DIVERSE VOICES CONFERENCE 2019
KEYNOTE ADDRESS
November 15, 2019

Will Canada's new *Divorce* Act keep women and children fleeing abuse safe?

Introduction

I am really happy to be here with you today to talk about Canada's amended *Divorce Act.* My presentation is focused on the impact of the revisions – both positive and negative -- on women who are leaving abusive relationships, as well as – of course – on their children.

It is based on the work I have been involved with for more than 30 years now, most recently primarily with Luke's Place, where I am the Legal Director.

Luke's Place provides a wide range of family court support services to women in Durham Region, Ontario, who are fleeing abusive relationships. We also work on the provincial and national levels, developing and delivering training, engaging in research, creating resources and leading and participating in law reform advocacy: all focused on family law and violence against women.

Some context

I think it is important to situate any discussions about the new *Divorce Act* in the broader context of the history of attempts to reform this legislation over the past 20+ years.

The *Divorce Act*, in particular its provisions dealing with custody and access, have been of concern to feminists and violence against women activists– frontline workers, advocates, lawyers and academics – for decades. Various attempts to revise the Act, many of them driven by so-called fathers' rights activists, have failed.

Since at least 1997, when the *Child Support Guidelines* were introduced by the federal government, "fathers' rights" organizations have advocated for a presumption of equal-parenting. Couched in unsupported, gender-neutral, best interests of the child claims in favour of equal parenting, these organizations took the position that the Guidelines unfairly preferred mothers over fathers, impoverishing fathers with unreasonable child support requirements while not ensuring they had adequate time with their children. Despite the pleas for a shared parenting presumption in law, there can be little doubt that these organizations were largely driven by men who saw so-called shared parenting as a way to save money while also maintaining abusive power and control over their former partners.

For more than 20 years, there has been a concerted and organized attempt by these organizations to paint a picture of hapless, loving fathers being discriminated against and

victimized by vindictive women seeking to take all their money and deny them a relationship with their children. They have claimed the family law system in Canada was biased against men and in favour of women, going so far as to accuse women of lying about family violence to demonize fathers and "win" custody battles. They have engaged in vigorous lobbying at the provincial, territorial and federal levels to have family law set out a legal presumption in favour of shared parenting. Their activities have also included high-profile PR stunts to gain attention for their point of view.

Despite the lack of any kind of meaningful evidence – their strategy has been called a "personal troubles discourse" – they have garnered public and political sympathy, and a number of private member's bills in both the House of Commons and the Senate since 1997 have attempted to introduce the concept of shared parenting into the *Divorce Act.* Fortunately, none of these attempts has been successful and, it appears, passage of Bill C-78, has put the threat of presumptions to rest for the foreseeable future.

Focus on violence against women

My remarks today are focused on the impact of the revisions to the *Divorce Act* in situations of family violence. There are a number of changes to the legislation that I am not even going to mention – not because they don't matter, but because, in the hour we have, I want to dig into those changes that are most relevant to people attending this conference.

A word about language before I go any farther. Violence in the family is gendered; women are the predominant victims and men are the predominant abusers, especially when we talk about the most insidious form of abuse – coercive controlling behaviour – and the most serious form of physical abuse – homicide.

Men can also be victims of abuse by their female partners, and both women and men can be abused by same-sex partners. In some families, the abuse is perpetrated by other family members, parents-in-law, for instance.

Abuse also looks and feels different in different kinds of families. In a newcomer family, for instance, there may be threats to withdraw sponsorship or to report the victim, making her subject to possible deportation. Indigenous families must confront the ongoing reality of systemic racism and the intergenerational trauma caused by colonization, the residential schools regime, the child protection scoop of children in the 1960s and since and the genocide against Indigenous women and girls. Families living in poverty face economic issues related to abuse that middle and upper class families don't have to deal with. Abuse in same-sex families

raises different issues and, with an increasing awareness about different gender identities and expressions, we have been challenged to consider yet more forms of family violence. And so on.

