

***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***

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**Respectfully Submitted by  
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**Introduction**

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This brief endorses recommendations found in briefs on Bill C-78 submitted to the Canadian House of Commons:

- [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)
- The Brief submitted by the Women's Legal Education and Action Fund ([LEAF brief](#))
- [Brief](#) submitted by Dr. Linda C Neilson

Nonetheless the focus here is on legislative matters of central importance to the safety and well-being of Canadian families and children when *Divorce Act* cases involve family violence.

**Positive Comments on the Bill**

At the outset it is important to state clearly that although, from a legal-systems-family-violence-research point of view, Bill C-78 would benefit from recommended modifications, Bill C-78 improves federal legislation in the family law field. Implementation of this legislation is of the utmost importance to the safety and well-being of Canadian children and their families. Examples of positive change include: explicit reference to family violence as a best interests of the child consideration; inclusion of the terms "coercive and controlling" in the definition of family violence; child best interests as the only consideration; primary consideration to the child's safety, security and well-being; consideration of the history of care of the child; a legislated duty on the part of parents to exercise parenting responsibilities in accordance with child best interests; the onus on courts to consider civil protection, child protection and criminal orders and proceedings that affect the family; and the potential for ex parte applications to waive or modify notice provisions when a change of residence or relocation is contemplated and there is a risk of family violence. These provisions

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1 The author would like to acknowledge the contributions to this brief of Susan Boyd, F.R.S.C, Professor Emerita, Peter Allard School of Law, UBC; Honorable Donna Martinson, retired Justice of the British Columbia Supreme Court; and Professor Wanda Wiegiers, College of Law, University of Saskatchewan. The brief has benefitted greatly from their review comments and expertise. Errors or omissions, however, belong solely to Dr. Neilson.

enhance the *Divorce Act* and will benefit Canadian families. Canada is to be commended for introducing these positive changes.

### **Lingering Concerns, Gender, Human & Child Rights, Family Violence**

Nonetheless, the Bill falls short on a number of issues that the Canadian Senate could decide to remedy: 1) gender equality,<sup>2</sup> 2) human rights obligations to protect women, particularly Indigenous women, from gender-related violence<sup>3</sup> and 3) obligations to protect children from family violence and parental abuse pursuant to article 19 of the United Nations *Convention on the Rights of the Child*.<sup>4</sup>

In connection with gender equality before and under the law, we know that family violence is gendered (primarily directed against women). Nevertheless, in addition to the burden of proving family violence, the onus throughout this Bill – to prove the negative effects of family violence on the child, to prove negative parenting patterns known to be associated with engaging in family violence, to prove exceptions to maximum parenting time, to prove the need for protective measures, to prove an exception to notice in relocation cases, to prove an exception to the other parent's entitlement to demand information about the child, to prove an exception to the other parent's right to make day to day decisions during parenting time, to prove an exception to the appropriateness of dispute resolution – always falls on the parent subjected to family violence (usually a mother) rather than where the onus belongs: on the parent who engaged in family violence. Even when family violence is proven, the Bill fails to impose an onus on perpetrators to prove that child and family safety and well being will be ensured in connection with parenting. In short, the Bill lacks gender balance.

In connection with children, research-informed family law legislation elsewhere is recognizing that family violence is a form of child abuse.<sup>5</sup> The approach elsewhere is consistent with empirical research. A consistent body of research shows that family violence against children's caregivers in the home causes direct, scientifically documented child stress and harm. The violence need not be witnessed directly in order to cause harm. Some of these children will experience toxic levels of stress and long term fear responses that can lead to emotional, even developmental, harm.<sup>6</sup> Verification of direct harm to children from violence

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2 The term 'gender equality' refers to Canada's commitment to considering the differential impacts of legislation on diverse groups of women and men when developing legislation: Government of Canada, [Action Plan on Gender-based Analysis](#) (2016-2020) and to gender equality principles set out in [The Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 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](#); Jennifer Koshan, [State Responsibility for Protection against Domestic Violence](#): The Inter-American Commission on Human Rights Report in Lenahan (Gonzales) and its Application in Canada, 2012 30-1 *Windsor Yearbook of Access to Justice*, 39, 2012 CanLIIDocs 42. 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](#).

