

***Brief on Bill C-78: 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 other Acts.***

**Submitted by  
Dr. Linda C Neilson**

## **Introduction**

Dr. Linda C Neilson, Professor Emerita and Research Fellow of the Muriel McQueen Fergusson Centre for Family Violence Research at the University of New Brunswick, is an academic authority on legal system responses to domestic violence. She serves regularly as academic advisor on domestic-violence and law-related cross-sector government committees. Recent works include [\*Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?\*](#) (Vancouver: The FREDA Centre for Research on Violence Against Women and Children), [\*Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems\*](#) (Ottawa: Department of Justice) and the national public legal information e-book, based on bench books written for the National Judicial Institute, titled [\*Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases\*](#) (Ottawa: Canadian Legal Information Institute (CanLII)).

This brief endorses the comments and recommendations (summarized below) found in two other briefs on Bill C-78:

- The Joint Brief submitted by Luke's Place Support and Resource Centre, Durham Region, Ontario and National Association of Women and the Law/Association nationale Femmes et Droit (Joint Luke's Place and NAWL Brief) and
- The Brief submitted by the Women's Legal Education and Action Fund (LEAF brief).

This brief emphasizes the social and legal importance of ensuring that new *Divorce Act* provisions respond, to the fullest extent possible, to the challenges the Canadian family law system faces when responding to the complexity of family violence in the context of gender, child harm, and culture within a legal institutional framework.

## **Overriding Issues: Educational and Procedural Context**

At the outset it is important to state clearly that although, from a legal-systems-family-violence-research point of view, Bill C-78 requires modifications, it is an improvement on current federal legislation in the family law field.

The Joint Luke's Place and & NAWL Brief makes the important points that family violence must be understood in the context of gender and culture in intersectional context and that Indigenous women should be consulted in connection with proposed changes to the *Divorce Act*. This brief endorses those assertions. Canada's failure to adhere to its gender equality and human rights obligations to protect

women, particularly Indigenous women, from gender-related violence generates international criticism.<sup>1</sup> Canada has an obligation to address this shortcoming.<sup>2</sup> Bill C-78, with recommended processes and changes, could be a major step in that direction.

In addition to obligations to women, it is important to emphasize Canada's human rights obligations to children. These include a duty to protect children from family violence pursuant to article 19 of the United Nations *Convention on the Rights of the Child*.<sup>3</sup> Refer to the Honourable Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes, A Child Rights Approach to Legal Representation*, (2018) 31 *Can. J. Fam. L.* 151 to 168 for a nuanced discussion of pertinent child rights issues.<sup>4</sup>

We know, from a consistent body of research, that family violence against children's caregivers in children's homes causes direct, scientifically documented child stress along with potential child harm. The violence need not be witnessed directly in order to cause harm. Some of these children will experience long term fear responses and emotional, even developmental harm.<sup>5</sup> Documentation of direct harm to children from violence directed against adult caregivers is consistent across research methods (qualitative and quantitative) and even across disciplines (social science, medicine, psychiatry, child development, neurobiology).<sup>6</sup> The research also tells us that perpetrating abuse against mothers is often associated with abuse and violence directed at children<sup>7</sup> and that patterns of behavior associated with coercive domestic violence, such as demeaning domination, monitoring and surveillance, isolation, excessive physical discipline, and coercive control, are commonly replicated in parenting

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1 Canada is being criticized by the international community for failure to adhere to international human rights obligations to protect women, particularly Indigenous women, from family violence: Chapter 4 of Inter-American Commission on Human Rights (2014) [Missing and Murdered Indigenous Women in British Columbia](#), Canada; United Nations Human Rights Committee (2015) [Concluding observations on the sixth periodic report of Canada](#) (United Nations); Canadian Human Rights Commission *Submission By the Canadian Human Rights Commission to the government of Canada Pre-Inquiry Design Process*.

