Legislative Background: *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*
(Bill C-78 in the 42nd Parliament)

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June 2019

Contents

June 2019

INTRODUCTION

Family law touches more Canadians than any other area of law. Statistics Canada's most recent data indicated that in 2011 about five million Canadians had separated or divorced in the last 20 years, with over two million children living in divorced or separated families. The Government of Canada is committed to supporting families going through separation and divorce.

On May 22, 2018, the government introduced Bill C-78 to strengthen the Canadian family justice system. The legislation makes changes to the *Divorce Act,* the *Family Orders and Agreements Enforcement Assistance Act* (FOAEAA), and the *Garnishment, Attachment and Pension Diversion Act* (GAPDA) and align federal family laws with two international family law Conventions. The bill received Royal Assent on June 21, 2019. Most of the amendments to the Divorce Act will come into force on July 1, 2020. Changes to federal support enforcement laws will come into force within two years.

This version of the Legislative Background is an updated version of the original document that was tabled in Parliament on September 26, 2018[1] and posted on the Justice Canada website. It identifies key changes made to Bill C-78 through the parliamentary process.

This legislation makes federal family laws more responsive to families' needs. Its four key objectives are:

- Promoting children's best interests
- Addressing family violence
- Helping to reduce poverty
- Making Canada's family justice system more accessible and efficient

The changes to family laws are a key milestone in the government's ongoing efforts to support Canadian children and families going through separation and divorce.[2] A strengthened family justice system will help increase access to family justice, facilitate the resolution of disputes and improve outcomes for children and families.

BACKGROUND

A. DIVISION OF FEDERAL AND PROVINCIAL RESPONSIBILITIES FOR FAMILY LAW

[1] 42nd Parliament, 1st Session, Edited Hansard Number 326: https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-326/hansard

[2] These efforts include committing ongoing funding for family justice activities through Budget 2017, signing two international family law Conventions in 2017, and Budget 2018's commitment to expand unified family courts.

Family law is an area of shared jurisdiction. The federal government is responsible for divorce and associated matters such as custody and access (parenting) and family support (i.e., child and spousal support) for divorcing or divorced couples.

Provincial and territorial governments are responsible for matters related to separating unmarried couples and married couples who separate but do not seek a divorce, as well as division of property issues related to separation and divorce. They are also responsible for the administration of justice. This includes the administration of the courts and the delivery of family justice services, such as mediation and parent education sessions. Each province and territory has laws to address both the substance of family law, including matters such as parenting and support, and the procedure of family law, such as court rules. Provinces and territories are also responsible for the enforcement of family support obligations.

There are several federal family law statutes. The *Divorce Act* creates a national system for divorce and provides for orders for spousal and child support as well as parenting in divorce cases. FOAEAA allows for the release of information from federal information banks, the garnishment of federal monies such as income tax refunds, and the suspension (or denial) of federal licences, including the Canadian Passport, to enforce family support obligations. GAPDA allows for the garnishment of federal employees' salaries to enforce civil judgments, including those relating to support obligations, and the diversion of federal pension benefits to enforce family support obligations only.[3]

The federal government works closely with provincial and territorial governments to promote consistency between family laws across Canadian jurisdictions. Federal family laws must also reflect Canada's two legal traditions. While most provinces and territories rely on the common law system, Québec has a civil law system. The 2019 changes to family laws reflect these different responsibilities and legal traditions.

B. CHALLENGES FACING THE FAMILY JUSTICE SYSTEM

Family laws and programs are essential to helping Canadians resolve family law disputes. Federal family laws had not been substantially amended in over 20 years. They did not address a number of important issues, including, for example, family violence. In contrast, several provinces and territories have amended their family laws to better address a variety of pressing family law issues, including relocation, family violence and promoting out-of-court dispute resolution.

1. Outdated federal family laws

[3] Two additional federal family law Acts, the *Civil Marriage Act*, SC 2005, c 33, and the *Marriage (Prohibited Degrees) Act*, SC 1990, c 46, are not addressed in this paper.

Federal family laws were developed to provide guidelines and rules to help families through separation and divorce and to chart the course for the ongoing care and support of children.

Family law stakeholders have been calling for updates to federal family laws for several years. One of the earliest and strongest calls for change came from the Special Joint Committee on Child Custody and Access.[4] Some of the Committee's key recommendations included the adoption of new parenting terminology in the *Divorce Act* and a list of best interests of the child criteria. The Canadian Bar Association has strongly supported these recommendations.[5] There have also been calls to address the growing gap between federal and provincial and territorial enforcement legislation.

2. Access to justice

For many years, access to justice was understood simply as access to lawyers and courts. In 2013, the Action Committee on Access to Justice in Civil and Family Matters, chaired by retired Supreme Court Justice Thomas Cromwell, adopted a more "expansive vision."[6] In an associated report, the Action Committee's Family Justice Working Group defined the justice system as including

> all laws, programs and services that meaningfully contribute to the resolution of family law issues. This includes public institutions such as the courts, government ministries, and legal aid service providers, as well as non-government agencies, lawyers, mediators and other private professionals who help families during the separation process.[7]

Increasing access to justice does not necessarily mean increasing the number of matters before the court or the speed at which they get resolved, but rather increasing options for families.

There have been important calls to improve access to justice in recent years. A 2016 report by the Canadian Forum on Civil Justice, a non-profit organization that advocates civil justice reform, found that in a given three-year period, 5.1% of the Canadian adult population, or about 1.2 million Canadians, will face a family law problem.[8] The report estimated that,

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[4] Parliament of Canada, Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (December 1998).
[5] The Canadian Bar Association, *"Bill S-202 – Shared Parenting Act,"* Legislative Comment on Bill S-202, *An Act to amend the Divorce Act (shared parenting plans)*, 1st Sess, 42nd Parl, 2015.
[6] Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice: A Roadmap for Change*, Final report (Toronto: Canadian Forum on Civil Justice, 2013) at 2.
[7] Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice: Beyond Wise Words*, Final report by the Family Justice Working Group, (Toronto: Canadian Forum on Civil Justice, 2013).
[8] Canadian Forum on Civil Justice, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, (Toronto: 2016) at 2.

between 2012 and 2015, individual Canadians as a group spent $23 billion on resolving their civil and family law problems. It further estimated that the associated cost to government of Canadians' civil and family law problems—including added costs related to social assistance, loss of employment, and physical and mental health issues—was at least $800 million annually. The report concluded that "some Canadians, particularly those with fewer resources and those who see themselves more on the margins of society, do not view the justice system as fair, accessible or reflective of them or their needs."[9]

There is a growing gap in access to justice. More and more middle-income families are ineligible for legal aid and unable to pay for lawyers. They must navigate the often-complex family justice system alone. This can contribute to entrenched conflict and financial hardship for those going through divorce or separation. Improving access to family justice, including family justice services, can help reduce or prevent some of the negative outcomes associated with separation and divorce.

3. Contentious issues in family law

Family justice professionals identify certain family law issues as being particularly contentious or difficult to resolve. For example, disagreements over relocation—moving with a child after separation or divorce—may be challenging because of the complexity of the situation itself and the lack of guidance in legislation. Some academics argue that even the language used to describe the responsibilities of parenting can fuel conflict between parents. Many have called for increased clarity in the law to better address some of these issues.

Another highly contentious issue relates to the failure to comply with income disclosure obligations for family support purposes. Lack of accurate and up-to-date income information makes it difficult to determine fair and accurate family support amounts and puts pressure on the family justice system. It also creates financial and emotional hardship for the parties involved.

Another challenge in family law relates to obtaining or enforcing family law orders when parties live in different countries. Countries' laws and legal traditions may differ considerably, so determining which rules to apply in cross-border situations can be challenging.

OVERVIEW: LEGISLATIVE OBJECTIVES

A. PROMOTING THE BEST INTERESTS OF THE CHILD

The best interests of the child is a foundational legal principle in Canadian family law. The Supreme Court of Canada has referred to the best interests of the child as a child's "positive

[9] *Ibid* at 11.

right to the best possible arrangements in the circumstances."[10] The best interests of the child is also a significant principle internationally. For example, it forms the basis of Article 3 of the United Nations *Convention on the Rights of the Child*,[11] which calls for the child's best interests to be a primary consideration in all actions involving children. The best interests of the child test also underlies much of provincial and territorial family law. There is considerable consensus that the best interests of the child is the appropriate basis upon which to make decisions related to children.

The 2019 changes to family laws maintain the best interests of the child as the only consideration for parenting decisions under the *Divorce Act* and includes various measures to promote the best interests of the child. For example, the amendments create a duty for parents to exercise their responsibilities for their children in a manner consistent with the best interests of the child.

The legislation also sets out a list of best interests of the child criteria highlighting key factors related to children's well-being. This list will help parents, family justice professionals and judges determine what is best for the child in a particular case.

The changes to the *Divorce Act* also replace the terms "custody" and "access" with terminology focused on parents' responsibilities for their children. Family law academics have written that this change in terminology supports children's best interests by helping to reduce parental conflict.[12] The amendments introduce "parenting orders" and "contact orders" through which courts could provide specific direction on the care of children.

Finally, the legislation introduces provisions to help parents and courts resolve disputes over relocation after separation and divorce. This supports the objective of promoting the best interests of the child by contributing to a reduction in parental conflict.

1. Exclusive focus on the best interests of the child in parenting matters

Over the years, several private member's bills[13] have proposed changes to the *Divorce Act* that would have created a legal presumption of equal shared parenting meaning equal time and joint decision-making responsibility. This presumption would apply unless a parent could prove that such an arrangement is not in the best interests of the child. While in most cases parents can and should share responsibilities for their children, a presumptive equal shared parenting

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[10] *Young v Young,* [1993] 4 SCR 3 at 10.
[11] United Nations, *Convention on the Rights of the Child*, 20 November 1989, Art 3 (entered into force 2 September 1990).
[12] Nicholas Bala et al, "Shared parenting in Canada: Increasing use but continued controversy" (2017) 55:4 Family Court Review 513.
[13] See for example Bill C-560, *An Act to amend the Divorce Act (equal parenting) and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2013.

arrangement does not work for all families. For example, if one parent travels frequently with work, or does shift work, it may be very difficult to share time with a child equally. If there has been family violence, sharing responsibilities may be dangerous to the child and other family members. An imbalance in power between spouses—as well as the high cost of legal representation—may make it difficult for a party to present evidence to convince a court not to apply the presumption.

Several stakeholders, including the Canadian Bar Association,[14] have argued that a presumption could increase litigation by forcing parents to lead evidence showing that the other parent is less fit, thus fuelling conflict. The Special Joint Committee on Child Custody and Access noted that a parenting presumption would shift the focus of the inquiry in parenting matters away from the best interests of the child.[15] A presumption would be inconsistent with the emphasis on children's best interests brought in by the 2019 changes to family laws.

2. Best interests criteria (Clause 12)

The *Divorce Act* does not currently include a list of factors for courts to consider in determining what is in the best interests of the child in a particular case. All provinces and territories but one include such a list in their family law legislation, and a substantial body of case law has developed defining the best interests of the child test.[16] The 2019 amendments set out a non-exhaustive list of best interests of the child criteria to provide some consistency and clarity and to assist in guiding parents, family justice professionals, lawyers and courts.

