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The Proposed Changes to Canada's Divorce Laws: meaningless, costly and unfair

Family Matters by John Syrtash

I have had 37 years of experience almost exclusively in Canadian family law. Despite the rhetoric and headlines, a careful reading of Bill C-78 suggests that the Media's praiseworthy comments are alarming. In fact, some of the Bill's provisions are either meaningless or could actually increase the cost of resolving high conflict disputes by introducing expensive and unnecessary new hurdles to final resolution.

The basic problem in Family Law is not so much law, but the inability of certain spouses to listen to each other and accept the need to change when partnering. Why learn to get along when the me generation has created a spiraling divorce rate. If it "ain't good" spouses often just don't bother anymore as much. Better to simply get off the train and look for a different brand of shampoo, cell phone or person. Then if kids, property rights and support get in the way, the lawyers are hired often to impose a parent's will rather than compromise. However, the proposed changes often make make this process either more costly or reform legal language without helping to reduce the cost.

By example, the proposal to eliminate custody and access orders is based on the premise that words matter. The perception is that clients often fight for "custody" or "shared custody" because these words are loaded with perceived power and rights. The thinking behind these new provisions is that such words lead to meaningless fights that often clog the court system and have parties spend unnecessary funds over these words. However, in contested disputes, eliminating Orders for "custody" and "access" and replacing them with Orders for "parenting time" and "decision-making responsibility" will make no difference. Doing so will not *in any way* lower the cost of disputes over scheduling issues or over who makes decisions for a child's health, education, religion and other major issues. It will not change the cost of disputes over the amount of time each parent spends with the child. No parent who insists upon final say over any of these issues will ultimately care over the new language proposed, so long he or she obtains *sole or shared decision making powers and control over scheduling issues*. One of the reasons that the new laws won't reduce conflict is that the law of child support hasn't changed. Unless a parent has 40% or more of the child's time, the parent who is the primary caregiver will receive the same amount of child support. So many payers will continue to litigate for more time and for this very reason, not because the words for custody and access have changed. Nothing in the provisions changes this reality.

In addition some of the proposed provisions either further lengthen certain proceedings or make them much more costly

For instance, section 7.3 now *directs* anyone applying for parenting time with a child in a law suit to mediate, negotiate or use "collaborative law" techniques to resolve a dispute. A court has always been able to order parties to mediate. However, as this provision is a new legal requirement, unintended consequences could result. An abused person may now possibly be hindered from obtaining protection from the Court unless she also "negotiates or mediates" with her abuser. Making "family dispute resolution process" legally mandatory could also hinder someone from bringing an *emergency* court application with or without notice. If the Applicant didn't also attempt to negotiate or mediate he may not receive the Court order he seeks. Although mediators are provided by the Courts for free they may not always be appropriate or available. So the people involved will now be retaining costly mediators or pay their lawyers to *prove* that they have attempted to negotiate a solution *before being able to apply for a court order*. In my experience, a direct approach to a Judge is often necessary in situations where negotiation or mediation is useless, such as to obtain an Order to preserve assets or to stop a parent from relocating when that parent failed to provide adequate notice.

Another section increases the time a parent must provide to the other parent when planning to relocate with a child from at least 30 to 60 days, unless the Court provides otherwise. So if a parent suddenly finds a job elsewhere and must move more quickly, then *the burden and cost of doing so dramatically shifts to such an individual* to apply for a Court Order to permit the move.

Under section 6.1(3) if no parenting order has been made in respect of a child, no application for a contact order may be brought under the new Divorce Act. This proposed provisions effectively prevents anyone who is not a parent, *which includes any grandparent*, from applying for an Order for contact with a child, *unless one of the parents commenced a law suit for parenting time*. Of course, such a grandparent or other person may still bring an Application for visits/contact under Provincial family law. But why does the government find it necessary to limit grandparent's rights in such a drastic fashion under our federal family laws?

Another proposed provision under 16.92(1) means that if your spouse decides to relocate with a child permanently to a different town or city, and the visiting parent isn't current with his child support, a Court can now deny a child's rights to visit and the visiting parent the ability to object to the move. In short, a child can lose contact with his/her parent when the other primary parent decides to move away, if there is unpaid child support. We all understand that not paying child support will often severely impact a child's welfare. But in many cases this provision can be used as a weapon to deprive a child who has a strong bond to a payer who is behind in his support payments.

If you believe I am exaggerating the problematic impact of these new provisions then one only has to review the term "Family Violence" in the new legislation. It will now include *"financial abuse."* If a parent is behind in child *or spousal* support payments the Court can now exclude him/her from having any contact with the child because Family Violence now includes the failure be "up to date" with either form of support. Enforcing such payments is a noble goal. But perverting the term "violence" to include unpaid child or spousal support is Doublespeak. It is nothing more than trying to change the English language for political correctness. In many instances such Orders limiting access for financial reasons may not be fair to the child or in the child's best interests, particularly when there is only a failure to honour spousal support obligations completely. The term "Family Violence" could now also include "coercive behaviour" on the part of the one of the caregivers, even if it's against someone *dating* the other caregiver. So if the primary caregiver's boyfriend is the subject of "coercion", whatever that means, then the child may not be able to see his father or mother anymore, no matter how strong the bond.

Before passing these changes into law we all need to reflect much more carefully on what is being proposed and ignore the Media's current enthusiasm.

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