2 In 2006 the Secretary General of the United Nations *In-depth study of all forms of violence against women. Report of the Secretary-General* General Assembly, declared violence against women a breach of internationally recognized fundamental human rights of women. Canada has a legal obligations to ensure gender equality pursuant to *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c. 11, Part 1, Canadian Charter of Rights and Freedoms*. Refer as well to the *Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) United Nations Treaty Series Vol. 1249 signed by Canada July 17, 1980, ratified December 10, 1981; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, United Nations Treaty Series Vol. 2131 A/Res/54/4 ratified by Canada October 18, 2002 and the United Nations General Assembly Declaration on the Elimination of Violence Against Women*

3 Honourable Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes, A Child Rights Approach to Legal Representation*, (2018) 31 *Can. J. Fam. L.* 151 to 168; materials posted by the Canadian Bar Association, [The CBA Child Rights Toolkit](#) on line.

4 See also Australian Human Rights Commission Children's Rights Report (2015) [Chapter 4: All I want is a life free from violence – the impact of family and domestic violence on children](#).

5 National Scientific Council on the Developing Child at Harvard University (2010) [Persistent Fear and Anxiety Can Affect Young Children's Learning and Development](#) on line and educational materials on [toxic stress](#). For discussion of pertinent research, see Linda C Neilson (2017) Chapter 6 "Children: Impact of Domestic violence & Evidence of children" in [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII).

6 Refer, for example, to the lengthy list of references on this issue at "Supplementary Reference Bibliography: Effects of Domestic Violence on Children" of [Responding to Domestic Violence in Family Law, Civil Protection and Child Protection Cases](#) (Ottawa: CanLII) on line.

7 Child Welfare Information Gateway, U.S. Department of Health & Human Services [Domestic/Intimate Partner Violence](#), reference materials on the connections between domestic violence and abuse directed at children; Australian Government materials on [Domestic violence and child abuse and neglect](#); Jeffrey Edleson (1999) "The Overlap Between Child Maltreatment and Woman Battering" *Violence Against Women* 5(2): 134-154.

practices that continue against children – as well as against targeted adults – after adults separate.<sup>8</sup> When we fail to protect vulnerable children from negative perpetrator parenting practices after separation and divorce, we impair children's recovery from fear and reduce children's resilience. Research also tells us that risk and lethality indicators for children mirror risk and lethality indicators for women.<sup>9</sup> Thus, when mothers face risk from a perpetrator, the children are at risk too.<sup>10</sup>

In short, while family violence in the home is clearly a women's equality, human rights issue, it is clearly a children's human rights issue too. We owe it to families, to women and to children to ensure that changes to the *Divorce Act* are as effective as possible.

Nonetheless new legislation alone will not solve the problem. Problems in the legal system are the result not only of faulty legislation – as the Leaf and Joint Luke's Place and NAWL briefs document in connection with maximum contact provisions – but also of factors that prevent evidence of family violence from being presented or considered (as a result, in part, of limited use of screening tools).<sup>11</sup> In connection with screening, failure to disclose family violence in the absence of specialized screening tools is well documented.<sup>12</sup> Limited access to information combines with limited understanding among many judges, mediators, lawyers, and experts testifying before family courts of the complexity of family violence and its clear association with parenting and child harm<sup>13</sup> both before and after separation and divorce. In the absence of extensive specialized education, researchers in Australia have documented limited change in child safety practices after new family violence legislation was implemented in that country.<sup>14</sup> Closer to home, in Canada, Susan Boyd and Ruben Lindy documented judicial tendencies to prioritize maximum contact and to make use of family violence criteria in legislation to exclude consideration of evidence of family violence after new family violence provisions were introduced in British Columbia's *Family Law Act*, SBC 2011, c 25.<sup>15</sup> This is the reason that the LEAF and the Joint Luke's Place and NAWL Briefs both stress the critical importance of extensive family violence education as well as mandatory professional duties on the part of lawyers,