In our work, we use an intersectional feminist framework that recognizes and honours all of these realities while also understanding that violence in families has been shaped by centuries of misogyny and patriarchal political and social structures.

For these reasons, my language will respectfully reflect the fact that women are the predominant victims/survivors and men the predominant perpetrators of the abuse that happens within families.

I want to take just a minute to give you a family law in Canada primer, because (thank goodness) you are not all lawyers.

The *Divorce Act* is a federal law, which means it applies to everyone in Canada. It is the law through which people who are married can end their marriage with a divorce. It also covers what are called "corollary issues:" custody and access, property division and support. It does not contain provisions for restraining orders or orders for exclusive possession of the matrimonial home.

All provinces and territories have legislation that deals with family law issues. These laws cannot give people a divorce but can help people resolve all other family law issues.

In Alberta and British Columbia, for instance, the legislation governing post-separation arrangements for children is called the *Family Law Act.* Ontario's legislation is called the *Children's Law Reform Act*, Quebec's *The Civil Code of Quebec,* Nova Scotia *The Parenting and Support Act.*

The changes to the *Divorce Act* will create some differences between federal and provincial laws with respect to the language and approach to resolving issues relating to children – more in some parts of the country than in others.

Positive changes
The amended *Divorce Act* offers many long overdue substantive improvements for families in this country who turn to it to resolve disputes at the time of family breakdown.

1. <u>Language</u>

The present *Divorce Act* uses the language of custody and access to refer to the arrangements parents make for their children post-separation. Custody, in legal terms, means decision-making responsibility, which often – but not always – also means primary responsibility for the care of children. Access is the time the children spend with the other parent. People can agree

on, or courts can order, sole custody, meaning one parent can make decisions about the children without consulting with the other, or joint custody, which means the parents must consult about major decisions relating to the children.

Access can be formal or informal. Most often, it is unsupervised, but where there are concerns for the safety of the children or that they may not be returned at the end of the access visit, it can be supervised.

These terms are used in some provincial and territorial legislation as well as in many other jurisdictions around the world. They are well-known and generally fairly well understood.

However, they are terms that are seen by some to be adversarial; to create a winner/loser dynamic in family law proceedings.

When the new provisions of the *Divorce Act* come into effect on July 1, 2020, this language will be gone, replaced by terms that emphasize a focus on children: "parenting order," "contact order," "decision-making responsibility" and "parenting time."

Inevitably, there will be some confusion as all of us become familiar with these terms. Some provincial laws will continue to use the language of custody and access, while others have already moved to this new language.

So what do these terms mean?

Contact order is the term to be used to describe the time a child spends with someone other than their parents; most commonly grandparents.

This is not just a new term – it is a new concept. Grandparent rights, while entrenched in some provincial family laws, have not until now been protected under federal law.
A contact order can set out time a child spends with someone other than their parent, physically or by telephone, Skype, etc.

As with all decisions relating to children, the court must apply the best interests of the child test (which we will discuss in a few minutes) when deciding whether a child should spend time with a grandparent or other person.

Decision-making responsibility is the term to be used to describe who can make decisions about the children. The parent with decision making responsibility has the authority to make the significant decisions about the child's life and well-being, including decisions related to health, education, culture, language, religion and spirituality and significant extra-curricular activities.

This responsibility can be given to one parent or shared between the two parents. Whichever parent the child is with at a given time has the authority to make decisions during that time.

Parenting order replaces the terms "'custody order," "access order" and "custody and access order," and assigns parenting time and decision making responsibility between the parents.

Parenting time describes the time the child spends in the care of each parent, including time that they are not physically with that person (ie when attending school).
These new terms mean that, in language, there is no distinction between custodial and access time.

A parenting order might set out, for instance, that the mother shall have primary parenting time or that the child shall be primarily resident with the mother and that the father shall have parenting time every other weekend and every Wednesday after school.

