THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 22, 2017

Via email: mcu@justice.gc.ca

The Honourable Jody Wilson-Raybould, P.C., M.P.
Minister of Justice and Attorney General of Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Minister:

Re: Amending the *Divorce Act*

I am writing on behalf of the Canadian Bar Association Family Law Section (CBA Section) to urge you to amend the *Divorce Act*. Amendments would be timely given Canada's recent signature of the 1996 *Child Protection Convention* and the 2007 *Child Maintenance Convention*, and because they have the potential to better meet the needs and interests of separating and divorced Canadian families.

The CBA Section recommends three specific areas for change; relocation, child support in shared parenting situations, and in the terminology used in the *Divorce Act*. Much has changed in the over 30 years since the last substantive amendments to the Act.

In addition, we recommend the *Divorce Act*'s emphasis on the 'best interests of children' as the foundational principle in establishing post-separation parenting regimes should *not* change. We have recently responded to Private Members' Bill S-202 to that effect. That said, further defining 'best interests', as has already occurred in some provinces, would be helpful.

Canadians often have their first encounter with the legal system because of a family law issue, and family law should reflect the best current knowledge in the area. Amendments to prioritize increasing access to justice, encouraging proportional responses and advancing the best interests of children would further this goal.

Relocation

In most jurisdictions, the law provides only general guidance for parents, lawyers and the courts when considering disputes about post-separation relocation of a parent and child. Relocation decisions are to be based on the 'best interests of the child'[1] but that provides little guidance for

[1] *Gordon v Goertz*, [1996] 2 SCR 27.

individual relocation cases. There is inconsistency in how the law is applied and significant unpredictability in this area.

As a result, it is difficult for lawyers to advise clients about relocation issues. Parents experience significant frustration in planning their affairs and children's interests are negatively affected. Unnecessary litigation results because of uncertainty in the law. We believe that clearer guidance about the 'best interests test' and how it applies to relocation cases would facilitate earlier resolution, promote settlements and reduce costs for litigants. It would contribute to greater fairness and predictability, and help parents move on to make post-separation plans for their children.[2]

Co-ordinated multi-jurisdictional law reform would help address this problem. Already, British Columbia and Nova Scotia have enacted legislation, and Manitoba introduced legislation that later died on the order paper.[3] This situation calls for legislative amendments to the *Divorce Act* to reflect current social science research and Canadian case law in relocation decisions. Greater clarity and guidance would help parents and their lawyers deal more effectively with relocation situations.

While amendments to the *Divorce Act* would help many families, we recognize that more difficult or complex cases would still require judges' determinations based on the best interests of the child or children involved.

Child support in shared parenting

Shared parenting orders, whether by agreement or determination by the Court, have increased substantially since the *Divorce Act* was last amended. Even since the introduction of the Child Support Guidelines in 1997, there has been a substantial increase in shared parenting. However, our experience is that child support in shared parenting situations remains a difficult and thorny issue for many Canadian families. While courts must retain jurisdiction to determine individual cases, providing a starting framework or formula for child support in shared parenting situations would help reduce conflict, increase stability and predictability, and lower the emotional and financial toll of litigation in this critical area. Guiding principles should include fairness to parties, reasonable child support amounts, fairness between households, simplicity and clarity, and room for judicial oversight. A framework, formula or set of guiding principles to assist in the determination of child support in shared parenting situations would help address this reality.

Currently, parents often discover that after resolving multiple other difficult issues, including parenting arrangements, they face the complexity and confusion of resolving child support in shared parenting situations with little guidance from the *Divorce Act*. The money spent on these situations is frequently disproportionate to the results, leading to unnecessary impoverishment or parties who too often resign themselves to less support than they should receive to avoid conflict.

The *Contino* decision of the Supreme Court[4] generally requires courts to undertake a full analysis of sections 9(a), 9(b) and 9(c) of the Child Support Guidelines. It can be onerous and costly for parents

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2 See Canadian Bar Association Resolution 15-08-A, which urges Federal, Provincial and Territorial governments to amend the *Divorce Act* and other relevant legislation to provide harmonious, more efficient, speedy and certain processes for making relocation decisions consistent with the best interests of children.

3 *Province Introduces Family Law Overhaul That Would Put Children First* – Order Paper (http://ow.ly/dkkV30hfPYR).

4 *Contino v. Leonelli-Contino*,[2005] 3 SCR 217, 2005 SCC 63 (CanLii).

to present sufficient evidence, and courts have commented on the costs involved being disproportionate to the amounts at stake.[5]

Parties who settle cases often rely on a straight offset of the parties' table amounts in the Child Support Guidelines, with an annual adjustment based on any changes in parties' incomes. They frequently also share the expenses that would otherwise be considered under section 7.