- 8 L. Bancroft, J. Silverman and D. Ritchie (2012, 2<sup>nd</sup> ed.) *The Batterer as Parent: Addressing the Impact of Domestic Violence on Families* (Sage); Linda Neilson et al. (2001) [Spousal Abuse, Children and the Legal System](#), (2017) note 5; Dale Bagshaw et al. (2011) [The effect of family violence on post-separation parenting arrangements](#) in *Family Matters* 86 (Australian Government); ANROWS (2017) Research Summary [The impacts of domestic and family violence on children](#) summarizing major Australian research studies by Humphreys and Healey and by Kaspiew et al.
- 9 Canadian Domestic Homicide Prevention Initiative (2017) [Children and Domestic Homicide: Understanding the Risks](#) resources and links to materials posted on line as well as [Children Living with Domestic Violence Research Team](#); Peter Jaffe, M. Campbell et al. (2017) Children Killed in the Context of Domestic Violence: International Perspectives from Death Review Committees in M. Dawson (ed.) *Domestic Homicide and Death Reviews* (Palgrave Macmillan); Leslie Hamilton et al. (2013) Assessing Children's Risk for Homicide in the Context of Domestic Violence in *J Fam Viol* 28: 179-189.
- 10 Ibid. See also: Katreena Scott and Deborah Sinclair [Identifying The Risk Factors that Should Inform Assessment Practices](#) (Ontario: Learning to end Abuse)
- 11 Linda Neilson et al. (2001) note 8; Luke's Place (2018) [What You Don't Know Can Hurt You](#): The importance of family violence screening tools for family law practitioners (Ottawa: Department of Justice).
- 12 Luke's Place (2018) *ibid.*
- 13 See, for example, the problems identified in Linda C Neilson, [Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?](#) (Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 2018).
- 14 Rae Kaspiew et al. (2015) *Evaluation of the 2012 family violence amendments Synthesis report* (Australian Institute of Family Studies, Government of Australia); Molly Dragiewicz (2015) "Family law reform and domestic violence: lessons from Australia" in R. Goel and L. Goodmark (eds.) *Comparative Perspectives on Domestic Violence: Lesson from Efforts Worldwide* (New York: Oxford University Press) and Renata Alexander "Family Violence in Parenting Cases in Australia Under the Family Law Act 1975 (Cth): The Journey So Far – Where are We Now and are We There Yet?" (2015) 29 *International Journal of Law, Policy and The Family* 313-340.
- 15 Susan B. Boyd and Ruben Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (2016) 35(2) *Canadian Family Law Quarterly* 101-138.

mediators, dispute resolvers, and experts testifying in family law cases to screen for presence of family violence,<sup>16</sup> using culturally informed screening tools,<sup>17</sup> and to ensure that any referrals to settlement services are consensual, beneficial and safe. In addition is the need, prior to referrals and decision-making, to implement procedural obligations to ensure that family members are assessed for risk and danger, as is now the case in other countries.<sup>18</sup>

### **Cautionary comments in connection with parental alienation theory:**

Bill C-78 appropriately and wisely does not refer to ‘parental alienation’ or child resistance to contact in best interest of the child considerations. The concept, checklists and remedies proposed by parental alienation theorists are highly controversial. The theory is known to create gender bias against primary parents, most of whom are women, in family law cases.<sup>19</sup> The concept, checklists and remedies all lack credible research support.<sup>20</sup> Close scrutiny of ‘alienation research’ reveals that this body of ‘research’ is

16 Luke’s Place (2018) note 11.

17 The use of specialized screening tools was one of the recommendations in the Chief Coroner’s report for the Province of Ontario (2007) *Sixth Annual Report of the Domestic Violence Death Review Committee* at page 27. It is important to keep in mind that forms of family violence vary with cultural contexts such as immigration, sexual orientation, age, Indigenous colonial history and status, minority and disability status. All screening tools should address these issues in as well as the forms of abuse and violence in the context of coercion, power and control (social, cultural, and interpersonal in the relationship). See chapters 19 to 22 of Linda C Neilson (2017) [Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases](#) (Ottawa: Canadian Legal Information Institute) for discussion of forms of domestic violence specific to cultural contexts.