In addition to a list of criteria, the 2019 changes identify a "primary consideration." The primary consideration specifies that a child's safety, security and well-being are the most important factors to consider. In some cases, there may be conflicts between two or more of the enumerated best interests of the child criteria. The primary consideration will help to resolve any such conflicts by stressing that the child's safety, security and well-being must always come first. Similar provisions are included in the family law statutes of Alberta and British Columbia.

The list of best interests criteria is a non-exhaustive list. Parents and courts could therefore consider factors that are relevant to the circumstances of a particular child even if such factors do not appear on the list. The list does not prioritize any one criterion over another, with the exception of the primary consideration. No single criterion is determinative, and the weighting for each criterion depends on the circumstances of the particular child. The remainder of this section includes descriptions of each of the best interests of the child criteria.

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[14] The Canadian Bar Association, *"Bill S-202 – Shared Parenting Act,"* Legislative Comment on Bill S-202, *An Act to amend the Divorce Act (shared parenting plans)*, 1st Sess, 42nd Parl, 2015 at 2.
[15] Parliament of Canada, Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (December 1998) at 44.
[16] See especially *Young v Young*, [1993] 4 SCR 3; *Van de Pierre v Edwards*, [2001] 2 SCR 1014.

a. The child's needs, given the child's age and stage of development, such as the child's need for stability

This criterion emphasizes the need to focus on the individual circumstances of each child. For example, a child's temperament can influence their ability to respond to change and may affect the parenting style they require. If the child has any special physical or psychological needs, such as a physical disability, this may be important for the court to consider. This criterion recognizes that each child experiences their parents' divorce or separation in unique ways.

A child's needs also change over time. A child's stage of development influences their reaction to any situation. For example, most infants require more predictability in their schedules and routines than adolescents do. This factor takes these types of developmental issues into account.

b. The nature and strength of the child's relationship with each spouse, siblings, grandparents and other important persons

Courts generally consider the nature of the relationship that existed during the marriage between the child and each parent when determining parenting arrangements. Many judicial decisions and family assessment reports begin by reviewing the relationship the child has had with each parent.

Children can also have important relationships with siblings, grandparents and other extended family members. These relationships can provide stability at a time of substantial change in the child's life. This factor requires consideration of the importance of children's ongoing contact with existing extended family members, such as grandparents. This contact will primarily take place through the parenting time of the spouses, although in some cases, a contact order may be necessary.

c. Each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse

A child's relationship with each parent is important, and it is generally important for each parent to support the child's relationship with the other parent. Maintaining a positive relationship with both parents provides stability for a child when they are going through a significant life change, their parent's separation. This provision reflects the "friendly parent rule" currently contained in subsections 16(10) and 17(9) of the *Divorce Act*.
If a parent actively attempts to undermine their child's relationship with the other parent, courts may need to consider this in making a parenting order.

In certain situations, it may be inappropriate for one parent to facilitate a child's relationship with the other parent, for example, in some situations of family violence where there is a safety concern. As a result, this provision is included in the list of best interests criteria where a court

can consider it along with other factors relevant to the child's welfare, keeping in mind the primary consideration relating to the child's safety, security, and well-being.

d. The history of care of the child

In assessing the potential roles that individuals can play in a child's upbringing after the parents' divorce, courts may need to consider the roles these individuals played before the divorce. A party's knowledge of and ability to cope with a child's daily routine are an important part of their ability to provide ongoing daily care to that child. The history of the child's relationship with each individual applying for an order also relates to the issue of stability for the child, which includes the concept of continuity of care.

e. The child's views and preferences

Canada is a party to the United Nations *Convention on the Rights of the Child*. Article 12 of this Convention provides that governments should recognize that children who are capable of forming their own views, depending on their age or maturity, have the right to participate in decisions that affect their lives. Children are directly affected by the parenting decisions that parents and judges make about them. This factor requires consideration of children's views on issues that are important to them. It also directs that courts and parents give weight to the child's views in accordance with the child's age and maturity.

f. The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage

In determining parenting arrangements, courts often consider the relevance of a child's culture, language, religion and spirituality. Depending on the circumstances of the child, a child's culture or religion may provide an added support system for the child. Children's best interests are generally furthered when they can learn not only from formal education but also through experience and observation. The potential for a child to develop their own cultural identity and positive self-esteem may be important factors for the courts to consider. A parent's ability to maintain and promote a child's comprehension of and link to the child's cultural, linguistic and religious heritage is one consideration with respect to a child's overall well-being.

As is consistent with child protection legislation in several provinces, this criterion specifically directs that consideration be given to a child's Indigenous heritage, if applicable.

g. Any plans for the child's care

Parents are generally best placed to identify what is best for their children. The 2019 changes to the *Divorce Act* aim to encourage parents to develop parenting arrangements with as little court intervention as possible. In determining the best interests of the child, a court may consider how parents plan to care for their children post-divorce.

One tool that some parents, mediators and lawyers use to help determine how parents will share responsibilities following separation and divorce is a "parenting plan." If parties agree to a parenting plan, new section 16.8 will require a court to include its provisions in a parenting or contact order, as applicable, unless it is not in the best interests of the child.

Parenting plans are one way that parents can express their views about parenting post-divorce, but this criterion could include other ways for parents to describe plans for their children's care and upbringing, such as pleadings or affidavits.

h. <u>The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child</u>

Some parents may be unable or unwilling to meet their responsibilities due to certain limitations. These limitations may raise real concerns for the child's health, safety and well-being. This criterion will help to ensure that courts consider parenting ability and willingness in the assessment of a child's best interests.

The criterion does not focus simply on the past, but also on the present and future ability and willingness to care for and meet the needs of the child. Courts will be required to consider an applicant's strengths and limitations when determining parenting arrangements or contact orders.

i. <u>The ability and willingness of each person in respect of whom the order would apply to communicate and cooperate</u>

Children benefit when parents are able to cooperate and communicate. Courts need to assess parents' ability and willingness to work together, as this will influence the type of parenting arrangements that may be considered. Parents who are able to cooperate and communicate are more likely to successfully share decision-making responsibilities. They are also more likely to be able to manage flexible parenting arrangements that set out relatively few details.

Flexible arrangements may not be workable for parents unable or unwilling to cooperate or communicate well with each other. When parents are not able or willing to cooperate or communicate effectively, children may find themselves in the middle of their parents' disputes. These parents may need more detailed agreements or orders clearly specifying the arrangements for the children.

j. <u>Any family violence</u>

This is discussed below, in the "Addressing family violence" section.

k. Any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child

This is discussed below, in the "Addressing family violence" section.

3. Parenting terminology (Clauses include 1(1), 1(7), 12)

Child custody and access are among the most emotionally charged and heavily contested matters in family law. They account for a disproportionately high number of court events and take longer to resolve.[17] Some academics have suggested that this may be due in part to the terms we use to describe parents' responsibilities.[18] "Custody" has connotations of ownership and is often associated with the concept of police detention. The terms custody and access also reinforce a winner-loser mentality where the "winner" is the custodial parent and the "loser" is the access parent. The Special Joint Committee on Child Custody and Access strongly recommended that Parliament replace these terms with more child-focused terminology. [19]

The 2019 changes remove the terms "custody" and "access" from the *Divorce Act*. The amendments introduce "parenting orders" and also the concepts of "parenting time" and "decision-making responsibility." Parenting orders will be available for those who either have or wish to take on the parental responsibilities associated with the care and upbringing of a child.

Replacing "custody" and "access" terminology is intended to encourage parents to focus on the needs of their children. Many jurisdictions have already moved away from the concepts of "custody" and "access." For example, Alberta,[20] British Columbia,[21] several American states, and countries such as the United Kingdom[22] and Australia[23] have done so. In Canada, many

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[17] Canada, Department of Justice Canada, *JustFacts: Family Law Cases*, Research and Statistics Division, (Ottawa: Department of Justice, June 2016).
[18] Nicholas Bala, "Bringing Canada's Divorce Act into the New Millennium: Enacting a Child-Focused Parenting Law" 40:2 Queen's Law Journal 425.
[19] Parliament of Canada, Special Joint Committee on Child Custody and Access, *For the Sake of the Children* (December 1998) at 27.
[20] The *Family Law Act*, SA 2003, c F-4.5 uses the terminology of "guardianship," "parental responsibilities," "parenting time," "parenting orders" and "contact orders."
[21] The *Family Law Act*, SBC 2011, c 25 uses the terminology of "guardianship," "parental responsibilities," "parenting time," "parenting orders" and "contact orders."
[22] Under the UK *Children's Act 1989*, c 41, as a general rule, both parents have "parental responsibility" (decision-making responsibility), which is subject to an order of the court. With respect to time with the child, there are "residence orders" (where the child will primarily reside) and "contact orders" (time with the child).
[23] In 1995, Australia amended its *Family Law Act 1975* to replace the terms "custody" and "access" with "residence" and "contact." Through the *Family Law Amendment (Shared Parental Responsibility) Act 2006, no 46,* Australia introduced further reforms, introducing "parenting orders" and creating a presumption in favour of "equal shared parental responsibility" (decision-making responsibility).

lawyers and judges already make orders with respect to parenting arrangements under the current *Divorce Act* without using the terms "custody" and "access."[24]

Alberta was the first province to adopt new parenting terminology in its legislation. It conducted an extensive review of its changes to family law in 2009.[25] It found that half of lawyers surveyed supported the change, nearly three quarters believed that the new terminology facilitates collaboration, and over 80% believed it "reflects current thinking about children and families."[26] British Columbia consulted with stakeholders through a comprehensive discussion paper before introducing its new legislation. Most respondents agreed with the proposal to adopt new parenting language.

Case law from the Québec Court of Appeal highlights the compatibility of the *Divorce Act* and the parenting provisions of the *Civil Code of Québec*.[27] The 2019 amendments do not change the interaction between these laws.

4. Parenting orders (Clause 12)

As mentioned, the 2019 changes to the *Divorce Act* introduce "parenting orders" which could set out "parenting time" and "decision-making responsibility." Parenting time is the time during which someone in the role of a parent is responsible for a child. This includes time when the child is not physically in the care of that person, such as when the child is at school or in daycare.

"Decision-making responsibility" refers to the responsibility to make significant decisions about a child, such as decisions about a child's health and education. Both spouses, a parent, and any person currently in or seeking a parental role in the life of a child could apply for a parenting order. Non-spouses would have to seek leave of the court, as is the case currently for custody orders under the *Divorce Act*. This preserves judicial resources, allowing courts to focus only on applications that are in the best interests of the child.

The 2019 amendments codify some existing practices of family courts under the *Divorce Act* and introduce some new concepts.

a. Parenting time

[24] *M v F*, 2015 ONCA 277; Canada, Department of Justice Canada, *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program* (2016), by the Canadian Research Institute for Law and the Family at 31.
[25] Canadian Research Institute for Law and the Family, *An evaluation of Alberta's Family Law Act* (Calgary: Alberta Law Foundation, 2009) at 77.
[26] *Ibid* at 131-132.
[27] *D(W) c A(G)*, [2003] RJQ 1411 (CA).

