationships with children. The new terminology not only eliminates confusion over the meaning of these terms "custody" and "access", which are often conflated with one another, but also confirms the cultural shift in the family law community that has taken place over the past two decades away from an adversarial approach that promotes winners and losers (where "custody" is something to be prized while "access" is for the secondary parent) towards a child-focused approach that promotes cooperative problem solving.

Promotion of alternative dispute resolution

Bill C-78 imposes a duty on divorcing spouses to protect children from conflict that arises from their family law proceeding and to try to resolve matters outside of court through "family dispute resolution processes", which include negotiation, mediation and collaborative family law. This not only reflects the fact that it is faster and less expensive to resolve issues through dispute resolution rather than litigation, but also instills the need for divorcing spouses to learn to communicate effectively with one another, as they will need to do for years to come for the benefit of their children. Bill C-78 also recognizes that dispute resolution processes are not appropriate in cases where there has been family violence or a significant power imbalance between the parties.

Clarifying the "best interests of the child"

The current *Divorce Act* states that when making an order related to parenting, the court is to consider the "best interests of the child" by reference to the "condition, means, needs and other circumstances of the child". Bill C-78 establishes a broader scope of factors to be considered by a court in determining the best interests of the child, including a child's age and stage of development, the existing relationship between the child and each parent and extended family, the ability of each parent to support the child's relationship with the other parent, each parent's history of care and plan of care for the child, and the child's views and preferences regarding the parenting arrangements to be made, among other considerations. These factors are, to a large extent, already found in most provincial family law statutes, including Ontario's *Family Law Act*.

A controversial proposal for a "presumption of equal parenting" was made and rejected at the Committee hearings. Such a presumption would assume that equal time and joint decision-making responsibility is, by default, the appropriate regime in all cases unless a parent could prove that such an arrangement is not in the best interests of the child. The Committee's final position on the matter confirms what many academics and lawyers already know to be true – while many parents can and should share responsibilities for their children, a presumptive equal shared parenting arrangement does not work for all families and the optimal amount of time spent with each parent depends on an individual child's circumstances. In its final form, Bill C-78 includes a new section 16(6), which specifies that in "allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child."

Family violence as a mandatory consideration in parenting orders

While the current *Divorce Act* makes no reference to family violence, Bill C-78 requires courts to consider the relevance of family violence (more expansively defined as any conduct that is violent or threatening, a pattern of coercive and controlling behaviour or conduct that causes a family member to fear for their safety, including financial violence) when determining what parenting arrangements are in a child's best interests. Among other things, a court will need to consider the impact of family violence on a parent's ability and willingness to care for and meet the child's needs and whether cooperation from a parent who has engaged in family violence is required in making decisions affecting the child.

A new legal framework for relocation cases

Relocation, or moving a child to a new jurisdiction after separation and divorce, is one of the most litigated family law issues. As there are no statutory criteria for determining relocation cases under the current *Divorce Act*, lawyers and judges have relied upon the test set out in the leading case on the issue, being the Supreme Court of Canada's decision in *Gordon v. Goertz*, [1996] 2 SCR 27. The Court held that in considering the merits of an application to vary a parenting order in the context of a proposed relocation, the court must be satisfied that the relocation is in the child's best interests, as determined by the consideration of an enumerated list of factors. Given the fact-specific nature of this analysis, *Gordon v. Goertz* has been criticized by the legal community for not offering enough guidance and certainty to predict outcomes in relocation cases and advise clients accordingly.

Bill C-78 introduces a new legal framework for relocation cases, which includes the following key components:

1. Amount of notice to be given of a proposed relocation (which varies depending on whether the relocation is merely a change in residence or a true "relocation" that would significantly impact the child's relationship with the parent who is not relocating) as well as the information required in the notice (including the expected date of the relocation, the new address and a proposal as to how parenting time with the non-relocating parent could be exercised).

2. Additional "best interests" criteria for relocation cases (including the reason for the relocation, which departs from the Supreme Court of Canada's direction in *Gordon v. Goertz* that the reasons for the move should generally not be considered).

3. Burdens of proof that would apply in certain relocation cases. Namely, in shared parenting scenarios where the parents make decisions jointly and the child spends substantially equal time with both parents, the parent proposing the move will need to demonstrate why the move is in the child's best interests. Conversely, where one parent has primary responsibility for the care of a child and the child is primarily in the care of one parent, the burden of proof shifts to the parent opposing the move.

Enforcement of support obligations

In addition to the long overdue overhaul of the *Divorce Act,* Bill C-78 also introduces key changes to the *Family Orders and Agreements Enforcement Assistance Act* (the "FOAEAA") that help establish and enforce support and expand the scope of operations for provincial support calculation and enforcement agencies. Among other things, Bill C-78 allows the federal government to release an individual's income information, including information from tax returns, to a court on a confidential basis for the purposes of establishing, varying or enforcing support orders and expands the group of provincial family justice organizations that can request the release of such information.

Bill C-78 also introduces amendments to the *Garnishment, Attachment and Pension Diversion Act* the (" **GAPDA**") that establish the principle that in the context of garnishment applications, family support debts are to take priority over commercial debts and all other debts other than Crown debts, thereby promoting the economic well-being of children.

Implementation of Bill C-78

The coming-into-force date of most of the *Divorce Act* amendments has been set by Order in Council as July 1, 2020. The delayed coming into force is intended to allow for necessary changes to forms, rules and procedures at the provincial and territorial level. Bill C-78 will creates pressure for provincial law reform in particular, so that unmarried spouses whose affairs are not governed by the *Divorce Act* receive equal treatment under the law.

The delayed implementation of the new law will allow governments and professionals time to adapt to the new changes and educate the public. As recognized in the Senate Committee Report, ongoing support from governments will be critical to ensure that the objectives of the reforms are achieved and that necessary further systemic and legislative reforms are undertaken.

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The legislative overhaul contemplated by Bill C-78 will undoubtedly have a significant impact on separating spouses and families. Our family law department would be happy to advise on the impact of the new laws as they apply to your situation.

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