18 Neilson (2017) *ibid.*, Chapter 8 on Risk and Lethality; United Kingdom [Practice Direction 12J – Child Arrangements & Contact Orders: Domestic Violence and Harm](#); State of Victoria (2018) [Family Violence Reform](#), resources in connection with Family Violence Information Sharing Scheme and the state’s Risk Management Framework.

19 Neilson (2018) note 13; Joan Meier (2017) “Mapping Gender: Shedding Empirical Light on Family Court’s Treatment of Cases Involving Abuse and Alienation” 35 *LAW & INEQ.* 311, *Family Court Outcome Project: Empirical Analysis of Custody Cases involving Abuse and Alienation*, PP presentation, International Society of Family Law, North American Regional Conference, April 25, 2018, University of Minnesota Law School; H. Smith (2016) “Parental Alienation syndrome: Fact or Fiction? The Problem With Its Use in Child Custody Cases” in 11 *Mass. L. Rev.* 64.

20 The following is a partial list of authors documenting concerns about the research foundations of parental alienation theory: M. Clements & D. Padilla-Racero (2016) When Courts accept what science rejects: Custody Issues concerning the alleged “parental alienation syndrome in *Journal of Child Custody* 13:2-3 126-133; S. J. Dallam (1999) Parental Alienation Syndrome: Is it scientific? in E. St. Charles & L. Crook (eds.) *Expose: The failure of family courts to protect children from abuse in custody disputes*; S. Dallam & J. Silberg (2016) Recommended treatments for “parental alienation syndrome” (PAS) may cause children foreseeable and lasting psychological harm in *Journal of Child Custody* 13:2-3 134-143; J. Doughty (2018) *Review of research and case on parental alienation* on line; R. E. Emery (2005) “Parental Alienation Syndrome: Proponents Bear the Burden of Proof” *Family Court Review* 43(1) 8-13, (2016) “Denigrating a CoParent: Alienation or Boomerang in *Psychology Today*”; N. Erickson “Fighting False Allegations of Parental Alienation Raised as Defenses to Valid Claims of Abuse” 2013 6(1) *Family & Intimate Partner Violence Quarterly* 35-78; S. Huff (2015) PhD dissertation titled *Expanding the Relationship between Parental Alienating Behaviors and Children’s Contact Refusal Following Divorce: Testing Additional Factors and Long-Term Outcomes*; J. Meier (2009) “A Historical Perspective on Parental Alienation Syndrome and Parental Alienation” in 2009 6 *Journal of Child Custody* 232-257, (2009) Parental Alienation Syndrome and Parental Alienation: Research Reviews in *Applied Research Forum* (National Online Resource Centre on Violence Against Women), (2017) note 19; L. Neilson (2018) note 13; W. O’Donohue et al. (2016) Examining the validity of parental alienation syndrome in *Journal of Child Custody*, 1:2-3: 113-125; M.S. Pignotti “Parental alienation syndrome (PAS) unknown in medical setting, endemic in courts” 104(2) *Pub Med* 54-58; J. Rowen (2015) *Examining Parental Denigration in Family Systems and its Association with Parent-Child Closeness, Interparental Conflict, and Psychological Well-being. PhD Dissertation University of Virginia*; J. Rowen and R. Emery (2018) “Parental Denigration: A Form of Conflict that Typically Backfires” *Family Court Review* 56(2); D. Saunders and K. Oglesby (2016) No way to turn: Traps encountered by many battered women with negative child custody experiences in *Journal of Child custody* 13:2-3 154-177; H. Smith (2016) 19; R. Thomas and J. Richardson (2015) “Parental Alienation Syndrome: 30 years On and Still Junk Science” 54(3) *Judge’s Journal*; L.E. Walker et al. (2005) “A Critical Analysis of Parental Alienation Syndrome and Its

lacking in research controls and rigorous research methods.<sup>21</sup> Many of the ‘research’ conclusions have been advanced by individuals who offer or have offered alienation ‘reunification therapy’ for profit.<sup>22</sup> The National Council of Juvenile and Family Court Judges in the United States warns against use of the concept in family law cases, particularly in cases involving allegations of family violence.<sup>23</sup>