The 2019 changes to the *Divorce Act* include a provision stating that parenting time may be allocated according to a schedule. This may be helpful in situations of high conflict, where a flexible schedule may lead to more frequent disputes. The amendments also indicate that each person with parenting time may make day-to-day decisions about a child when the child is in their care, unless a court orders otherwise. Day-to-day decisions include matters such as a child's bedtime. If a particular matter that would normally be a day-to-day decision is significant to an individual child, a court could make special mention of the matter in a parenting order. For example, if parents decided that a child was to be vegetarian, they would each choose meals for the child avoiding meat. A parenting order could provide for this.

The legislation preserves the *Divorce Act* principle that a child should spend as much time with each parent as is consistent with the child's best interests. Under the current *Divorce Act*, this is reflected in what is known as the "maximum contact principle." This principle is now subject to the "primary consideration" that a court must consider a child's physical, emotional and psychological safety, security and well-being above all else. This may be particularly important in cases of family violence.

It is important to note that this parenting time principle is not a presumption of equal time. As the Supreme Court of Canada has held with respect to the current Act, "the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted."[28]

During the parliamentary process, several witnesses raised concerns with respect to this principle. In response, the House of Commons Standing Committee on Justice and Human Rights (House Committee) moved the provision into the new section on best interests of the child. This amendment helps to clarify that that the best interests of the child test, including the primary consideration, is the test to be applied in allocating parenting time.

In addition, some witnesses were concerned that the "maximum parenting time" marginal note for the provision could give the impression that it creates a presumption of equal parenting time. To make it clear that the best interests of the child is the only consideration when making any decision about a child, the Minister of Justice committed in a letter to the Chair of the Standing Senate Committee on Legal and Constitutional Affairs to make an administrative change to this marginal note to remove the word "maximum" and instead use wording along the lines of "parenting time consistent with the best interests of the child," which more closely reflects the legislative intent behind this provision.[29]

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[28] *Young v Young,* [1993] 4 SCR 3 at 7.

[29] Minister of Justice, *Letter to the Chair of the Senate Standing Committee on Legal and Constitutional Affairs*, June 11, 2019.

b. Decision-making responsibility

The 2019 changes to the *Divorce Act* introduce the concept of "decision-making responsibility" as the responsibility for making significant decisions about a child's well-being, including decisions about the child's health, education, language, religion, and significant extra-curricular activities. This responsibility could be allocated to one or both spouses or other persons who currently stand —or who intend to stand—in the place of a parent. The amendments also recognize the option of separately allocating different decision-making responsibilities to each parent. This may be helpful in cases where a court determines that joint-decision-making responsibility is not appropriate, but it would be in the child's best interests for both parents to be involved in certain decisions about the child.

"Significant extra-curricular activities" is included as one of the enumerated items in the definition of decision-making responsibility. Such activities are often the subject of considerable disagreement and sometimes litigation. This provision will guide parents and courts to consider these issues as early as possible in the process of coming to agreements. The term is intended to capture activities that require a greater investment of a family's resources, whether in terms of time or finances.

c. Prohibition on removal of child

Courts will, in exceptional cases, include what is commonly called a "non-removal clause" in an order if there is a concern that a child may be at risk of abduction or in cases of very high conflict. This practice has developed despite the lack of explicit mention of this authority under the *Divorce Act*. To promote the best interests of children, the 2019 amendments include a variety of measures intended to help prevent child abduction. One example is the requirement that applications for parenting orders be heard in the province in which a child is habitually resident. The provision prohibiting the removal of a child from a specified geographic area without the written consent of a specified person or without a court order authorizing the removal is another. This provision simply codifies courts' current practice in cases where there is a risk of abduction.

5. Contact orders (Clause 12)

In most cases, parents facilitate contact between their children and other special people in their children's lives, such as grandparents. Sometimes when a relationship breaks down, the relationship between the former spouses and the children's extended family may become strained. The former spouses may be unable or unwilling to facilitate contact when this happens. The 2019 changes to the *Divorce Act* provide for "contact orders" to address such situations.

A non-spouse may apply for a "contact order" to have time carved out of a child's schedule to spend with the child. Because contact orders will not be necessary for most families, and to reduce unnecessary litigation, the applicant will have to seek leave of the court to bring an

application for a contact order. Contact orders could be subject to the same terms and conditions as parenting orders, such as the prohibition on removal of the child. Because the role of a person with a contact order will not be a parental one, however, there are differences between contact orders and parenting orders. For example, persons with contact orders are not automatically entitled to make day-to-day decisions about a child during contact.

6. Changes of residence and relocation (Clause 12)

Relocation, or moving a child after separation and divorce, is one of the most litigated family law issues. In a 2016 survey of lawyers and judges, over 98% of respondents indicated that disputes are harder to settle when relocation is involved.[30]

The leading case in this area is *Gordon v Goertz,* decided by the Supreme Court of Canada in 1996.[31] The Supreme Court held that, before actually considering the merits of an application to vary a custody order in the context of a proposal for relocation, a court must be satisfied that the relocation constitutes a material change in the circumstances of the child. If it does constitute such a change, in determining the best interests of the child, the court should consider, among other factors

1. The existing custody and access arrangements and relationship between the child and each parent
2. The desirability of maximizing contact between the child and both parents
3. The views of the child
4. The custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child
5. The impact of the potential disruption on the child of either a change in custody or removal from their current environment

According to the Supreme Court, there is no presumption in favour of the custodial parent, although the views of the custodial parent are entitled to "great respect and the most serious consideration."

Gordon v Goertz did not address issues related to notice of a move, or who must bring an application for variation of the order before a relocation may occur.[32]

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[30] Canada, Department of Justice Canada, *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program* (2016), by the Canadian Research Institute for Law and the Family at 12.
[31] *Gordon v Goertz,* [1996] 2 SCR 27.
[32] Canada, Status of Women Canada, *The Relocation of Custodial Parents: Final Report*, by Martha Bailey & Michelle Giroux (Ottawa: Status of Women Canada, 1998).

There has been a great deal of criticism in the academic literature and by practitioners about the state of the law related to relocation. Some have argued that the decision in *Gordon v Goertz* does not provide sufficient certainty, making it difficult to predict the outcome in a case, advise clients and settle cases.[33] The Supreme Court's direction that the reason for the move should only be considered exceptionally has largely been ignored, as in practice the reason for the move often relates to an analysis of the best interests of the child.

Over time, some patterns in the case law have emerged. In particular, two patterns are important to highlight. First, a relocation is more likely to be denied if there is a shared care/custody arrangement. Second, where there is a clear primary caregiver for a child, a move is more likely to be approved.[34]

There is little empirical research on relocation's effects on children, and most of what is available is limited by small sample sizes and other methodological challenges. While some research suggests that relocation can be disruptive for children and affect their relationships, a range of factors needs to be considered.[35]

a. Creating a framework for changes of residence and relocation

The 2019 changes to the *Divorce Act* set out a framework for changes of residence and relocation that includes three broad components:

1. Notice of a proposed change of residence or relocation
2. Additional best interests criteria for relocation cases
3. Burdens of proof that will apply in certain relocation cases

Key to the application of these provisions is the concept of "relocation" which is defined as a move—either by a child or a person with parenting time or decision-making responsibility—that could have a significant impact on the child's relationship with a person with parenting time or decision-making responsibility, a person applying for such responsibilities, or a person who has contact with the child under a contact order.

b. Notice provisions

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[33] See DA Rollie Thompson, "Relocation and Relitigation: After *Gordon v. Goertz*," Case Comment, (1999) 16 CFLQ 46; Philip M Epstein, "Annotation to *L(S.S.) v. W(J.W.)*," Case Comment, (2010) 81 RFL 6; Alfred A. Mamo, "A Practitioners Guide to Mobility Cases" in Martha Shaffer ed, *Contemporary Issues in Family Law: Engaging with the Legacy of James G. McLeod* (Toronto: Thomson Carswell, 2007).

[34] D.A. Rollie Thompson, "Heading for the Light: International Relocation from Canada" (2011) 30:1 CFLQ; Canada, Department of Justice, *A Study of Post-Separation/Divorce Parental Relocation*, by Nicholas Bala et al (Ottawa: Department of Justice, 2012).

[35] Canada, Department of Justice, *Critical Review of Social Science Research on Parental Relocation Post-Separation/Divorce*, by Michael A. Saini (Toronto: Department of Justice, 2013).

Any move—including a local move—is a change of residence. Under the new framework, a person with parenting time or decision-making responsibility is required to give notice to any person with parenting time, decision-making responsibility or contact of a change of their residence or that of the child. The notice will include information about the new address and contact information.

Some moves, however, are likely to have a significant impact on a child's relationship with others. Where a move could have such an impact—for example, in the case of a long distance move—this will be considered a relocation. The notice required for a relocation will need to be given at least 60 days before the proposed move and will also need to include a proposal about how the parenting arrangements could be changed. The House Committee amended the bill to require that the notice be provided in a form prescribed by regulations.

Even when a parent proposes to move without the child, the notice provisions will nonetheless be applicable. This is because whether it is the child or the parent who is moving, the impact on the child will likely be similar. The move may affect the parenting arrangement or potentially even the relationship between the parent and the child.

The 2019 amendments set out similar notice requirements for a person with contact who proposes to move, including requiring that for moves that are likely to have a significant impact on the relationship with the child, notice must be given at least 60 days in advance in a form prescribed by regulations.

For all types of moves, a court could order that the notice requirements should not apply, or could modify the requirements as necessary. The situation of family violence is specifically highlighted as a circumstance where the court could make such an order. In addition, the House Committee amended the bill to provide explicitly that applications for exemption from notice requirements can be made on an *ex parte* basis, meaning without notice to any other party. These provisions are intended to promote the safety of family members, especially children.

c. Objection to a move

If a person with parenting time or decision-making responsibility objects to a relocation of the child, they will be encouraged to negotiate a resolution with the person proposing the relocation. Under the amendments, the parties have a new obligation to try to resolve matters out of court. If a resolution does not seem possible, the person with parenting time or decision-making responsibility who is opposing the relocation could object either by way of a standard form or by bringing a court application. The House Committee added the option of objecting by way of a form prescribed by regulations.

Requiring the person opposing the move to object through the use of a standard form or by filing a court application will conserve judicial resources. Courts will only have to deal with relocation applications if there is a disagreement.

If a person with a parenting order objects to the move by way of court application, this commences the process for a court to decide whether the relocation can take place. If, however, they object through a standard form, the person proposing the move will need to bring a court application to seek permission to move. In either case, the court will be required to determine whether the move should be permitted, based on the best interests of the child.

If there is no objection within 30 days after the notice was received, and there is no court order prohibiting the move, the person proposing the move will be entitled to move as of the date proposed in the notice.

