

Family

Bar gives good initial reviews to Ottawa's proposal to put best interests of kids first in divorce overhaul

By **Cristin Schmitz**

(May 22, 2018, 5:43 PM EDT) -- Family law lawyers were giving mostly positive early reviews to the Trudeau government's proposed overhaul of the antiquated *Divorce Act* — but they also reserved final judgment until they parse the hefty 192-page bill that proposes to modernize laws relating to child custody/access, child support, child relocation and parental abduction.

In the first major divorce reforms since the watershed child support guidelines were enacted in 1997, federal Justice Minister Jody Wilson-Raybould introduced in the Commons on May 22 Bill C-78 which would amend the *Divorce Act*, the *Family Orders and Agreements Enforcement Act* (FOAEA) and the *Garnishment, Attachment and Pension Diversion Act* (GAPDA).



MP Marco Mendicino (left), parliamentary secretary to Justice Minister Jody Wilson-Raybould (centre), and Minister of Families, Children and Social Development Jean-Yves Duclos (right)

Wilson-Raybould told reporters outside the Commons the aim of the reform package — which caught many family law lawyers by surprise although the Liberals started closed-door consultations with the provinces, select members of the bar, and other stakeholders two years ago — is to promote children's best interests, address family violence, help to reduce child poverty and make the family justice system more accessible and efficient.

"We are doing it because there have ongoing calls dating back decades to reform the *Divorce Act*," she said. "When we started out in doing consultations around increasing the use of Unified Family Courts — aside from being a personal commitment of mine in wanting to make some reform — we heard loudly and clearly from individuals at round tables, from individuals that have spoken out from law associations, [from] family advocates to rights organizations, that there [should be] a much needed overhaul ... that brings the *Divorce Act* up to modern times," she explained. "And this was an incredible opportunity for us, as a government, to bolster the [my] mandate letter commitment" to expand Unified Family Court.



Wayne Barkauskas, Wise Scheible Barkauskas

Calgary family law lawyer Wayne Barkauskas, past chair of the Canadian Bar Association's national family law section, said the Trudeau government deserves credit for wading into the contentious area of family law reform.

"I have a feeling this is going to take some time to digest and pick apart, in terms of people having specific knowledge in certain areas, and analyzing [the bill] to see whether we are creating issues," he told *The Lawyer's Daily* soon after the legislation was tabled.

"But [it is noteworthy] that this government has taken it on, whereas 35 years of governments before now weren't brave enough to do so, [even though] they knew it needed to be done," he remarked.

Barkauskas predicted some aspects of the bill will cause public controversy — including possibly Ottawa's policy choice not to adopt a joint custody presumption — a mechanism the CBA has long opposed as contradicting the primacy of children's best interests. "Without a doubt there's going to be some conversation around these changes," he said.



Judith Huddart, Dranoff and Huddart

Barkauskas, of Wise Scheible Barkauskas, welcomed the government's decision to provide badly needed guidance to parents and courts on how to decide a parent's requests to relocate children, and

for its decision to jettison the divisive language of parental “custody” and “access” in favour of more neutral terminology emphasizing parental responsibilities.

“I am very happy that this legislation includes a very clear commitment to the idea of best interests of the child taking priority and it breaks down what best interest of the child means, and I’m very glad to see that this government sees the importance of that,” he said.

Toronto family law practitioner Judith Huddart, of Dranoff and Huddart, called it “definitely a step forward” that the legislation would impose express duties on legal advisers to encourage their clients — except when “clearly not” appropriate — to resolve their matters via non-litigation-based family dispute resolution services, including collaborative law.

Reforms in Bill C-78 would, among other things:

- Replace the outdated terms of “custody” and “access” with language emphasizing parents’ responsibilities, including parenting orders, parenting time, parental decision-making and parenting plans.
- Make expressly the child’s “best interests” the touchstone for all decisions in respect of the child and, for the first time, flesh out that term, including stipulating that a court shall give “primary consideration” to the child’s “physical, emotional and psychological safety, security and well-being”; the bill also includes a non-exhaustive list of 11 factors to be considered in determining a child’s best interests, as well as guidance on what factors a court is to consider in relation to family violence.
- Establish a framework for deciding whether a child should be allowed to relocate with a parent, including notice requirements; stipulating factors to take into account in determining whether a proposed move would be in the child’s best interests; creating burdens of proof on parents who want to move or oppose the move; and barring courts from considering whether the parent who intends to relocate the child would move without the child if the child’s relocation were prohibited.
- Introduce measures to require courts to take into account “family violence,” including defining that term and requiring consideration of any other proceedings or orders involving any of the parties (e.g. restraining orders).
- Allow, in some circumstances, the release of tax information to a court or provincial maintenance enforcement program to help ensure a child support amount is accurate.
- Permit provincial child support recalculation services to recalculate child support at any time if needed, instead of on a fixed schedule.
- Provide for orders, with leave of a court, requiring “contact” with a child for a person other than a spouse, for example a grandparent.
- Streamline the process of varying a support order for parties living in different provinces or territories, allowing only one court to be involved, instead of courts in both jurisdictions.
- Make changes that would bring Canada closer to becoming a party to the 1996 *Hague Convention on the Protection of Children* and the 2007 *Hague Child Support Convention*.

In a prepared statement, the Canadian Bar Association said that in addition to the bill’s positive reforms emphasizing the primacy of children’s best interests and clarifying the law in respect of relocating children, “changes that on first reading appear to be in line with CBA advocacy include an emphasis on dispute resolution and early intervention to avoid litigation and court time, more administrative remedies for simpler access to justice, measures to assist unrepresented litigants and measures that better address situations of family violence.”

Photo of Marco Mendicino, Jody Wilson-Raybould, and Jean-Yves Duclos by Cristin Schmitz