Scrutiny of emerging arm’s length research utilizing research controls and credible research methods reveals that the premises of parental alienation enthusiasts do not stand up to research scrutiny. Instead, it becomes clear that factors long identified in child-centred research, such as parental warmth, exposure to family violence and or parental conflict, offer far better explanations for child resistance to contact that does parental alienation theory. In addition, these long-documented factors<sup>24</sup> operate in opposition to the premises of parental alienation theory. Dr. Scott Huff reports, in his 2015 doctoral dissertation, University of Connecticut:

*These findings are notable in that alienating behaviors were not predictors of outcomes in any of the analyses, contrary to previous work on parental alienating behaviours (Baker & Verocchio, 2012; Bena-Ami & Baker, 2012).*<sup>25</sup>

Similarly, Jenna Rowen, who studied the effects on children of parents denigrating the other parent in her PhD research, found that denigration patterns and the effects on children were consistent with conflict theory – we have long known that parental conflict is harmful to children – and not with parental alienation theory. Denigration problems were seldom one-sided or linear. Denigration alone seldom resulted in the successful manipulation of a child against the other parent. Instead, denigration usually had the opposite effect of impairing the child’s relationship with the parent engaging in denigration.<sup>26</sup>

In other words, the factors – family violence, parental conflict, absence of parent-child warmth - that are associated with children’s resistance to parental contact are both different and more complex than parental alienation theorists contend.

Turning to the case law, parental alienation claims are commonly advanced by parents who are alleged to have engaged in family violence<sup>27</sup> and, more recently, by parents who do not have close relationships with children as a result of alleged inappropriate parenting, child abuse, substance misuse or mental illness.<sup>28</sup> These claims are causing major problems with access to justice in legal system because judges

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Admissibility in the Family Court” *1(2) Journal of Child Custody* 47-74.

21 Ibid.

22 For example, Richard A. Warshak, formerly associated with Family Bridges workshops in the United States; Amy J. Baker; Stanley Clawar, clinical sociologist, and owner of Walden Counselling & Therapy; Barbara Jo Fidler of [Families Moving Forward](#). While analysis and conclusions drawn from therapeutic experience are not necessarily wrong, it is important to distinguish therapeutic impressions from therapeutic practice from conclusions generated by arm’s length academic research.

23 National Council of Juvenile and Family Court Judges (2008) [A Judicial Guide to Child Safety in Custody Cases](#); Barry Goldstein “[Why Family Courts Cannot Protect Children: ACE vs. PAS](#)” (NOMAS: National Organization for Men Against Sexism).

24 See, for example, L. Neilson "Spousal Abuse, Children and the Courts: The Case For Social Rather than Legal Change". *Canadian Journal of Law and Society* 12(1): 101-145 in connection with research documenting the negative impact of parental conflict on children.

25 S. Huff (2015) PhD dissertation titled [Expanding the Relationship between Parental Alienating Behaviors and Children’s Contact Refusal Following Divorce: Testing Additional Factors and Long-Term Outcomes](#) University of Connecticut.

26 J. Rowen (2015) note 20.

27 Neilson (2018) note 13.

28 This is a conclusion drawn from reviewing cases that included a parental alienation claim from 2017 and October 10, 2018. It is important to acknowledge, however, that the author has not yet quantified the numbers.

who accept parent alienation theory are silencing or ignoring the views and concerns of children<sup>29</sup> contrary to children's fundamental legal rights<sup>30</sup> and, in some cases, child safety and are dismissing or ignoring evidence of family violence.<sup>31</sup> Potentially, this is a very dangerous situation for women and children. Now that some children are reaching an age where they can legally object, children are resisting alienation orders and reunification therapies imposed on them.<sup>32</sup> Children are asking, instead, to have their views heard and respected, particularly in connection with their own safety.<sup>33</sup>

In conclusion, the decision not to include parental alienation in Bill C -78 is both research-informed and commendable.