The notice provisions in the 2019 legislation are broadly consistent with those in British Columbia's *Family Law Act* and Nova Scotia's *Parenting and Support Act*. British Columbia and Nova Scotia are the only two Canadian jurisdictions that have set out a relocation process in their family laws.

d. Additional best interests criteria in relocation cases

In addition to the general best interests of the child criteria, the 2019 changes to the *Divorce Act* set out seven criteria to be considered in all relocation cases. Similar to the general best interests of the child criteria, none of these factors is determinative.

(a) Reasons for the relocation

This factor departs from the Supreme Court of Canada decision in *Gordon v Goertz*, which held that the reasons for the move should generally not be considered. The reason for the move can be important in determining whether, in all of the circumstances, the proposed move is in the best interests of the child. For example, it would be highly relevant for the court to know whether the move is to allow a parent to obtain a job that would improve their financial circumstances, and thus those of the child. There are many reasons why a move might be proposed, and it can be important for the court to be aware of these.

(b) Impact of the relocation

From a child-focused perspective, it will be important for the court to consider the possible impact of the move on the child. For example, this criterion directs the court to consider the benefits and disadvantages to the child of living in each location.

(c) Amount of time spent with the child by each person who has parenting time

It is relevant for the court to consider the level of disruption a relocation may have on a child's relationship with their parents, whether or not the move is permitted. For example, a court may need to consider that, where a child spends a significant amount of time with each parent, a relocation could be quite disruptive to the existing arrangement. In contrast, if one parent is clearly primarily responsible for the child, and is proposing to move with the child, the court will

want to consider the impact on the child should that child not be permitted to move with the parent who has been primarily responsible for them.

(d) Whether notice was provided

Several of the factors are more process-oriented, and relate to the overall context of the proposed move. Factor (d), relating to whether notice has been given, promotes an orderly approach to moving, and creates an incentive for parents to comply with the notice requirements.

(e) Orders or agreements specifying geographic area

This factor recognizes that sometimes parents make agreements or courts make orders that include a term that a child is to live within a specific geographic area. This term may have been negotiated in good faith in exchange for other terms, or the court may have included such a term for specific reasons. While circumstances related to the best interests of the child can change over time, this is one factor for a court to consider.

(f) Reasonableness of the proposal

This factor recognizes that it is important to consider the practicality of the specific proposal to relocate. The court may consider matters such as the distance involved and the age of the child in the context of possible means of transportation.

(g) Compliance with family law obligations

This factor recognizes that courts generally need to consider whether each parent has been complying with existing legal obligations. These obligations may relate for example to parenting time or support obligations. This is important contextual information about which the court should be aware.

e. <u>Factor not to be considered</u>

Parents seeking to relocate with their children are sometimes faced with the difficult question of whether they would proceed with a relocation even if they were not permitted to bring their child. This situation has been referred to in the case law as a “double-bind” question. If a parent says they would not relocate without their child, this response might be interpreted as evidence that the relocation is not sufficiently important, and therefore the relocation should not be permitted.

On the other hand, if the parent says they would relocate without the child, this response might be seen as evidence that the parent is not sufficiently devoted to their child. These questions divert attention from the legal issue before the court which is whether the move as proposed should be permitted. The 2019 amendments address this issue by directing courts not to

consider whether the parent would move without the child if the move were prohibited and, conversely whether the parent would stay if the move were prohibited.

f. Burdens of proof

Consistent with the current law, the ultimate test for whether a relocation should occur remains the best interests of the child. However, to assist parents, lawyers and judges in undertaking a best interests analysis, the 2019 amendments add specific burdens of proof.

If parents spend substantially equal time with the child and share responsibility for the care of the child fairly equally, the person proposing the move would have to demonstrate why the move is in the best interests of the child.

If one parent clearly has primary responsibility for the care of the child—that is, the child is in the care of that parent the vast majority of the time—the parent opposing the move would have to demonstrate why the move is not in the child's best interests.

In all other cases, each parent must demonstrate whether the move would be in the best interests of the child. The proposed burdens recognize broad trends in the case law.

The starting points for relocation situations will apply only where the parties have an order, arbitral award or agreement in place and they are substantially complying with the order. In these cases, either the court, an arbitrator or the parties have determined what arrangement is in the best interests of the child, the parties are generally living according to the terms of that agreement and one party is now proposing to change that arrangement.

The burdens are not based on a precise percentage of time. Percentages could lead to bargaining over a specific percentage of parenting time, rather than focusing on what is in the best interests of the child when making parenting arrangements.

g. Costs relating to exercise of parenting time

Amendments specify that a court, having found that a relocation may proceed, may determine if and how the costs associated with exercising parenting time will be shared between the parties.

A relocation could result in a child moving a considerable distance from a parent with parenting time. This could result in a significant increase to the other party's travel and accommodation costs. A court could determine the proportion of such costs that each party will pay if a relocation proceeds.

B. ADDRESSING FAMILY VIOLENCE

Family violence includes various forms of abuse, mistreatment or neglect that adults or children may experience in their intimate, family or dependent relationships. Family violence is a devastating reality for Canadians from many walks of life. It may cause, contribute to or result from a family breakdown. In 2014, 4% of people living in Canadian provinces with a current or former spouse or common-law partner (approximately 760,000 people) reported having been physically or sexually abused by their spouse during the preceding five years.[36] In fact, separation and divorce can exacerbate an already violent relationship and the period following separation is the highest time of risk. From 2007 to 2011, a woman's risk of being killed by a spouse from whom she was separated was nearly six times higher than the risk of being killed by a spouse with whom she was living.[37]

While overall rates of family violence may not differ greatly between men and women, there are significant gender differences in the severity of the violence. In 2014, women were twice as likely as men to report being sexually assaulted, beaten, choked or threatened with a gun or knife. In contrast, men were three and a half times more likely to report being kicked, bitten or hit with something.[38]

Some forms of family violence are clearly criminal in nature, such as assault or sexual assault. In contrast, other forms of family violence, such as psychological abuse, such as ridiculing, constantly criticizing, or threatening deportation, are abusive in nature and are often a precursor to physical or sexual violence, but do not constitute criminal behaviour. All of these forms of family violence, however, are highly relevant to the family law context, and, in the context of the *Divorce Act*, they are particularly relevant to a determination about parenting and contact.

As knowledge about the scope of family violence has expanded, so has the understanding that not all violence is the same. Experts have identified at least four types of intimate partner violence: [39]

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[36] Canada, Statistics Canada, *Family violence in Canada: A statistical profile, 2014*, by the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2016) at 5 and 8. These data reflect responses from the provinces only. A later study found that 12% of residents of the territories reported being subjected to spousal violence by a current or former spouse or common-law partner in the previous five years. See also Canada, Statistics Canada, *Criminal victimization in the territories, 2014* by the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2016) at 12.

[37] Canada, Statistics Canada, *Family violence in Canada: A statistical profile, 2011*, by Maire Sinha for the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2013).

[38] Canada, Statistics Canada, *Family violence in Canada: A statistical profile, 2014*, by the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2016) at 5 and 8. These data reflect responses from the provinces only.

[39] Joan B Kelly & Michael P Johnson, "Differentiation among types of intimate partner violence: Research update and implications for interventions" (2008) 46:3 Family Court Review 476.

1. *coercive and controlling violence*: violence that forms "a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners."[40]
2. *violent resistance*: violence in response to coercive and controlling violence. The violence is generally a response to an assault and the objective is to protect oneself or another person.
3. *situational (or common) couple violence*: violence that is not associated with a general desire to control one's partner, but to a particular incident or situation. It is generally a result of an inability to manage conflict or anger.
4. *separation-instigated violence*: violence that generally occurs around the time of separation with a small number of incidents. It can range from minor to quite severe.

These distinctions are particularly important in the context of parenting determinations because, depending on the type of violence, different parenting arrangements may be in the best interests of the child.[41]

While all violence is of concern, the most serious type of violence in the family law context is coercive and controlling violence. This is because it is part of an ongoing pattern, involves more danger, and is more likely to be associated with compromised parenting.[42]

Family violence can have a profound effect on children. Children who are exposed to violence are at risk for emotional and behavioural problems throughout their lifespan, and these impacts are similar to those of direct abuse. Some of these consequences include post-traumatic stress disorder, depression, low educational achievement, difficulties regulating emotions and chronic physical diseases.[43] In Canada in 2014, 51% of parents who reported experiencing spousal violence also reported that their children may have heard or seen assaults on them.[44] About 72% of individuals with children who experienced violence after separation indicated that a child had seen or heard the violence.[45] Research also indicates that, in families where intimate partner violence occurs, direct child abuse also often occurs. In 2014, 70% of adults who reported having witnessed spousal violence as children also reported being a victim of

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[40] *Ibid* at 478.
[41] Canada, Department of Justice, *Making Appropriate Parenting Arrangements in Family Violence Cases*, by Peter G Jaffe, Claire V Crooks & Nicholas Bala (Ottawa: Department of Justice, 2005).
[42] Canada, Department of Justice, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* Report of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, vol I (Ottawa: Department of Justice, 2013).
[43] Canada, Department of Justice, *Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce* by Peter Jaffe et al (Ottawa: Department of Justice, 2014).
[44] Canada, Statistics Canada, *Family violence in Canada: A statistical profile, 2014*, by the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2016) at 14.
[45] Canada, Department of Justice, *Violence Perpetuated by Ex-spouses in Canada*, by Melissa Lindsay (Ottawa: Department of Justice, 2014).

childhood physical and/or sexual abuse. Children who witnessed spousal violence were also more than twice as likely to experience the most severe forms of physical abuse as those who had not witnessed violence.[46]

Despite all that is known about family violence, including the heightened risk after separation and its potential impacts on parenting, the *Divorce Act* was silent on this important issue. Furthermore, the *Divorce Act* did not address the fact that in some cases, families may have been involved with many parts of the justice system, sometimes simultaneously. This is particularly true in cases of family violence, where the criminal justice system, the child protection system and the family justice system may be involved. There are challenges in coordinating the responses of these systems, which have been identified in the federal, provincial and territorial report *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* ("*Making the Links"*).[47] For example, if a family court is not aware of a civil protection order or a criminal order that prohibits contact or communication between the parties, an inconsistent order may be issued, which can create problems in terms of enforcement of the orders, confusion for the parties, and potential safety issues. Relatedly, and as discussed in *Making the Links*, it is not possible to coordinate the various proceedings unless the courts are aware that the other proceedings exist.

[46] Canada, Statistics Canada, *Family violence in Canada: A statistical profile, 2014*, by the Canadian Centre for Justice Statistics (Ottawa: Statistics Canada, 2016) at 5 and 8.

[47] Canada, Department of Justice, *Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* Report of the Federal-Provincial-Territorial Ad Hoc Working Group on Family Violence, vol I (Ottawa: Department of Justice, 2013); Canada, Department of Justice, *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal, family, child protection): A Family Law, Domestic Violence Perspective* by Linda C Neilson (Ottawa: Department of Justice, 2013); Canada, Department of Justice, *Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective*, by Nicholas Bala & Kate Kehoe (Ottawa: Department of Justice Canada, 2014).