If child support is determined based on a full *Contino* analysis, the parties often do not seek an adjustment to child support even when the parties' financial circumstances change. Some simply wish to avoid further litigation, or realize that what they spend trying to determine child support is unwarranted given the small amount at stake. When courts require section 7 expenses to be included in the analysis of section 9 child support amounts, matters are further complicated when section 7 expenses change as children grow and their interests fluctuate.[6]

This means that access to justice for many families is unnecessarily limited, and litigated solutions for child support in shared parenting situations are rarely adjusted in a fair, proportional and economical manner. Parties leaving controlling or abusive situations are especially likely to avoid further contact and conflict with the other parent. The result is that many children and parents are not receiving and paying proper amounts of child support as means and needs change.

We suggest that the Federal Child Support Guidelines and the *Divorce Act* should be amended to assist in determining child support in shared parenting situations. The mechanism chosen should be user-friendly, fair, easy to understand, easy to implement and proportionate to the amounts at stake. The goals should be advancing the best interests of children, enhancing stability and consistency, and reducing conflict.

Terminology

The current terminology of 'custody' and 'access' is outdated and these terms tend to increase conflicts, add to disenchantment between parents and go against a 'best interest' analysis of parenting responsibilities. Many provinces and territories have moved away from this language to rely on more progressive terms focused on parenting responsibilities. This reflects the fact that many modern parents both maintain a role in parenting children following separation.

Maintaining the 'best interests' principle is key, and further defining the term in the *Divorce Act* would assist courts as well as parents attempting to resolve their matters without litigation. In 1998, the CBA Section suggested factors to better define 'best interests', including:[7]

- the love, affection and emotional ties between the child and each person seeking custody or access, other members of the child's family residing with him or her, and persons involved in the child's care and upbringing
- the child's views and preferences, if they can reasonably be ascertained
- the length of time the child has lived in a stable home environment

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5 See *Martin v. Martin* (2007), MB QB 296, where Hon. Justice Little indicated that generally the range of support will be between the set off amount and the full table amount. See also *Huntly v. Huntly* 2008 MB QB 42 (CanLii) at paragraph 38.

6 Currently in Newfoundland and Labrador, parties using a set off cannot rely on automatic recalculation services, and instead have to refile their orders each year.

7 Family Law Section, *Custody and Access Review* (Ottawa: CBA, 1998) at 4-5.

- the ability of each person seeking custody or access to act as a parent and fulfill the parental responsibilities set out in this Act
- the ability and willingness of each person seeking custody to provide the child with guidance, education and necessities of life and to meet any special needs of the child
- any plans proposed for the child's care and upbringing
- the permanence and stability of the family unit with which it is proposed that the child will live
- the relationship, by blood or through an adoption order, between the child and each person who is a party to the application or motion
- the caregiving role assumed by each person applying for custody during the child's life
- any past history of family violence perpetrated by any party applying for custody or access
- the child's established cultural ties and religious affiliation, and
- the importance and benefit to the child of having an ongoing relationship with his or her parents.[8]

Given current social realities and developments in the law since 1998, we also suggest consideration of:

- the impact on the child of any domestic violence, including:
    - consideration of the safety of the child and other family and household members who care for the child;
    - the child's general well-being;
    - whether the parent who perpetrated the domestic violence is able to care for and meet the needs of the child; and
    - the appropriateness of making an order that would require the parents to co-operate on issues affecting the child
- the nature and quality of the relationship of the child, their parent, and other significant individuals in the child's extended family (defined as grandparents, aunts, uncles, cousins and non-related individuals who historically have played a key, positive, and active role in the child's life);
- the child's development (physical, psychological, emotional, educational, social, and moral) and needs including safety;
- the willingness and ability of each parent to cooperate and communicate respecting the child and facilitate a relationship with the other parent as appropriate according to the best interests of the child;
- each parent's ability to ensure appropriate supports and resources for a child requiring accommodation to reach their full potential (eg. children with FASD, ADHD, anxiety, etc);
- the child's cultural, linguistic, religious and spiritual upbringing and heritage

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8 CBA Family Law Section, *Custody and Access Review* (Ottawa: CBA, 1998) at 4-5.

Conclusion

The CBA Section suggests that the federal government take immediate steps to amend the *Divorce Act* to address the issues we have identified. We would be happy to respond to any questions and assist as we can.

Yours truly,

(original letter signed by Gaylene Schellenberg for Lawrence Pinsky)

Lawrence Pinsky
Chair, CBA Family Law Section