## **Summary of endorsed comments and recommendations from the Leaf & Joint Luke's Place and NAWL briefs**

This brief endorses the following comments and recommendations:

- Strong endorsement of the direction in Bill C-78 to take into consideration only the best interests of the child in making parenting or contact orders, s. 16(1), and to give primary consideration to the child's physical, emotional and psychological safety, security and well-being in s. 16(2).
- While the definition of family violence in the Bill could be improved, mandatory consideration of family violence and "history of care" in the list of mandatory best interests of the child factors that judges must consider, as well as the identification of child safety, security and well-being as the primary consideration, are positive changes.
- Strong endorsement of the requirement in s. 16(3)(e) to consider child views and preferences
- Strong endorsement of the inclusion in s.16(3) of "family violence" and "history of care" (subject to qualifying comments below) in the factors to be considered
- Remove subsections 16(3)(c) & (i) in connection with duties to cooperate and communicate or failing that include family violence exceptions as set out in the joint Luke's Place and NAWL brief as follows:
  - (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse, *except in cases of family violence, or when it is otherwise contrary to the child's best interests to develop or maintain a relationship with the other spouse;*
  - (i) 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, *except when such communication and cooperation are contrary to the child's best interests, including in cases of family violence involving either the other spouse and/or the child.*

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29 Martinson and Tempesta (2018) note 3; Neilson (2018) note 13.

30 Martinson and Tempesta (2018) *ibid.*

31 N. Erickson note 20; J. Meier (2017) note 19; L. Neilson (2018) note 13; D. Saunders and K. Oglesby (2016) note 20; H. Smith (2016) 19; L.E. Walker et al. (2005).

32 *N.L. v. R.R.M.*, 2016 ONCA 915; *L. (N.) v M. (R.R.)*, 2016 ONSC 809; *Glegg*, 2016 ONSC 5292; *Glegg (re)*, 2016 ONSC 7181 and *Glegg v. Glegg*, 2017 ONCJ 102; *R.G. v. K.G.*, 2017 ONCA 108; *O.G. v. R.G.*, 2017 ONCJ 153; *O.G. v. R.G.*, 2017 ONSC 6490; *Children's Aid Society of Toronto v. M.S.*, 2018 ONCJ 14;

33 R. Carson et al. (2018) [Children and young people in separated families: Family law system experiences and needs](#) (Australia Government).

- Reword section 16(3)(j) and 16(4)(g) to reflect the clear connection between perpetrating family violence and poor parenting capacity and to ensure consideration of the impact of any steps taken to prevent family violence. More particularly:

*16(3)(j) any family violence, and in particular, but not limited to (i) its impact on the child; (ii) its impact on the child's relationship with each spouse; (iii) its impact on 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; (iv) the importance of protecting the physical, emotional and psychological safety, security and well-being of the spouse not engaging in family violence (noting that self-defence does not constitute family violence); (v) its association with negative parenting practices on the part of the person who engaged in a pattern of family violence; (vi) the demonstrated capacity of any person who engaged in family violence to prioritize the best interests of the child and to meet the needs of the child.*

*16(4) (g) evidence that the person engaging in family violence has taken steps both to ensure he does not perpetrate further family violence, and to prevent family violence from occurring and to improve their ability to care for and meet the needs of the child and that the steps have resulted in positive changes in behaviour.*

- Revise s. 16(5) in connection with past conduct. More particularly:

Past Conduct

**16 (5)** *In determining what is in the best interests of the child, the court shall take into consideration past conduct relevant to the exercise of past parenting duties and responsibilities toward the child, including the exercise of parenting time, decision-making responsibility or contact with the child under a contact order.*

- Remove s. 16.2(1) "Maximum Parenting Time" or, if the provision remains, change the heading to "Best Interests and Parenting Time" and add the following qualification:

*"...as is consistent with the child's physical, emotional and psychological safety, security and well-being"*

