

New divorce act holds beneficial changes

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For Law Times

A modernization of Canada's Divorce Act intended to make the family justice system more efficient and effective could significantly impact some families during the divorce process, say lawyers.

The prospect that family violence will be directly addressed in the updated federal legislation can make it a powerful tool for families, says Toronto family lawyer Nathalie Boutet of Toronto firm Boutet Family Law.

Family members victimized by a spouse will be able to use the legislation to defend claims to limit the abuser's parenting time, she says, suggesting it may also encourage victims to stand up to abusers as they go through divorce proceedings.

"I think that adding it here is a very important statement," says Boutet, whose firm focuses on non-court resolution processes. "I certainly have cases where there's family violence. And I would be able to say, more strongly now, that this is an important element in your case and it needs to be discussed."

Previously, she says, the victimized spouse had to prove they were a victim of family violence to demonstrate its impact on family members and their behaviour.

Amendments to the Divorce Act, as well as the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension

Diversion Act were introduced in the spring and are wending their way through the legislative process, having undergone a second reading. It is currently before the House of Commons Standing Committee on Justice and Human Rights.

In their introduction, the federal government announced that these are the first substantial updates of federal family laws in 20 years. The key objectives are to promote the best interests of the child, address family violence, help reduce child poverty and make Canada's family justice system more accessible and efficient.

The amendments are intended to streamline some family justice processes, encourage people to resolve divorce-related disputes out of court and create new rules for parents who wish to relocate with a child after a divorce. The proposed amendments include additional tools for enforcing family support obligations and an expansion to unified family courts.

The amendments also introduce language that many lawyers have already adopted, says Katherine Cooligan, Borden Ladner Gervais LLP's managing partner in Ottawa and a certified specialist in family law. The use of "parenting time" instead of "custody" and "access" is intended to make it less adversarial and less territorial.

"The bottom line is the intent was to soften the custodial language with a view to leading to resolution more easily," she says. "Whether or not that's going to



Nathalie Boutet says she's encouraged by changes in the federal Divorce Act.

make a practical difference, I'm not sure."

What Cooligan sees as significant in the proposed amendments is that it introduces, for the first time, a legislated test for mobility cases, when one parent wants to move with the child, she says.

The amendments set out who has to prove that the move is in the best interests of children and legislated the best-interests test and the steps on how to get there.

"We have been governed by the Supreme Court of Canada case in *Gordon v. Goertz* and there hasn't been a legislated test," she says, referring to the 1996 decision that established the circumstances surrounding a proposed move by one parent, focusing on the best interests of the child.

Boutet says the change allowing judges to access income information from other govern-

ment agencies is long overdue and one that will save time and money pursuing information that isn't always made readily accessible by resistant parties.

"That's a big victory for everything: The cost to the judicial system, access to justice, the speed of determining issues and one of the important aspects for families who want to operate outside of the court system," she says.

"I think this is going to have a very significant impact on families that use mediation or collaborative negotiation."

If one of the divorcing parties fails to disclose income information during an alternative dispute resolution approach, the opposing party will have a new negotiating tool, says Boutet, forcing the issue to go to court where that information will likely be ordered by a judge.

She is also encouraged by the proposed move away from the need to return to court for yearly reviews under child support guidelines in situations where income changes. Instead, there would be an administrative framework through which to register income statements, says Boutet.

The new system would also encourage people to resolve divorce-related disputes out of court by having lawyers communicate the options of negotiating, using mediation and the collaborative approach to their clients, she says.

"For me, as a collaborative lawyer, to understand that lawyers would have to make this

process known to their clients is a huge victory," says Boutet. "Collaborative negotiation is a perfect model of non-court negotiation where the lawyers are there supporting the clients during the negotiation meeting and it's also a commitment to finding a resolution without going to court. It's very powerful."

Russell Alexander, the principal of Collaborative Family Lawyers, who is based in Whitby, Ont., is also encouraged by the initiative for those who are divorcing to look at alternatives to the courts. Although many lawyers now offer those services, he says the options and how they work are not so well known in the general public.

Many of the changes to the Divorce Act, including the move away from the language such as sole custody and access, which he describes as fighting words locking people into positions, toward the gentler parenting time has largely been adopted by family lawyers, he says. And the shifting onus when a spouse wants to relocate, he says, is an interesting approach and an area that was in need of clarification.

"It's really child-focused legislation," he says. "Ultimately, it's going to be better for families."

Ottawa family lawyer and mediator Gil Rumstein says the changes mark a societal shift away from the typical acrimonious and adversarial divorce proceedings.

"It's a change in the culture of divorce and refocuses people," he says. **LT**