



Article

Family Law

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Updated *Divorce Act* emphasizes parental responsibilities over rights to children

Changes reflect a social and cultural shift away from the adversarial process, while recognizing effect of family violence

By Laurie H. Pawlitza

Six weeks ago, the first significant changes in years were made to the *Divorce Act*, the federal legislation that deals with parenting, child and spousal support and, of course, divorce.

Critics of the *Act's* changes have complained that amendments are just tweaks in nomenclature. In the new *Act*, for example, a “custody” order is now a “parenting” order, and an “access” order is now a “contact” order.

In fact, the changes represent a much more significant shift.

Many of them, particularly those related to parenting, focus on the roles and responsibilities of the spouses, rather than a parent’s “rights” to their children.

The amendments stress the duties of separating spouses: parents are obliged to spend their time with their child in a way that is consistent with a child’s best interests, they must protect the child from conflict and have the obligation to provide “complete, accurate and up to date information.” The information provision in essence directs spouses to provide accurate financial disclosure to the other.

In addition to the obligations for parenting and disclosure, the enumerated duties require a spouse to attempt to use a family dispute resolution process – out of court settlement options – including negotiation and mediation.

Any spouse now starting a divorce proceeding must confirm in the documents filed with the court that they are aware of their duties.

The family lawyer's obligations have also changed: the lawyer acting in the court proceeding must sign a certificate confirming that she has advised the spouse of that spouse's duties under the *Act*. The lawyer must also "encourage" alternative dispute resolution unless it is "clearly" not appropriate.

The lawyer also has a duty to inform the client of family justice services that might assist the spouse in resolving matters or in complying with any order made. Family justice services are public or private services that are available to help the spouse to deal with issues arising from separation or divorce.

These latter changes recognize that for separating couples, court should be the place of last resort – and that the untangling of a marriage is a multi-faceted problem.

For the first time, the *Act* also now defines "family violence." It is "any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person – and in the case of a child, the direct or indirect exposure to such conduct." Examples included in the legislation are harassment, stalking, psychological abuse, financial abuse and threats to kill or harm an animal or damage property. A "family member" also includes someone a spouse is dating.

The breadth of the family violence definition reflects the current understanding about violence in the mental health field. Several of the examples in the legislation, such as stalking and threats to harm an animal, are well-documented signs that are often precursors to serious physical violence.

The new *Act* sends a clear message about family violence, as where there has been family violence, the court is obliged to 'take into account' the nature, seriousness and frequency of the family violence, whether there was a pattern of coercive and controlling behaviour, whether it was directed toward the child, whether the child was exposed directly or indirectly to the family violence, and the physical, emotional and psychological harm or risk of harm to the child.

The *Act* makes the primary consideration when deciding a child's best interests, "the child's physical, emotional and psychological safety, security and well-being." The factors in deciding best interests include the child's need for stability, each spouse's willingness to support a relationship with the other spouse, the child's views and preferences (taking their age and maturity into account), the child's cultural, linguistic, religious and spiritual upbringing, including Indigenous upbringing and family violence.

While men's rights groups lobbied the federal government to enshrine a presumption of equal shared parenting, in the law, that was ultimately rejected by the government.

Nevertheless, when allocating parenting time, the court is directed to "give effect to the principle that a child should have as much time with each spouse as is consistent" with a child's best interests.

In Ontario, the implementation of this provision means that even the divorce forms have changed. In addition to requiring parents to confirm that they understand their duties, they also must confirm they understand the maximum contact principle. Ontario's forms now specifically require each spouse to provide details of their plan for the child "to have maximum time with the other parent."

The *Divorce Act* changes clearly reflect a social and cultural shift away from the adversarial process, while recognizing the effect of family violence and the many forms in which it appears.

The amendments bring direct separating spouses to accept that the demise of the relationship does not obviate their responsibilities. Each separating spouse must try to bridge their differences by agreement and keep their children out of the cross-fire of divorce.

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