1. *Divorce Act* amendments (Clauses 1(7), 8, 12)

The 2019 changes to family laws include several amendments to the *Divorce Act* to address family violence.

a. Coordination of court proceedings (Clause 8)

The 2019 amendments create a new duty for the court in any proceeding under the Act where there is a request for corollary relief, meaning a request for a parenting order or a child or spousal support order. Courts will be required to consider the existence of any civil protection, child protection or criminal proceedings or orders that involve the parties and are pending or in effect.

The purpose of the section is to facilitate the identification of existing orders and similar instruments or proceedings that may conflict with an order under the Act, and to facilitate the coordination of multiple proceedings in different courts.

The new section specifies that to fulfill its duty, a court shall ask the parties about such orders or proceedings, or shall review information that is readily available as a result of a search conducted under provincial law. Thus, should a province or territory, in the future, have a mechanism in place to provide for systematic searches of orders and proceedings involving the parties to the family law matter, a court could rely on the information obtained from that search, rather than relying only on information provided by the parties.

b. Evidence-based definition of family violence (Clause 1(7))

For the purposes of the *Divorce Act,* family violence is defined as any conduct that is violent, threatening or a pattern of coercive and controlling behaviour, or that causes a family member to fear for their safety. In the case of a child, it also includes direct or indirect exposure to such conduct. The definition specifically recognizes that conduct that falls within this definition would not necessarily constitute a criminal offence. The definition also has a non-exhaustive list of examples of conduct that constitutes family violence. These include physical abuse, psychological abuse, financial abuse, and the harming or killing of an animal.

c. Best interests of the child criteria (Clause 12)

As mentioned above, the 2019 changes to the *Divorce Act*introduce best interests of the child criteria for the court to consider when making a parenting or contact order.

i. Presence of family violence

The 2019 amendments require that the courts consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet

the needs of the child. Courts must also consider the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child.

To help determine the impact of the violence, the bill includes a list of specific factors to consider. These include criteria such as the nature and seriousness of the violence, whether there is a pattern of coercive and controlling behaviour, and whether the person engaging in the violence has taken any steps to prevent further violence and improve their parenting.

ii. Other proceedings or orders relevant to safety, security and well-being

The 2019 changes to the *Divorce Act* also require courts to consider any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

When making a decision about parenting or contact, the court must consider any proceeding or order that is potentially relevant to the best interests of the child, even if, for example, a civil protection order is no longer in effect. This is broader than the duty on the court that applies to all proceedings involving corollary relief. It will allow parties to a proceeding in relation to parenting or contact to present any evidence relevant to the child's safety, security and well-being to the court.

The factors in the list of criteria specific to family violence and the two family violence factors in the general list of best interests criteria will all be subject to the "primary consideration." Again, this consideration requires that courts consider a child's physical, emotional and psychological safety, security and well-being above all else.

d. <u>Other changes relevant to family violence (Clause 12)</u>

As discussed above, the 2019 amendments make changes to the current "maximum contact principle." The *Divorce Act*'s current maximum contact principle has two components: 1) the principle that children should have as much contact with each spouse as is consistent with their best interests; and 2) the "friendly parent rule," a requirement that courts consider the willingness of the person seeking custody to facilitate contact with the other parent. The "friendly parent rule" will become one of the best interests of the child criteria. This criterion highlights the importance of developing and maintaining the child's relationship with the other spouse.

As previously noted, the provision that requires judges to 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 is now included in the section on best interests of the child. The marginal note will be changed administratively to remove the word "maximum" and use wording that more closely reflects the legislative intent behind this provision.

There are other changes to promote the safety of family members who have experienced family violence. For example, orders could require that parenting time, contact or the transfer of the child from one person to another be supervised. Parenting orders or contact orders could also prohibit the removal of a child from a specific geographic area, without the written consent of specified persons or a court order.

2. FOAEAA amendments (Clause 46)

FOAEAA provides for the search and release of information from designated federal information banks to help trace and locate a family support debtor for enforcement purposes.

The legislation passed in 2019 includes amendments that will permit the release of information to a court for the purposes of establishing and varying support.[48] These amendments include important safeguards that account for situations of family violence. For example, before an application for tracing could be made, FOAEAA will require the court to be satisfied that the release of tracing information will not likely jeopardize the safety or security of any person.

In addition, if an individual requests that the court make a FOAEAA application without giving notice to the other party, the applicant will have to provide the court with the results of a recent criminal record check and an affidavit. The affidavit will have to state, among other things, whether there is a court order, undertaking, recognizance or document of a similar nature that restricts the applicant's communication or contact with the person whose information is sought.

The applicant will also have to state whether the applicant has caused or attempted to cause physical harm to the person or has caused the person to fear for their safety or security or that of another person.

Finally, where information is released to a court pursuant to FOAEAA, the 2019 amendments require that the information be sealed and kept in a location to which the public has no access.

C. HELPING TO REDUCE POVERTY

[48] Under the court application process, the person seeking FOAEAA information for the purposes of establishing, varying or enforcing a support order will have to make a request to the court that a court official be authorized to submit an application for FOAEAA information. The 2019 changes to federal family laws will outline the process. If the court approved the request, the court will make an order authorizing a court official to apply for FOAEAA information. The FOAEAA information will be sent to the authorized court official, who will have to give the information to the court. The court may then disclose the FOAEAA information for the purpose for which it was requested (i.e. to establish, vary or enforce a support order) and make any order protecting the confidentiality of the information.

Separation and divorce can have significant economic impacts on families. The payment of support is a key factor in reducing the risk of poverty, especially for children, and low-income and lone-parent families. The data on the financial challenges of lone parenthood are stark. In 2016, the median net worth of Canadian couples with children under 18 was $361,400, while the median net worth of lone-parent families was less than a sixth of that at only $57,200.[49]

Children need the financial support of both parents and are legally entitled to this support after separation or divorce. To determine an appropriate child support amount, federal, provincial and territorial child support laws require parents to disclose specific income information and set out penalties and consequences if a parent fails to disclose this information. This includes imputing income, which means that a court assumes that the parent's income is a certain amount for child support purposes, and the child support order is based on that income.

The sooner a fair and accurate amount of child support is established after parents separate and payments are made, the better the outcomes are for the children. Most parents dutifully meet their legal obligations. However, some parents do not provide complete and accurate income information, despite the possible penalties and consequences. This is a significant issue that has serious consequences for children and families going through the family justice system.

Family law practitioners and judges often say that income disclosure issues are one of the most contentious areas of family law.[50] Failure to comply with disclosure obligations can put significant pressure on the family justice system. It may also discourage parents from reaching agreements through family dispute resolution processes, such as mediation. If income cannot be properly determined at the outset, it may also prevent families from benefiting from other family justice services such as administrative child support calculation or recalculation services.

When financial disclosure is not made, the parent seeking family support must ask a court to order that the information be provided. For example, 30% of the morning family chambers docket at the Court of Queen's Bench of Alberta is spent on income disclosure issues in family support cases.[51] This creates significant costs for families and can overburden the family justice system, including courts—and the other parent may still not disclose their income information. In these situations, the court may impute the income of the other parent.

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[49] Canada, Statistics Canada, *Survey of Financial Security, 2016* (Ottawa: Statistics Canada, 2017).
[50] Canada, Department of Justice Canada, *The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program* (2016), by the Canadian Research Institute for Law and the Family at 31.
[51] Court of Queen's Bench of Alberta, Announcement, FAMILY LAW - FINANCIAL DISCLOSURE, January 25, 2016: "At its meeting on December 9th 2015, the Court of Queen's Bench Executive Board approved a number of short term measures to improve the current family law financial disclosure application process. Currently, these disclosure applications and adjournments consume 30% of the morning family chambers docket. Reducing the need for these applications allows the Court to achieve better lead times for morning chambers and free up judicial time for use in other areas."

Although imputing income may work adequately in some situations, it is very difficult for the court to determine a fair amount of support that reflects a parent's true ability to pay, absent complete, up-to-date income information. Imputing income may result in child support amounts that are too high, which in many situations will not be paid, or too low, which would prevent children from fully benefiting from the support of both parents.

1. *Divorce Act* amendments (Clauses 24-25)

Divorce Act amendments that aim to help families obtain fair and accurate family support are described below, in the "Making Canada's family justice system more accessible and efficient" section.

2. FOAEAA amendments (Clause 46)

The legislation passed in 2019 brings changes to help reduce poverty and limit the negative consequences of income-related disputes on the family justice system. Amendments to FOAEAA will help ensure that failure to properly disclose income information does not prevent the establishment of a fair and accurate amount of support.

The changes amend FOAEAA to allow the federal government to release an individual's income information, including information from tax returns, to a court for the purposes of establishing, varying or enforcing family support. The income information to be released will be listed in the regulations with the concurrence of the Minister of Finance, and important safeguards are included in the Act (see the discussion of FOAEAA amendments in the "Privacy Protections" section below). For example, where information is released to a court pursuant to FOAEAA, the 2019 amendments require that the information be sealed and kept in a location to which the public has no access.

In the case of child support, the release of income information will help ensure that amounts reflect the parent's true capacity to pay. It will also reduce legal costs associated with obtaining income disclosure for a parent, as well as associated use of court resources. Child support orders will be made more quickly, accurately and with less conflict and expense.

3. GAPDA amendments (Clause 101)

Under the Treasury Board of Canada *Guidelines for the Processing of Garnishments*, a garnishee summons enforcing a family support debt takes precedence over one enforcing a commercial debt.[52] The legislation passed in 2019 includes amendments to GAPDA that enshrine in legislation the principle that garnishment for family support debts be prioritized over all other debts, except for Crown debts.[53]

Ensuring that garnishment applications enforcing a family support obligation are processed first promotes the economic well-being of children. The creation of a priority in favour of

[52] The Treasury Board Guidelines for the Processing of Garnishments took effect on April 1, 2012.
[53] Garnishment is a process by which a third party is required by law to pay money owed to one person to another person instead, to help satisfy a debt between the two people.

garnishment applications that enforce support obligations also acknowledges the importance of these obligations over other debts.

D. MAKING CANADA'S FAMILY JUSTICE SYSTEM MORE ACCESSIBLE AND EFFICIENT

Access to justice is a priority for the federal government, and access to family justice is a key part of this. Costs, delays and complex procedures can all create barriers to accessing the family justice system.

The 2019 changes to federal family laws include changes to promote access to justice in both official languages and promote the use of a wider range of services to facilitate family dispute resolution. It also includes provisions aimed at streamlining certain processes and improving the use of administrative services.

1. *Divorce Act* amendments (Clauses 1(7), 8, 14, 22.1, 24-25)

a. Official languages (Clause 22.1)

Currently, the *Divorce Act* is silent on whether parties can use the official language of their choice in proceedings under the Act. The House Committee amended what was known as Bill C-78 to include official language rights in the *Divorce Act* similar to those provided under Part XVII of the *Criminal Code* for criminal matters.

