FOLA'S SUBMISSION TO THE MINISTRY OF ATTORNEY GENERAL ON AMENDMENTS TO THE DIVORCE ACT

Submitted to: Doug Downey, Attorney General
Ministry of Attorney General
McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Submitted on: Thursday January 16, 2020

Submitted by:

Sam (Rasim) Misheal
Family Law Chair, FOLA
sam@familyseparation.ca

Thank you for providing this opportunity to FOLA to provide comment regarding the Ministry of Attorney General on amendments to the *Divorce Act.*

The Federation of Ontario Law Associations (FOLA), is an organization that represents the associations and members of the 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, we represent approximately 12,000 lawyers, most of whom are in private practice in firms across the province. These lawyers are on the front lines of the justice system and see its triumphs and shortcomings every day.

This Report serves as FOLA's views and comments regarding the changes made to the *Divorce Act*, and adopting same within the provincial legislation.

INTRODUCTION

In response to the Ministry of Attorney General's request for FOLA's views on the recent amendments made to the *Divorce Act*, FOLA has consulted with our members in order to make meaningful observations and submissions on both consultation papers. Many of our members are professionals who specialize in family law either exclusively, or as part of a broader general practice. FOLA respectfully submits that the recent amendments made to Bill C-78 would impact separating and divorcing families throughout Ontario and other provinces.

It is trite to note that separation is often an emotional and stressful time. A system that addresses the best interests of children would attempt to alleviate the turmoil of separation for children and parents alike. There is no doubt that the recent changes to the federal *Divorce Act* will reshape, reform, and provide clarity with respect to what is in the best interests of the child, addressing concerns relating to domestic violence, updating parenting terminology, and encouraging the use of family alternative dispute resolution processes in certain circumstances.

FOLA respectfully submits that the recent Bill C-78 amendments to the *Divorce Act* should be largely incorporated into the Ontario *Children's Law Reform Act* in order to protect and provide a guiding path with respect to families that are affected by separation. FOLA further submits that any reference made to the "child of the marriage" pursuant to the *Divorce Act* should just read "child" in the *Children's Law Reform Act*, and any reference to spouse should just read "parent".

Question # 1: Views on how Ontario should be aligned to the changing references to child "custody" and "access"?

FOLA is of the view that the definitions used in Bill C-78 should be adopted in the *Children's Law Reform Act:* namely, "parenting order", "parental decision making", "parenting time" and "contact order". The new terminology encompassed in "parenting orders" will certainly reflect the cultural change that has been witnessed in the past couple of decades and it is a welcome step away from the adversarial approach towards a child-centered approach that promotes cooperative problem solving.

Furthermore, FOLA is of the view that the terminology must be adopted in other provincial legislation that refers to the terms "custody" and / or "access", such as s. 112 of the *Court of Justice Act, Child, Youth Family Service Act,* and *Family Law Act* to ensure consistency.

The *Divorce Act* and the provincial legislation anticipates family break-ups, and consequently a potential disagreement about "parenting orders". The recent amendments to the "parenting orders" under s. 16.1 to 16.5 provide the courts with a mechanism as to how the court should make parenting and contact orders. FOLA's view is that the updated terminology should be adopted within the *Children's Law Reform Act*.

Moreover, FOLA is of the view that the *Children's Law Reform Act* should also be consistent with the *Divorce Act*. Under s. 16.1 of the *Divorce Act*, a person wishing to have a decision-making responsibility as described in paragraph (1)(b), may make an application under subsection (1) or (2) only with leave of the court. As it currently stands, the *Children's Law Reform Act* permits anyone to apply for "custody" of a child without the necessary vetting step of having to apply for leave.

Question # 2: Should the province add new requirements in relation to family dispute resolution processes;

The *Children Law Reform Act* and the *Family Law Act* do not define dispute resolution or set out any guidelines to dispute resolution process. While dispute resolution mechanisms have been a welcome step in family law in the last ten or so years, one must proceed with caution given that they are not appropriate in certain circumstances, such as when there is power imbalance between the parties, and / or domestic violence.

FOLA is also of the view that any amendments to the *Children's Law Reform Act* or the *Family Law Act* should take into consideration that dispute resolution mechanisms would not be appropriate in some circumstances, some examples include, when the case is urgent, where one parent absconds with the child and immediate intervention is required, where there are limited financial resources, or when an undertaking or bail recognizance prevents one individual from having contact with the other.

Furthermore, FOLA is of the view that the province should define dispute resolution and consider adopting the language used in s. 7.3 (family dispute resolution process) and s.7.7(2)(a) (duty to discuss and inform) of the *Divorce Act,* but not make dispute resolution mechanisms universally mandatory given the concerns outlined in the paragraph above. However, in circumstances where the Court deems it appropriate, an Order can and should be made to compel the parties to engage in dispute resolution mechanisms.

Question # 3: FOLA's views on amending/expanding the best interests of the child test.

There is no dispute that every family law case must be decided on its own merits and the best interest of the child is paramount from beginning to end. Some parents are able to reach an agreement without any trouble while others appear to view a

"custody/access" proceeding as a competition wherein the only goal is winning, without any consideration of what is in fact best for the child.

While the *Children's Law Reform Act* provides guidance under ss. 24.(1), it is FOLA's view that the current test under this Act is too simplistic and provides little guidance to parents in reaching an agreement. It is FOLA's view that the province should adopt the entire "best interest test of the child" as set out in ss.16(1) to (7) of the *Divorce Act* to ensure consistency, and additionally provide a comprehensive and non-exhaustive list of factors to be taken into consideration.

Question # 4 : Should the province add a new definition in relation to family violence?

Neither the *Children's Law Reform Act* nor the *Family Law Act* define "family violence". It is FOLA's view that the province should adopt the definition used in the *Divorce Act* as this definition is comprehensive and addresses the apparent gaps in the current legislations.

Question # 5: Should the province add a legislative test to apply in child relocation cases?

There is no doubt that mobility (child relocation) is a very contentious topic. While the decision by the Supreme Court of Canada in *Gordon v Goertz* sets out factors to be considered in child mobility cases, it is FOLA's view that the province should adopt the changes outlined in the *Divorce Act* with respect to "Change in Place of Residence". We believe it is of utmost importance to remain consistent with the *Divorce Act* so as to avoid having two separate regimes for dealing with child relocation: CLRA/FLA cases under *Gordon v. Goertz* and *Divorce Act* cases under "change in place of residence."