2. Enumerated best interests of the child test

Everywhere in Canada, regardless of the name or other details in the legislation, decisions about where children live and who has responsibility for making decisions about them are made using what is called the best interests of the child test. In some laws, this test is spelled out in detail; in others, not.

Until now, the *Divorce* Act has not set out a test, but the revisions provide one: a list of 11 factors for courts to consider when making decisions about children.

The provision requiring the court to give "primary consideration to the child's physical, emotional and psychological safety, security and well-being," which is a positive way to begin the list of required criteria, especially in the context of the family violence definition and factors to be considered.

The criteria to be considered include:

- The child's needs, including the need for stability
- The child's relationship with each parent, siblings, grandparents and other people who play an important role in the child's life
- Each parent's willingness to support the development and maintenance of the child's relationship with the other parent
- The history of care of the child
- The child's views and preferences
- The child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage
- Any plans for the child's care
- History of violence in the family

3. Expansive definition of family violence

The present *Divorce Act* makes no mention of family violence in the provisions dealing with custody and access. This will change dramatically when the revised legislation comes into

effect in June 2020, as family violence is given a broad and inclusive definition and factors are provided for how it is to be considered when courts are making parenting orders.

Family violence is defined as:

any conduct, whether or not that conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person – and in the case of a child, the direct or indirect exposure to such conduct – and includes:

This definition sets out important principles:

- The conduct does not have to be criminal to be considered in family law cases.
- The most serious cases are those involving coercive, controlling behaviour. This is the insidious, sometimes almost invisible to outsiders abuse that many women are subjected to. It often continues after separation and can leave the survivor, even long after court proceedings are over, fearful for her safety. It can also be difficult to prove in the context of determining appropriate parenting arrangements.
- The inclusion of psychological and financial abuse in the list of examples of family violence
- The explicit inclusion of threats to kill or killing or harming of animals. I am sure many of you have heard, as have I, from clients whose partners have terrorized them by threatening to harm, or actually harming, beloved pets or, in the rural context, farm animals

4. Family violence factors to be considered

The list of family violence factors courts are to consider in parenting determinations is another positive change to the *Divorce Act,* in particular:

- The frequency and timing of the violence, which will allow the court to consider whether it is likely to continue
- Whether there is a pattern of coercive and controlling behaviour
- The involvement/exposure of children
- Any compromise to the safety of children or other family members
- Fear
- Whether the person who has engaged in the violent behaviour has taken any steps to change their behaviour

What's not so positive?

hile the amended *Divorce Act* will, without question, materially improve the situation of women fleeing abuse (if they use the *Divorce Act* to resolve parenting issues), it is not perfect.

1. Lack of a gendered definition of violence within the family

As I said at the beginning of my remarks, violence within families is gendered. While the new *Divorce Act* addresses violence in a largely positive way, the lack of any gendered definition is problematic.

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

Often, a parent who has survived family violence has serious and legitimate concerns about the other parent's capacity to parent appropriately. This criterion in the BIC test is, in effect, a presumption that it is always better for children to have a close relationship with both parents.

While this is the ideal, it may not be the reality where one parent has been abusive to the other. Even without this provision, the BIC test in its totality, provides ample opportunity for both parents to put forward evidence about their parenting capacity. Including it puts undue pressure on mothers with concerns about their children's safety when in the care of their abusive ex-partner

3. Ability and willingness of each parent to communicate and cooperate, especially with one another, on matters affecting the child

This provision obscures the realities of family violence and, albeit unintentionally, risk endangering women and children. The complexities and pervasiveness of the impacts of past violence, and indeed the ongoing occurrences of violence themselves, do not end simply because divorce proceedings begin. The evidence is clear that violence by husbands often intensifies in the months following a separation, making them the most lethal for many abused women.

Consequently, requiring that mothers continue to communicate and cooperate with an abusive spouse is not only inappropriate, it is dangerous, and potentially lethal. Nonetheless, mothers who are legitimately incapable of or unwilling to cooperate with an abusive spouse are frowned upon by the courts and may even lose custody of the children to the abusive spouse. Therefore, cooperation and communication provisions need to be flexible and clearly indicate that they may not be appropriate and should not be required in cases where there has been any history of family violence.

