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SUBSTANTIAL CHANGES TO THE DIVORCE ACT

FAMILY LAW SASKATCHEWAN

MCKERCHER LLP BARRISTERS & SOLICITORS

MAY 14, 2020

UPDATE: THE FEDERAL GOVERNMENT HAS DELAYED THESE CHANGES UNTIL MARCH 1, 2021.

The *Divorce Act* of 1985 is getting its first substantial update since coming into force. On May 22, 2018, the government introduced Bill C-78 A*n 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*. The Bill received Royal Assent on June 21, 2019, and will come into force on July 1, 2020.

The key objectives of the changes to the *Divorce Act* are four-fold:

1. To promote the best interests of the child;
2. To address the issue of family violence;
3. To help reduce child poverty; and
4. To improve the efficiencies and accessibility of the family justice system.

Key Changes

Custody and Access

The terms "custody" and "access" are no more. In its place are parenting orders under which courts can make determinations of decision-making responsibility and parenting time between the parents. This change in terminology more accurately encapsulates what prior custody and access orders were actually granting to one or both parents, namely, the ability to make decisions regarding the care and well-being of their children (custody) and the amount of time the children were to spend with each parent (access). With the negative connotations surrounding the terms custody and access, the change in terminology will hopefully assist in reducing conflict between parents and more clearly convey the true indicia of parenting determinations under the *Act*.

Contact Orders

The ability to apply for a parenting order under the *Divorce Act* is limited to either a spouse, or a person other than a spouse who is a parent of the child or who stands in the place of a parent to a child. In essence, parenting orders are limited to parents. However, there are sometimes situations in which someone other than a parent wishes to have contact with a child, such as a grandparent. Usually, this contact would occur during the parent's time with the child; however, where that is not the case, contact orders provide a mechanism for such people to seek contact with a child of the marriage under the *Act*.

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Best Interests of the Child

In considering proposed changes to the *Divorce Act*, the inclusion of a "presumption of equal parenting" was rejected at the Committee hearings. Under this presumption, the default parenting arrangement would be that each parent is entitled to equal time with their children and joint decision-making authority with the other parent. If one of the parents opposed this presumption, the onus would be on them to prove that such an arrangement was not in the best interests of the child.

The rejection of this presumption reflects the reality that each family situation is unique, and the parenting order that should be put in place depends on the specific circumstances of that family. Equal shared parenting will not work, nor is it appropriate, in every circumstance. Instead, the new *Divorce Act* includes a provision that when "allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child".

The determination of what is in the child's best interests is not new to the *Divorce Act*. However, the current version provides little guidance on what factors are to be considered under such a determination. Bill C-78 specifically delineates factors to be considered, including:

1. the child's needs, given the child's age and stage of development, such as the child's need for stability;
2. the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
3. each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
4. dthe history of care of the child;
5. the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;
6. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
7. any plans for the child's care;
8. 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;
9. the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;
10. any family violence and its impact on, among other things,
    i. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
    ii. 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; and
11. any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

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Many of these factors reflect the caselaw that has developed in the determination of custody and access applications since the implementation of the *Divorce Act*, or factors that have been outlined in various provincial statutes, applicable to parents who are not married. A main factor listed above that is not part of *The Children's Law Act, 1997* for Saskatchewan and not a significant part of the caselaw in this province is the requirement to consider the impact of family violence in the best interests analysis.

Family Violence

Saskatchewan's rate of Intimate Partner Violence (IPV) is over double that of the national average. In Saskatchewan, a woman is killed by her current or former partner every four months, and one of the most dangerous times for victims of IPV is when they are separating from their partner. Although in cases of family violence, the children of the marriage may not be specifically harmed by the violent partner, the impact of being exposed to such violence has a lasting effect on children's developing brains.

In addressing this issue, the provisions of Bill C-78 outlines common indicators of abusive behaviour, including coercive and controlling behaviour, which is a dangerous form of IPV. The Bill further outlines distinct criteria to be considered in a best interests analysis where family violence is at issue, including the nature, seriousness and frequency of the violence; a pattern of coercive or controlling behaviour; and whether the family violence causes the child or other family member to fear for their own safety or the safety of another.

Relocation

Situations in which one parent wishes to relocate with the children following separation or divorce is one of the most contentious and litigated issues in family law. The current *Divorce Act* does not provide any specific guidance to address such situations, however, caselaw has developed over the years which does provide a set of criteria to consider in determining whether the relocation will or will not be permitted. The leading authority in this area is the Supreme Court of Canada's decision in *Gordon v Goertz*, [1996] 2 S.C.R. 27. However, even with the significant amount of caselaw in this area, there is much uncertainty over the outcome of such applications and disagreement over what factors should or should not be considered.

Bill C-78 attempts to address this uncertainty and delineate specific factors that should and should not be considered by the court on a mobility application. The main components of the new framework under Bill C-78 are as follows:

1. It requires a parent wishing to relocate with the children to provide 60 days' notice in writing to the other parent of their desire/intention to relocate. The other parent then has 30 days to object to such relocation.

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2. It delineates which parent has the burden of proof in the event the matter moves to court.
   a. If the children spend "substantially equal" time with both parents, a shared parenting arrangement, then the parent who wishes to relocate has to show why the relocation would be in the children's best interests.
   b. If the children spend the "vast majority" of their time with the parent who wishes to relocate, then the other parent would have to show why it is not in the children's best interests to move.
3. In determining whether the move is or is not in the children's best interests, the courts **are** to consider the reasons for the relocation, but it is **not** to consider whether the moving parent would relocate with or without the children. These two positions are in direct contrast to the caselaw in this area. Under *Gordon v. Goertz*, the reason for the relocation should not generally be considered. Additionally, courts would often consider whether the moving parent would relocate with or without the children, the "double bind". If a parent said they would move without their children, that calls into question their commitment to their children, if they said they wouldn't move without their children, then it makes it easier for a court to deny their relocation.

Conclusion

The changes to the *Divorce Act* outlined in Bill C-78 will have a significant impact on parenting matters following separation and divorce. If you have questions or concerns about how these changes will impact you, a member of our family law department would be happy to discuss this with you.

About Family Law Saskatchewan:
Kate, Samantha and Zina are active members of the larger McKercher LLP Family Law Group. This group is dedicated to the delivery of honest, focused and experienced legal solutions for families in Saskatchewan who are transitioning to a next chapter in their lives together, or apart.

About McKercher LLP:
McKercher LLP is one of Saskatchewan's largest, most established law firms, with offices in Saskatoon and Regina. Our deep roots and client-first philosophy have helped our firm to rank in the top 5 in Saskatchewan by Canadian Lawyer magazine (2019/20). Integrity, experience, and capacity provide innovative solutions for our clients' diverse legal issues and complex business transactions.

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