The new language rights provision will allow any person participating in any proceeding at first instance under the Act (e.g., parties, witnesses, legal advisors) to use the official language of their choice. The provision includes the right to file pleadings, give evidence and make submissions. Courts will have to provide simultaneous interpretation from one official language to another at the request of a person participating in a proceeding under the Act. The language rights provision will allow parties to a proceeding to be heard by a judge who speaks their official language. Under the new provision, parties could request that their court decisions be made available in the official language of their choice.

b. Encouraging the use of family dispute resolution processes and other family justice services (Clauses 1(7), 8)

More and more Canadians have to resolve their family law disputes without the assistance of a lawyer. For many separating and divorcing families, it is less expensive and less time-consuming to resolve issues by agreement than through court proceedings. Also, in out-of-court dispute resolution, parties often retain more control over decisions about their lives. In cases involving children, there are particular advantages to reaching an agreement through a non-adversarial process. For example, children may benefit from seeing their parents work together.

The 2019 changes to federal family laws add to existing duties for lawyers under the *Divorce Act* and also create duties for the parties to a proceeding under the Act. These duties encourage

the use of "family dispute resolution processes" which include a range of options such as negotiation, mediation and collaborative law.

Although dispute resolution processes such as mediation may be preferable in some cases, they may not always be appropriate, as may be the case if there has been family violence or a significant power imbalance. As a result, the requirement to engage in dispute resolution processes is not absolute, and will be required only "to the extent that it is appropriate to do so."

The legislation also sets out a new obligation for lawyers to inform their clients of any family justice services that may be of assistance to them.

c. Improving the administrative child support frameworks

The 2019 amendments do not change the existing child support rules or child support tables set out under the *Federal Child Support Guidelines*, which are a regulation under the *Divorce Act*. The process for amending regulations is different from the process for amending the Act.

However, the legislation passed in 2019 will make family justice more accessible by making it easier for administrative services to perform some tasks currently left up to the courts. These services provide a faster, more accessible, less costly and less adversarial manner for parents to determine and update child support.

The 2019 amendments create the legislative authority for the administrative establishment of child support and improve the existing child support recalculation process. These amendments seek to ensure that children continue to benefit from the financial means of their parents after separation, through administrative services that establish and maintain accurate child support amounts.

The amendments support federal poverty reduction efforts by helping families obtain fair and accurate family support.

i. Administrative child support recalculation services (Clause 25)

Section 25.1 of the *Divorce Act* allows provinces and territories to enter into an agreement with the Government of Canada to authorize a provincial child support service to recalculate child support amounts administratively in divorce cases.[54] Their role is limited to recalculating child support amounts based on complete and accurate income information provided by parents.

[54] As of August 2018, the Government of Canada has entered into nine agreements under section 25.1 of the *Divorce Act* with provinces and territories: Manitoba (July 2006), Prince Edward Island (August 2006), Newfoundland and Labrador (2002 and 2007), Alberta (December 2009), Québec (June 2014), Nova Scotia (October 2014), Yukon (June 2015), Ontario (April 2016) and Saskatchewan (July 2018).

The 2019 amendments include a number of improvements to address operational challenges with the current recalculation framework. The changes will help provincial and territorial child support recalculation services perform more efficiently and effectively by allowing for more flexibility in their operations. The amendments will:

- allow recalculation to be performed at the request of either or both former spouses rather than only at "regular intervals" (for example, if there is a job loss during a year)
- provide for rules allowing for the deeming of income by recalculation services if a spouse refuses to disclose their income information
- allow for the recalculation of an interim order
- allow a provincial recalculation service to apply the same rules to an order made under the *Divorce Act* as would apply to a support order made under provincial law

ii. Administrative child support calculation services (Clause 24)

Under the current *Divorce Act*, only a court can determine the initial child support amount in a child support order. The 2019 amendments will permit a province to enter into an agreement with the Government of Canada to authorize a provincial child support service to establish child support amounts administratively under the *Divorce Act*.

The framework will apply where a divorce proceeding has been initiated and will use the applicable child support guidelines to establish child support amounts in a child support decision. If either or both spouses disagree with the amount of child support established by the provincial child support service, the framework permits either party to apply for an initial child support order under the *Divorce Act.*

The legislative framework will ensure that the amount established in a child support decision has legal effect throughout Canada. The enforceability of the decision will be the same as a child support order. This framework will be faster and less costly than applying to a court for a support order.

d. Streamlining interjurisdictional processes for establishing and varying support (Clause 14)

The current interjurisdictional process under the *Divorce Act* is modeled on the former provincial Reciprocal Enforcement of Maintenance Orders (REMO) legislation. It is a two stage-process that involves two different courts. First, the court in the applicant's jurisdiction makes a provisional order. Second, the court in the respondent's jurisdiction confirms the order made in the first jurisdiction. The current process is limited to the variation of support orders between provinces and territories. This means that a former spouse cannot currently obtain an initial (first) support order through the interjurisdictional process. Also, former spouses living in a foreign designated jurisdiction cannot obtain or vary a *Divorce Act* order for support through this process. They also cannot have a foreign order recognised and enforced under the current process. These limitations cause challenges for families living abroad.

Today all provinces and territories (except Québec) have interjurisdictional support orders legislation (referred to as "ISO Acts") [55] which has replaced the REMO approach with a streamlined process. The legislation passed in 2019 introduces a similar streamlined process by eliminating the first-stage hearing and introducing a new summary application procedure. It will also broaden the scope of the current interjurisdictional process by allowing former spouses to obtain or vary a support order under the *Divorce Act* when the parties reside in different provinces or when the parties live in a province and a designated jurisdiction.[56] This process will be easier and less costly for families living in different provinces and territories or in another country. It will also ensure consistency between interjurisdictional proceedings, whether they are conducted under provincial interjurisdictional legislation or the *Divorce Act*.

Finally, the changes will also allow for the recognition of a support order made in a foreign designated jurisdiction in specific circumstances.

i. Interjurisdictional proceedings involving provinces or involving a province and a foreign designated jurisdiction

The legislation passed in 2019 will allow a former spouse to make an application through a "designated authority" - an administrative authority (as opposed to directly through a court). The application could be for an initial court order for support or for a variation of an existing support order. It could also be to request to have the amount of child support calculated or recalculated by a child support service in an interjurisdictional context.

The basic process will be as follows:

- the former spouse seeking relief would submit an application to the designated authority in their own province or country (if they live in a designated foreign jurisdiction)
- That designated authority would review the application and make sure it is complete. They would then send it to the designated authority in the respondent's province
- The designated authority in the respondent's province would then send the application to either a court in that jurisdiction or to a child support service, if there is such a service in that province

[55] By July 1, 2006 all common law provinces and territories had brought into force interjurisdictional support orders legislation. Similar legislation adapted to the civil law context was passed in Québec but is not yet in effect.
[56] Canada is not a party to any multilateral instrument on the recovery of family maintenance. All provinces and territories, however, have a number of reciprocity arrangements with foreign States to permit the establishment, variation, recognition and enforcement of support decisions across borders. The States with which the provinces and territories have reciprocity arrangements are designated in provincial and territorial regulations; The legislation passed in 2019 will refer to these as "designated jurisdictions."

- The respondent would then be served with the application along with a notice of where to appear and what information and documents to provide
- Based on the information from both the applicant and the respondent, either a court or a child support service in the respondent's jurisdiction would make a decision

ii. Recognition of foreign decisions

Currently, there is no process under federal family laws to recognize foreign support orders that have the effect of varying a *Divorce Act* order. The need for such recognition could occur where a spouse moves to a new jurisdiction, and that new jurisdiction makes an order for a different support amount than that provided for in the *Divorce Act* order.

The 2019 changes to federal family laws will allow for the recognition of a support order made in a foreign designated jurisdiction in specific circumstances.[57] The process for registering a foreign order for recognition will be determined under provincial law, including the grounds for objecting to the registration of the order. The order will have legal effect throughout Canada and this will facilitate enforcement.

2. FOAEAA amendments (Clauses 45-46, 51, 54, 57)

a. <u>Amendments related to provincial and territorial recalculation services (Clause 46)</u>

The legislation passed in 2019 will amend FOAEAA to allow for the disclosure of income information, including information from tax returns, to provincial and territorial recalculation services. This will reduce costs to parents and the court system. Without access to a parent's recent income information, recalculation services cannot accurately recalculate support.

Information-sharing agreements with provinces and territories will be updated to ensure that income information released to recalculation services is protected.

b. <u>Amendments related to provincial and territorial maintenance enforcement programs (Clause 46)</u>

Each province and territory has established an enforcement service, referred to as a Maintenance Enforcement Program (MEP), which has legislative authority to register, collect and enforce family support orders or agreements for the benefit of the family support recipient. Provincial and territorial legislation outlines the requirements of a support agreement before it can be registered and considered enforceable by a MEP. In some provinces and territories, when a support order is made, it is automatically enrolled with the MEP, but the

[57] The process will be the same for applications processed by a provincial Central Authority under the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance*, discussed below in the International Conventions section.

recipient can ask to have the order removed from the program. In other provinces and territories, parties have the option to enroll with the MEP.

Existing enforcement tools are ineffective against a growing number of support payors who have learned to hide their assets inside Canada. Information about certain assets, which may be detailed in federal tax slips, is currently inaccessible to MEPs. As a result, MEPs are unable to locate a support payor's assets in over 50% of their collective cases even if they have the payor's address and employer name.

The legislation passed in 2019 will increase MEPs' access to federal information, including the Social Insurance Number (SIN), to assist in their enforcement actions on behalf of family support recipients, mostly in relation to child support. The SIN will be identified in the FOAEAA regulations as information that can be searched for and released to a MEP. Locating support payors as quickly as possible lessens the financial hardship for support recipients and children. A validated SIN from the Social Insurance Number Register will help MEPs enforce more difficult cases and minimize risks of undertaking enforcement actions against the wrong individual.

c. Amendments related to interjurisdictional support cases (Clause 46)

The 2019 changes will amend FOAEAA to permit provincial and territorial designated authorities to apply for and receive information to process interjurisdictional cases. Federal, provincial and territorial Central Authorities under certain designated family law conventions will also be able to apply for and receive address information to assist in international cases to locate debtors, children and parents.[58]

d. Amendments related to peace officers investigating child abductions (Clause 46)

FOAEAA currently requires a peace officer investigating a child abduction under section 282 or 283 of the *Criminal Code* to lay a charge before applying for information. FOAEAA permits the release of the address of the person who is believed to have taken a child with them, as well as the release of the name and address of that person's employer, the address of a child who has been taken and the name and address of their employer, if any. FOAEAA applications by peace officers have rarely been made to date because the current process is perceived to be too slow and cumbersome.

