THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: claire.farid@justice.gc.ca

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Dear Ms. Farid:

Re: Guidelines Amending the Federal Child Support Guidelines, Notice of Relocation Regulations, and Provincial Child Support Service Regulations – Canada Gazette Part I, Vol. 154, No. 12, 21 March 2020

The Canadian Bar Association Family Law Section (CBA Section) is pleased to offer our comments on the Guidelines Amending the Federal Child Support Guidelines, Notice of Relocation Regulations, and Provincial Child Support Service Regulations. The CBA is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice. The CBA Section consists of lawyers from across Canada who specialize in family law, and act for all parties in family law disputes.

1. Guidelines Amending the Federal Child Support Guidelines

The new wording of sections 8 and 9 of the *Federal Child Support Guidelines* replaces the terms "**has** custody" and "**has** physical custody" with the terms "**exercises** the majority of parenting time" and "**exercises** not less than 40% of parenting time".

This is a seemingly minor change, but one that could have larger implications. The new terminology of "exercises" may lead to significant litigation and interpretive uncertainty. It may require a parent to first prove whether they are exercising the parenting time set out in the court order. This may be impossible where the parenting order and child support order are being made concurrently, and may impose an unintended requirement.

We recommend retaining the term "has" to avoid these potential and undesirable consequences.

2. Notice of Relocation Regulations

The recent amendments to the *Divorce Act* for relocating parents are some of the most useful and ground-breaking changes in Bill C-78, especially in parts of the country without relocation guidelines in provincial or territorial legislation. The provision of notice to the other parent and the ramifications of the response, or lack thereof, is an essential part of the legislation. We believe that significant care is required so the forms used to communicate a relocating person's plans will ensure that the legislative intent is met.

Clear and precise language in these forms will make them easier for non-lawyers to use and so improve access to justice for separating and divorcing families, which is particularly important considering the number of self-represented and unrepresented litigants engaged in the family law system. Self-represented and unrepresented litigants may also not understand the available time limits and procedures and may look at the forms in isolation from the relevant provisions of the *Divorce Act*.

Form 1 – Notice of Relocation

It would be difficult for a person who receives a notice of relocation to make a decision about the relocation of a child without additional procedural information beyond that currently in the form. Given the potential impact of decisions on relocation, we recommend the following changes:

1. A tick box with signature line, date and witness lines for the person who receives a notice of relocation to sign if they consent to immediate relocation. When parties agree, the relocating person would not need to wait for the notice period to expire to relocate. This would reduce confusion for the parties and for a court asked to review the matter in future.
2. A notice form must contain information for the person who receives a notice of relocation that clearly outlines the time limit for responding and the potential ramifications of not responding, with a link to the form to express any objection. This information should be prominent, perhaps by characterizing it as a “Warning to the recipient”.
3. Information for the person completing the form about the importance of ensuring that the intended recipient actually receives the form, advising that an affidavit of service or other additional information may be required to prove service. It should also state that the timeline for the Form 2: Notice of Objection does not start to run until 30 days after the day on which the notice is received.
4. Information to the person completing the form that the court may, on application, order that the usual requirements to complete and serve Form 1 may be changed or do not apply depending on the circumstances, including where there is a risk of family violence.

Form 2 – Notice of Objection

We suggest the following changes to make this form more useful:

1. Space for the objecting person to include their proposal to exercise parenting time, decision-making responsibility or contact.
2. Information about the need to ensure that the intended recipient actually receives the form and an affidavit of service or other additional information may be required to prove service.

Form 3 – Relocation of Person with Contact

As above, we propose that this form include information about the importance of ensuring that the intended recipient actually receives the form and advising that an affidavit of service or other additional information may be required to prove service.

3. Provincial Child Support Service Regulations

1. Sections 25.01(2) and 25.1(1.1) of the amended *Divorce Act* state that the law of the province will apply to those sections, to the extent that they are not inconsistent with the Act. Corresponding commentary in the Gazette says "(t)he new Regulations would apply in the absence of provincial or territorial rules."

This suggests that these Regulation clauses should only be considered if the province or territory does not have legislation in this regard. We recommend revised wording: "The new Regulations apply in the absence of provincial or territorial rules. The laws of the province or territory apply to these sections to the extent that they are not inconsistent with the sections in the *Divorce Act*."

2. Regulations 2 and 3 state that "notification of the decision" will be in accordance with the law of the province. Similarly, Regulations 5 and 6 state that "notification of the recalculated amount" will be in accordance with the law of the province. We are concerned about how notification would be defined. Provinces or territories may not have applicable laws or have laws without a definition of notification. We suggest that a definition of notification be added to paragraphs 2,3,5 and 6, as well as a statement that it would apply absent provincial or territorial legislation.

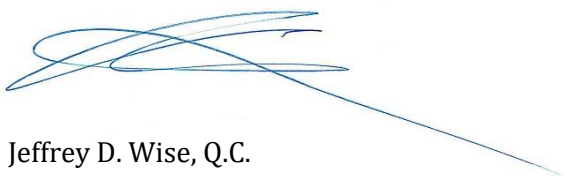
3. Regulations 3 and 6 set the prescribed period to apply to the court for appeal or objection at "30 days after the day on which both spouses were notified…". This could create uncertainty about the deadline to appeal or object, which could increase litigation. The proposed wording seems to imply that the clock for both parties starts when the last party was notified. Separated spouses may not know when the other spouse was notified, creating different actual or perceived deadlines. We suggest that the wording be revised: "…30 days after the day on which the person intending to apply was notified…".

4. Section 25.1(1.2) of the amended *Divorce Act* says that the calculation for deeming income is that set out in the law of the province or, if no such method is specified, in accordance with the method prescribed by the regulations. This on its own is clear, but with section 25.01(2) and 25.1(1.1) of the *Divorce Act* (provincial laws apply unless inconsistent with the Act), could lead to some ambiguity. If a province or territory has a less favorable method of calculation in their regulations, it might be said that the provincial or territorial regulation is "inconsistent" with the Act. This could be resolved by clarifying Regulation 4, to include that the Regulation method of calculation would only apply absent a provincial or territorial method of calculation regardless of whether the method is considered or perceived to be more or less favourable.

5. Regulation 4 relates to "recalculation" as opposed to "calculation". It is important to understand the distinct differences between the two because the method of calculation of deemed income applies to recalculation and not to calculation. We recommend that the title for Regulation 4 be revised to say "Prescribed Method of Calculation for Recalculations – subsection 25.1(1.2)".

We trust that our comments on the proposed Regulations to the amended *Divorce Act* will be helpful and would be pleased to offer further clarification or comment as required.

Yours truly,



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