- Add a new section 16.2.1 to set out best interest of the child presumptions not permitted:  
**(2.1)** *In determining the best interests of the child, the court shall not presume any particular arrangement to be in the best interests of the child and without limiting this: (i) **it must not be presumed** that custody/decision-making responsibilities should be allocated equally between spouses; (ii) **it must not be presumed** that custody and access/parenting time should be shared equally between spouses; (iii) **it must not be presumed** that each spouse should be allocated as much parenting time as possible; (iv) **it must not be presumed** that decisions regarding the child should be made either by one spouse or jointly (v) **it must not be presumed** that there should be maximum contact between a child and parent*

Explanatation: Although Canadian case law is clear that child best interests is the only test, scrutiny of case law reveals that judges are imposing joint care parenting presumptions.

- Revise s.16.2(3). As currently framed, the section imposes "parallel parenting". This can be harmful to children in a family violence context.

*Amend section 16.2 so that day-to-day decisions cannot conflict with decisions made by the parent with primary decision-making responsibility and remove “exclusive authority.”*

The Day-to-day decisions provision should state:

*(3) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) may, subject to compliance with best interests of the child principles set out in this Act, make, during that time, day-to-day decisions affecting the child.*

Day-to-day decisions shall not conflict

*(4) Notwithstanding, section 16.2(3) a parent shall not, during allocated parenting time, make decisions that conflict with decisions made by the parent with custody/decision-making responsibility, or that are contrary to the best interests of the child.*

- Revise the relocation sections 16.9(1), 16.92(d), 16.93(1) & (2). While 16.92(2) is a positive change, use of the term "substantially" in s. 16.93(1) and the term "vast" in 16.93(2) to qualify "majority of their time" will lead to confusion. We are also concerned about the operation of notice provisions when the need for safety requires immediate relocation.

*We emphasize accordingly the need for a provision specifying the ability to apply ex parte for an exemption from all or any part of the requirements to give notice under subsection 16.9(2).*

*In addition, we highly recommend that s. 16.92(d) be revised as follows:*

*(d) subject to taking into account risks associated with family violence, whether the person who intends to relocate the child complied with any applicable notice requirement...*

*Otherwise this brief endorses Luke’s Place and NAWL’s Recommendations #11, #12, #13 in connection with provisions on notice, burden of proof and factors relevant to assessment of a child’s best interests.*

*In general, however, these sections require further thought and clarification in order to better protect the safety and security of children and their caregivers.*

- Revise s. 7.3 and 7.7 in connection with dispute resolution.

*Luke’s Place and NAWL’s recommendations 14 and 15 on family dispute resolution are endorsed, including recommendation 14 to remove the duty on parties to attempt to resolve matters through family dispute resolution. The provisions also require a family violence exclusion.*

*No matter what language is chosen, it must reflect the fact that family dispute resolution should only be encouraged if it is relevant and not inappropriate to do so, especially with regard to the risks that ongoing contact between spouses may pose in cases of family violence.*

- Modify professional obligations in s. 7.7

*Under Duties in section 7.7, include an education requirement for all those involved in the divorce proceedings, including legal advisers, those who conduct family dispute resolution, and all decision-makers.*

*Add a professional duty to screen for family violence and to inform clients in all available processes as follows:*

*Duty to discuss and inform*

*(2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act*

*(a) to assess whether family violence may be present, using an accredited family violence screening tool, and the extent to which the family violence may adversely affect*

*(a) the safety of the party or a family member of that party, and*

*(b) the ability of the party to negotiate a fair agreement.*

*(a.1) to inform the person of all the available processes to resolve the matters that may be the subject of an order under this Act, including family dispute resolution processes.*

- **Consult family violence experts prior to implementing changes to *Family Orders and Agreements Enforcement Assistance Act*:**

We have concerns about proposed changes to this Act in connection with the release of information, particularly in family violence cases. The changes are likely to generate considerable litigation and could also put family members at risk.

*We recommend additional consultation with family violence experts prior to implementation.*

*Respectfully submitted by Dr. Linda C Neilson, Professor Emerita, Research Fellow of the Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick.*



**DSPACE**

<https://dspace.org/>

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