When dealing with a child abduction, time is of the essence. Police should have access to tracing information as soon as possible. Furthermore, in some situations, the only concern is finding the child. Laying a charge may be premature or wholly inappropriate, for example, in some cases involving family violence. The 2019 changes to federal family laws will therefore

[58] Family law conventions could be designated in regulations and include but not be limited to the following Hague Conventions: the *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, the 1996 Convention and the 2007 Convention.

amend FOAEAA to replace this requirement with a more robust affidavit requirement explicitly stating that police have reasonable grounds to believe that a criminal offence has been committed, and that the information disclosed will be used to assist in the investigation of the offence. Permitting police to seek tracing assistance prior to laying a charge should make the tracing service more accessible to police officers and thus a more effective tool.

e. Privacy Protections (Clauses 45-46)

FOAEAA currently provides safeguards to protect information released under the Act. For example, information-sharing agreements between the provinces and territories and the Government of Canada must safeguard information released under the Act. These agreements will have to be updated as a consequence of the many changes the legislation will make in respect of the release of information. It will amend FOAEAA to ensure that provincial entities that will now have access to information are subject to such agreements before they can apply for and receive information under FOAEAA. The legislation will also amend FOAEAA to require information-sharing agreements between the Government of Canada and any specific police force in Canada seeking to make use of the Act.[59]

Since provinces and territories cannot enter into information-sharing agreements with the Government of Canada on behalf of courts, the legislation passed in 2019 will amend FOAEAA to require that information released to a court be sealed and kept in a location to which the public will not have access. The court could then, for the purpose for which the information was requested, disclose the information to a person or official that the court considers appropriate and make any order to protect the confidentiality of the information.

f. Expanding the FOAEAA garnishment program (Clauses 51, 54 and 57)

FOAEAA currently permits the garnishment of designated federal monies, such as income tax refunds, to satisfy unpaid family support obligations.

Through their enforcement efforts, federal, provincial and territorial governments disburse about $2 billion annually to Canadian families to satisfy outstanding support debts. At the federal level, in 2017-18 about $185 million was garnisheed under FOAEAA for families and children. These federal support enforcement efforts alone resulted in the distribution of, on average, close to $2,000 per family on behalf of which funds were garnisheed for about 100,000 families.

The 2019 changes to federal family laws will amend FOAEAA to improve the garnishment process. For example, the federal Crown would be bound by a garnishee summons for 12 years instead of five, to better reflect the average length of time a file is enrolled for enforcement in

[59] This includes provincial and territorial designated authorities, Central Authorities and recalculation services.

Canada. This will improve the operational efficiency of the FOAEAA garnishment program and will reduce the need for MEPs to renew their garnishment applications.

The legislation will amend FOAEAA to allow for garnishment of court-ordered expenses incurred as a result of the denial of or refusal to exercise parenting time, custody, access or contact. It will also allow for garnishment where there is non-payment of expenses related to the exercise of parenting time, custody or access due to a child's relocation. The provisions in the legislation passed in 2019 will help ensure that parents can be compensated for expenses they incur in these situations.

The effectiveness of the FOAEAA garnishment provisions is significantly reduced when a support debtor does not file a tax return, where the refund could have been garnisheed to satisfy their unpaid support obligation. The 2019 changes to federal family laws amend FOAEAA to create a mechanism whereby the Minister of National Revenue could demand that a debtor who is subject to a FOAEAA garnishment file a tax return.

The changes will amend FOAEAA in various other ways to help create greater operational efficiency. For example, the legislation will eliminate the requirement for MEPs to submit an affidavit for tracing applications and licence denial applications. The safeguards provided by the affidavit can be addressed through other means for MEPs, such as the requirement that the applicant attest to the truthfulness of the application. In addition, MEPs have established rigorous internal safeguards since FOAEAA was enacted in the mid-1980s.

3. GAPDA amendments (Clauses 85, 87, 95, 96(2), 105(1), 105(3), 106(2), 115(3), 115(5))

The legislation passed in 2019 includes amendments to GAPDA to increase the effectiveness of the current processes under which federal salaries are garnisheed and federal pension benefits diverted.

Amendments extend the period within which a garnishee summons must be served on the federal Crown. This will provide a person who is owed money and who submits a garnishment application additional time to take corrective actions where procedural errors are made, such as serving documents at the wrong address. The garnishment regime is also amended to allow, where possible, the earlier interception of salary so that support recipients can obtain the support to which they are entitled faster.

The 2019 changes to federal family laws will also allow MEPs to apply for pension diversion on behalf of support recipients, without obtaining a certified copy of the support order. Eliminating the need to obtain a certified copy of the order will save support recipients time and costs associated with obtaining certification.

At present, only arrears that are set out in a court order can be enforced through pension diversion. The changes will allow MEPs to recover arrears with a statement of arrears that details the arrears owing. This will alleviate the burden on the support recipient to go back to court to obtain a court order for any arrears that have accrued, thus improving the efficiency of the diversion regime and allowing support recipients to collect the support they are owed faster. It will also allow MEPs to adjust the arrears owing if moneys are collected through other means.

E. INTERNATIONAL CONVENTIONS

On May 23, 2017, Canada signed two international family law Conventions: the *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance* (2007 Convention) and the *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children* (1996 Convention).

Although Canada has signed these Conventions, it is not yet a party to either. As a next step for Canada to become a party, Parliament needed to amend federal family laws to align them with the Conventions.

What was known as Bill C-78 in the 42nd Parliament is federal implementing legislation for the 1996 Convention and the 2007 Convention. It makes necessary amendments to the *Divorce Act* and the FOAEAA. Both Conventions have rules for federal States, like Canada, so that the Conventions can be implemented incrementally in different territorial units. In Canada, the territorial units are the provinces and territories. Upon ratification, Canada will declare that the Convention will apply in those provinces and territories that have amended their laws to be consistent with the Convention and have asked the federal government to have the Convention apply to them. If additional provinces and territories do the same, Canada will make additional declarations to extend the application of the Convention to them.

The legislation will give "force of law" to the 1996 Convention and the 2007 Convention under the *Divorce Act*. This means that the Conventions will become part of the law of Canada. Because of the constitutional division of powers, however, the Conventions will only be given force of law in relation to federal jurisdiction. The legislation also provides that the 1996 Convention and the 2007 Convention will override federal laws if they were in conflict with one another.

1. 2007 Convention (Clause 30)

Canada is currently not party to any international convention concerning the enforcement of family support. In Canada, the international recovery of family support is facilitated by reciprocal arrangements with other countries. Provinces and territories have established arrangements pursuant to their interjurisdictional support orders legislation under which

certain foreign States have been designated as "reciprocating jurisdictions" or, in the province of Québec, by designation pursuant to *An Act respecting reciprocal enforcement of maintenance orders*.

Where there is no reciprocity arrangement, the only way for most Canadians to have a support order enforced in another country is to hire a lawyer in that country and go to court. Most Canadians cannot afford to hire a foreign lawyer.

The 2007 Convention provides the legal framework for cross-border recognition and enforcement, establishment and modification of support orders and agreements. The Convention establishes an international system for administrative cooperation by requiring that a Central Authority be designated for each Contracting State to implement Convention obligations. In federal States such as Canada, the 2007 Convention allows for Central Authorities to also be designated for each territorial unit to which the 2007 Convention has been extended (Article 4(2) of the Convention).

The 2007 Convention applies to child support obligations for children under the age of 21, regardless of the marital status of the parents.[60] The Convention also covers recognition and enforcement of spousal support obligations where the spousal support claim is made with a claim for child support. The scope of the Convention is outlined in Article 2(1).

The 2007 Convention provisions will apply only if one of the spouses lives in a Contracting Party and the other spouse is habitually resident in a province that has implemented the 2007 Convention.

a. Benefits of becoming a party to the Convention

Ratification of the 2007 Convention will increase the number of countries with which Canadian jurisdictions have reciprocity, which will result in more family support flowing to Canadian families and children. Ratification of the 2007 Convention will make it easier to have Canadian child and spousal support orders recognized and enforced across international borders. It will also provide a means for Canadians to establish and vary a child support order in a foreign country.

The 2007 Convention may also provide added value to current reciprocity arrangements. The Convention does not prevent the application of reciprocity arrangements if the arrangements provide for a broader base of recognition and enforcement, a simpler procedure or more beneficial legal assistance.

Becoming a party to the 2007 Convention will contribute to the legislation's objectives of reducing child poverty and increasing the efficiency of the family justice system.

[60] In the case of the Canadian *Divorce Act*, it applies to parties who have divorced under the Act.

b. Role of the Central Authority

Under the Convention, Canada could designate a Federal Central Authority as well as provincial and territorial Central Authorities. Provincial and territorial Central Authorities would be primarily responsible for implementing Convention obligations. Upon receiving an application from a Central Authority located in a Contracting State, a provincial or territorial Central Authority would be required to provide assistance to a former spouse residing in that State. The provincial or territorial Central Authority would then send the application to the appropriate competent authority in its jurisdiction. The competent authority could either be a court, which would generally be the court closest to where the former spouse resides, or a provincial child support service if that service is available in the receiving jurisdiction. The Canadian Federal Central Authority would assist foreign Central Authorities in locating parties in Canada and with the transmission of applications to the appropriate provincial or territorial Central Authority (Articles 5 and 6).

c. Direct request to Court

Under the 2007 Convention, direct requests to courts will be available to foreign creditors seeking to have their support orders recognized or recognized and enforced in a province or territory to which the Convention has been extended. Foreign debtors will also be able to make direct requests to have decisions having the effect of suspending or limiting a support order either recognized or recognized and enforced in a province or territory to which the Convention has been extended.

Under the provisions relating to the 2007 Convention, the legislation passed in 2019 does not specifically provide the means for parties to make direct requests for establishment and variation of support orders as former spouses may use the existing process set out in sections 15.1 (child support), 15.2 (spousal support) or 17 (variation of orders) of the *Divorce Act* (Article 37).

d. Stand-alone spousal support claims

As noted, the 2007 Convention covers recognition and enforcement of spousal support obligations through a Central Authority only if the spousal claim is made with a claim for child support. Applicants wishing to establish stand-alone spousal support claims internationally would have to make a request to a court without the assistance of a Central Authority.

Under the 2007 Convention, Contracting States may, by means of declaration, extend all or parts of the Convention to other types of family support such as spousal support only, or support for vulnerable persons (Article 2(3)).Therefore Canada could, after receiving a request from a province or territory to do so, declare on behalf of that province or territory that the scope of the 2007 Convention is extended to other types of family maintenance not covered by the core scope of the 2007 Convention, including applications for spousal support only. The

2019 changes to federal family laws will provide authority under the *Divorce Act* for provincial or territorial Central Authorities to assist with these applications.

2. 1996 Convention (Clause 31)

Canada is currently not party to a multilateral private law instrument relating to parenting (custody and access) matters.[61] Because of this, Canada and another country might apply different jurisdictional rules to the same case, with the Canadian court and a court in another country potentially making conflicting decisions. Moreover, many foreign countries will not recognize and enforce Canadian custody orders. As Canada is not party to a multilateral private law instrument, it cannot be part of existing formal multilateral networks to promote cooperation in cross-border children's matters.

The 1996 Convention only applies among "Contracting States." The 1996 Convention sets out rules to clarify issues such as which State's courts can make decisions about parenting arrangements for a child and which laws should apply when a child lives in one State but also has close connections to one or more other States.

It also sets out rules for the recognition and enforcement in one Contracting State of orders made in a different Contracting State. The Convention also makes it easier for authorities in different Contracting States to communicate and cooperate with each other about many cross-border issues involving children.