4. Decision-making provisions

I am sure you are all familiar with the new language in the *Divorce Act* related to decision-making responsibilities. Briefly put, the parent with decision making responsibility has the authority to make the significant decisions about the child's life and well-being, including decisions related to health, education, culture, language, religion and spirituality and significant extra-curricular activities. This responsibility can be given to one parent or shared between the two parents.

The new legislation also says that whichever parent the child is with at a given time has the authority to make decisions during that time. While the intention is that those decisions be related to the situation at hand (eg. what breakfast cereal to have or whether or not to take a

raincoat to school) as well as emergency situations that could arise, the language is not as clear as it could be.

This will lead to challenges for women who have left an abusive relationship. For instance, an abusive ex could decide not to take the child to a swimming lesson or not to give the child medication, claiming that, even though the mother has primary decision-making responsibility, he has the right to make the decisions while the child is with him.

It would have been helpful if the legislation had included a clause clarifying that day-to-day decisions cannot conflict with decisions made by the parent with decision-making responsibility.

5. Language related to family dispute resolution

I have seen FDR work well in situations of family violence. I think it is an important option for families to have available to them. Some women leaving abusive relationships find these processes empowering and/or better suited to their needs. The flexibility of family dispute resolution processes serves some families extremely well.

However, the requirement that lawyers "encourage" the use of FDR, even with the moderating clause "unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so," favours FDR over litigation in a way that is not appropriate for situations involving family violence. FDR, especially in cases of coercive controlling violence can provide abusive partners with an opportunity to manipulate and continue being abusive.

The new *Divorce* Act would better serve these families if legal advisors were required to inform spouses about all processes available to them.

What's missing

6. Screening

Universal screening for family violence by all family law practitioners would be very helpful. For a number of reasons, not all survivors of family violence self-disclose. If the survivor doesn't tell and the practitioner doesn't ask, the presence of family violence may never be brought up. This will affect the legal advice provided by the lawyer, the process options considered by the client and may affect the safety – in both the short and long-term – of the woman and her children

It is unfortunate that the amended *Divorce Act* did not reference the value in all family law practitioners using a standardized and validated screening tool.

7. Education

Harmful myths and misconceptions about the realities and dynamics of family violence still influence family law processes and decisions. Without education on family violence and gender equality as well as on the amended *Divorce Act,* even the positive changes will have limited effectiveness.

Conclusion

Overall, I think the revisions to the *Divorce Act* are good for women fleeing abuse and their children. Their impact will be better felt if universal FV screening is introduced and if all players in the family law system have relevant educational opportunities.

It is also important to remember that not everyone has access to the *Divorce Act.* People who are not married to the other parent of their children, people who cannot afford the extra costs associated with applying for a divorce, people who, while married to their partner, choose not to proceed with a divorce right away – all of these people will continue to rely on provincial/territorial legislation to assist them in resolving their parenting disputes.

It is to be hoped that, over time, provincial and territorial legislation will be revised to mirror the positive changes made to the *Divorce Act* so that those people can access the potentially more positive outcomes it offers.

I don't want to end on an especially negative note, because these changes to the *Divorce Act* move us in a substantially positive direction in terms of acknowledging and addressing the reality of violence within families in this country, but I feel that I must sound a cautionary note about the law. It can only respond after the fact. It does not suit everyone's needs. Even a perfect law – if such were to exist anywhere – perfectly interpreted, applied and enforced does not guarantee safety to all women and children. Some women, for good reasons, will never turn to the laws of the state. Some abusers don't care what the law says – they will continue to engage in abusive behaviours no matter the risk to their own liberty or wallet.

At the end of the day, the law is nothing more than words written on a piece of paper, and that cannot stop an abuser determined to maintain power and control over his former partner.