In addition to parenting matters, the 1996 Convention applies to other issues including matters related more broadly to the "protection of children", such as child protection, and the administration, conservation and disposition of children's property. However, the legislation passed in 2019 only relates to parenting matters, as these are the matters addressed in the 1996 Convention that fall within federal jurisdiction.

a. Benefits of becoming a party

The 1996 Convention will facilitate the recognition and enforcement of Canadian parenting orders in other countries that are also party to the Convention, creating greater legal certainty. This will provide better assurances to families who travel or relocate to another Contracting State that their Canadian order will be respected. This could also make it easier to return a child to Canada in parental child abduction cases. It could also reduce costs for families by reducing the need to re-litigate the same issues in another Contracting State. In 2014, the Standing Senate Committee on Human Rights recognised the benefits of joining the 1996 Convention, both as a complement to the *Convention of 25 October 1980 on the Civil Aspects of*

[61] Canada is a party to the Hague *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* which addresses cross-border cases of child abduction.

International Child Abduction (Hague Abduction Convention) and as a tool to help resolve cross-border parenting disputes.[62]

The 1996 Convention could lead to more effective communication and cooperation between authorities in Canada and in other countries about many other child-related issues. The potential benefits of the Convention continue to grow as more countries become parties. The 1996 Convention now applies in over 40 countries, including many European countries.

b. Implementation through changes to federal family laws

The 2019 changes to federal family laws will give the 1996 Convention force of law which, from a legal perspective, will be sufficient to implement the Convention federally. However, the changes include other amendments to explain how some of the rules in the 1996 Convention are to be applied specifically in the *Divorce Act* context. The provisions of the *Divorce Act* dealing with the Convention will only apply to the provinces and territories to which the application of the Convention has been extended. In addition, consistent with the Convention, they will only apply to children under the age of 18.

c. Jurisdictional rules

The basic jurisdictional rule in the 1996 Convention is that the authorities of the Contracting State where the child is habitually resident have jurisdiction to make decisions related to the protection of the child (Article 5 of the Convention). The 2019 changes to federal family laws reflect this rule by providing that a court otherwise having jurisdiction under the *Divorce Act* cannot make a decision about a child who is habitually resident in another Contracting State, unless specified exceptions provided by the Convention are met.

The exceptions allowing a Canadian court to take jurisdiction where a child is habitually resident in another Contracting State are as follows:

- the child is present in Canada and the child is a refugee, internationally displaced or their habitual residence cannot be determined (Article 6)
- there is a divorce proceeding in the province and other mandatory criteria are met. These criteria are 1) at least one spouse has parental responsibility for the child, 2) anyone with parental responsibility consents to the court taking jurisdiction, and 3) the court determines that it is in the best interests of the child to take jurisdiction (Article 10)
- the court has requested or been requested to assume jurisdiction under the Convention's transfer provisions. This transfer can only occur where the competent authorities in both Contracting States agree that the transfer would be in the child's

[62] Senate, Standing Senate Committee on Human Rights, *Alert: Challenges and International Mechanisms to Address Cross-Border Child Abduction* (July 2015).

best interests. The cases where jurisdiction is most likely to be transferred to a Canadian court will be those where there is a divorce proceeding pending in a province, but where the conditions set out in new section 30.7 of the *Divorce Act* have not been met, or where the child has a substantial connection to the province (Articles 8 and 9)

- there is an urgent situation (Article 11)

The jurisdictional provisions also provide that, if a child has become habitually resident in a province as a result of a wrongful removal or retention, a court in that province may only take jurisdiction once specific criteria set out in the 1996 Convention have been met (Article 7). This provision will help discourage international parental child abduction by denying a jurisdictional advantage to a person who has abducted a child. It is complementary to the Hague Abduction Convention, to which Canada is a party.

A court in a province having jurisdiction under the *Divorce Act* and in accordance with the 1996 Convention may seek or accept to transfer jurisdiction to the competent authority of another Contracting State in certain circumstances set out in the 1996 Convention. Both authorities must agree that the transfer would be in the best interests of the child (Articles 8 and 9).

The 2019 changes to federal family laws create a new jurisdictional provision for cases where a child is habitually resident outside Canada, but where the 1996 Convention does not apply. A court could only take jurisdiction in such cases in "exceptional circumstances."

d. Recognition and enforcement

While foreign parenting orders are generally recognized under provincial and territorial laws, there is one situation in which such orders must be recognized under the *Divorce Act.* This is where the foreign parenting order has the effect of modifying a previous parenting or contact order made under the *Divorce Act.* It must be recognized under the *Divorce Act* so that it has the effect of overriding the original *Divorce Act* order.

Article 23 provides for the recognition by "operation of law" in Contracting States of measures (decisions) taken by other Contracting States. This means that the decision will have legal effect in a province without the need for a court application. Article 24 provides, however, that any interested person may ask a court to decide on the recognition or non-recognition of a measure taken by a Contracting State under the 1996 Convention. The 2019 changes specify that this application may be made to any court in a province if there is a sufficient connection between the matter and the province. Article 23(2) lists several grounds for non-recognition of a decision, for example if a person who claims their parental responsibility is infringed by the decision was not given an opportunity to be heard.[63]

[63] This basis for non-recognition would not apply in an urgent case.

Under the 2019 changes to federal family laws, where a foreign decision is recognized by operation of law, that decision will only be valid in the provinces and territories where the Convention applies (Article 23). This will provide for consistency, as these provinces and territories would also recognize decisions of Contracting States by operation of law. In cases where a foreign decision is recognized by the court of a province having a sufficient connection with the matter, it will have legal effect across Canada, consistent with the current approach under section 20(2) of the *Divorce Act* (Article 24).

While a foreign decision may be recognized by operation of law, if an individual wishes to have the foreign decision enforced, they must take the extra step of either registering the decision with a court in the province where enforcement is needed or seeking a declaration from that court that the decision is enforceable (Article 26). Provinces and territories will determine the appropriate procedure for their jurisdiction. The registration or declaration could be refused on the same grounds as could the recognition of a foreign decision meaning the grounds under Article 23(2). The legislation passed in 2019 clarifies this in the context of the *Divorce Act* and provides that a foreign decision will be enforced in the same way as an order of a court in the province.

The legislation provides a basis for the recognition of foreign decisions modifying a parenting or contact order made under the *Divorce Act* in situations where the 1996 Convention does not apply. The grounds for non-recognition are similar to those found in the 1996 Convention. Once recognized, the decision will be enforced as an order of a court in a province.

F. MISCELLANEOUS AMENDMENTS

The 2019 changes to federal family laws include a number of additional changes. Some minor changes will ensure consistency between the French and the English versions of all three Acts and provide for gender-neutral terminology.

1. *Divorce Act* amendments

The legislation passed in 2019 amends the *Divorce Act*'s current jurisdictional rules by, for example, replacing the term "ordinarily resident" with "habitually resident" (Clause 35) and changing the jurisdictional rules relating to parenting orders (Clauses 2-7). As discussed throughout this paper, the legislation sets out new obligations for parties under the *Divorce Act* (Clause 8). One explicitly requires parties to comply with court orders until they are no longer in effect. Others include the requirement to shield children from conflict arising from divorce and the duty to provide complete, accurate and up-to-date information required under the Act (Clause 8).

2. FOAEAA amendments

The legislation will amend Part II of FOAEAA by providing authority to set out in regulations the periods and circumstances where a garnishee summons will no longer be effective, as well as

providing authority to set out in regulations how multiple garnishee summonses relating to the same debtor are to be honoured (Clauses 55 and 66).

Part III of FOAEAA will also be amended to permit the Minister of Justice and the Ministers responsible for the denial or suspension of federal licences to, subject to the regulations, search any of the information banks that may be searched under Part I of FOAEAA for the purposes of confirming the identity of a debtor named in an application for federal licence denial (Clause 75).

3. GAPDA amendments

The legislation passed in 2019 will amend GAPDA to allow for periods and circumstances leading to the termination of garnishment to be set out in regulations (Clause 85). For example, garnishment of wages could be terminated after a specified period has elapsed since an employee has retired and no further wages are payable. Another amendment will define the term “Parliamentary entity” for Part I of the Act to allow the removal of the names of parliamentary entities from applicable provisions (Clause 82(2)). Using the defined term will improve the readability of those provisions without changing the substance of the text.

In Part II of GAPDA, if a person entitled to a deferred annuity under the *Canadian Forces Superannuation Act* or the *Reserve Force Pension Plan Regulations* is not paying their support obligation, the legislation will allow a support creditor to ask the court to make an order deeming the person to have opted for an annual allowance (Clause 107). Once the payment of pension benefits to the person began, the diversion could proceed.

G. COMING INTO FORCE

1. Royal Assent (No applicable clause)

The legislation passed in 2019 contains a small number of technical *Divorce Act* provisions that came into force immediately upon Royal Assent. These include provisions relating to the authority for ministerial activities, such as research and regulation-making authorities. Certain regulations will need to come into force at the same time as provisions of the legislation, such as those related to administrative calculation and recalculation. Changes to the *Federal Child Support Guidelines* will also come into force at the same time to reflect the changes in parenting terminology.

Most of the GAPDA amendments and several of the FOAEAA amendments included in the legislation came into force upon Royal Assent. These amendments will serve to improve the efficiency of service delivery.

2. Order in Council (Clause 126)

Most of the *Divorce Act* provisions come into force by Order in Council. Most of the amendments to the Act require changes to provincial rules of court, development of public legal education and information materials and professional training. Bringing these provisions into force by Order in Council gives the Government of Canada and the provinces and territories time to complete the required changes.

Most of the FOAEAA amendments and a few of the GAPDA amendments will also come into force by Order in Council. These amendments could not come into force until the regulations that support FOAEAA and GAPDA are amended and technical and operational changes required to federal, provincial and territorial systems are completed.

Finally, the coming into force of each international Convention depends on at least one province or territory having passed implementing legislation and indicating that it wishes to be bound by that Convention. As a result, each Convention will come into force by Order in Council after this occurs.

ANNEX A: KEY RESOURCES

- Access to Civil & Family Justice: A Roadmap for Change, Action Committee on Access to Justice in Civil and Family Matters, Canadian Forum on Civil Justice, October 2013.

- JustFacts: Child Custody and Access, Department of Justice, Research and Statistics Division, November 2017.

- JustFacts: Compliance with Family Support Obligations, Department of Justice, Research and Statistics Division, June 2016.

- JustFacts: Economic Consequences of Divorce and Separation, Department of Justice, Research and Statistics Division, June 2016.

- JustFacts: Family Law Cases, Department of Justice, Research and Statistics Division, June 2016.

- JustFacts: Family Structure in Canada, Department of Justice, Research and Statistics Division, June 2016.

- JustFacts: Mobility and Relocation in the Context of Family Law, Department of Justice, Research and Statistics Division, June 2016.

- JustFacts: Self-Represented Litigants in Family Law, Department of Justice, Research and Statistics Division, June 2016.

- Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems, Department of Justice Canada, Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence, November 2013.

- Meaningful Change for Family Justice: Beyond Wise Words, Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, April 2013.

- The Practice of Family Law in Canada: Results from a Survey of Participants at the 2016 National Family Law Program, Department of Justice Canada, by the Canadian Research Institute for Law and the Family, October 2016.