4 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.* 151-168 for a nuanced discussion of pertinent child rights issues as well as materials posted by the Canadian Bar Association, [The CBA Child Rights Toolkit](#) on line. 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 [Australian Family Law Legislation Amendment \(Family Violence and Other Measures\) Act 2011](#)

6 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

directed against adult caregivers is consistent across research methods (qualitative and quantitative) and even across disciplines (social science, medicine, psychiatry, child development, neurobiology).<sup>7</sup> We also know that perpetrating abuse against mothers often occurs together with abuse and violence directed against children<sup>8</sup> and that children very seldom disclose their own abuse.<sup>9</sup> We also know, from post-separation family violence parenting research, that patterns of behavior associated with engaging in coercive family violence against women (such as demeaning domination, monitoring and surveillance, isolation, psychological undermining, excessive physical violence, and coercive control) tend to be replicated in perpetrator parenting practices that harm children after the adults separate.<sup>10</sup> When we make assumptions about the benefits to children of maximizing parenting time and fail to protect vulnerable children and their caregivers from negative perpetrator parenting practices, we reduce children's resilience and impair children's recovery. In other words, we exacerbate the harm family violence has already done to these children. In addition, we also know empirically that the risk and lethality indicators for children mirror the risk and lethality indicators for mothers.<sup>11</sup> When mothers face risk from a perpetrator, the children face risk too.<sup>12</sup> Failure to consider risk to mothers is failure to consider the risk to children.

The capacity of family law systems to promote safety and well being in family violence cases depends on clear legislative guidance as well as on access to evidence. Without clear, gender-balanced guidance and a professional duty on the part of lawyers, dispute resolvers, and decision makers to screen for family violence and to ensure that risk assessments and safety planning are conducted, the new provisions in this Bill will fall short in terms of promoting child and family safety and well being.

### Overriding Educational and Process Issues

Problems in the legal system result not only from faulty legislation – as the LEAF and Joint Luke's Place/NAWL briefs to the House of Commons document in connection with maximizing parenting time – but also from factors that prevent evidence of family violence from being generated and considered (as a result, in part, of limited use of screening tools).<sup>13</sup> Failure to disclose family violence in the absence of specialized screening tools is already well documented.<sup>14</sup> Limited access to information combines with lack of

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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).

- 7 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.
- 8 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.
- 9 Statistics Canada (2017) [Family violence in Canada: A statistical profile](#), 2015. Catalogue no. 85-002-X.
- 10 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](#), Chapter 11 of Neilson (2017) note 6; 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.
- 11 Canadian Domestic Homicide Prevention Initiative (2017) [Children and Domestic Homicide: Understanding the Risks](#) resources and links to materials; 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.
- 12 Ibid. See also: Katreena Scott and Deborah Sinclair [Identifying The Risk Factors that Should Inform Assessment Practices](#) (Ontario: Learning to end Abuse)
- 13 Linda Neilson et al. (2001) note 10; Pamela Cross et al. (2018) [What You Don’t Know Can Hurt You](#): The importance of family violence screening tools for family law practitioners (Ottawa: Department of Justice); Sina Hariri (2018) [A Necessity for Domestic Violence Screening](#) (Ontario Bar Association).
- 14 Cross (2018) *ibid.*

understanding among many judges, mediators, lawyers, and experts testifying before family courts of the complexity of violence against women and its clear association with parenting problems and child harm.<sup>15</sup> 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>16</sup> Closer to home, in Canada, Susan Boyd and Ruben Lindy documented judicial tendencies, in the absence of specialized knowledge, 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>17</sup> This is the reason that the LEAF and Joint Luke's Place and NAWL briefs as well as my own brief to the House of Commons stressed the critical importance of extensive family violence education as well as mandatory professional duties on the part of lawyers, mediators, dispute resolvers, and experts testifying in family law cases to screen for presence of family violence,<sup>18</sup> using culturally informed screening tools,<sup>19</sup> and to ensure that any referrals to settlement services are consensual, beneficial and safe. Also important is the need, prior to referrals and decisions, to ensure that family members are assessed for risk and danger, as is now the case in other countries.<sup>20</sup>

### **Specific Recommendations that could enhance the positive effects of the family violence provisions in the Bill, with Supporting Comments:**

#### **1) Include in section 16(3) -best interests of child, factors to be considered - "child rights as set out in the United Nations' Convention on the Rights of the Child" (Convention)**

*Convention* rights include the rights of children to be protected from abuse and violence as well as to have their views "given due weight in accordance with the age and maturity of the child". A reference in section 16(3) would help to ensure that children's international rights are recognized when the *Divorce Act* is interpreted and applied. In particular section 16 (3) (e) should be changed from 'giving due weight to the

- 15 Researchers are reporting that many custody evaluators do not have sufficient understanding of domestic violence to assess child best interests in a domestic violence context: Daniel Saunders et al. (2012) [\*Child Custody Evaluators' Beliefs About Domestic Abuse Allegations: Their Relationship to Evaluator Demographics, Background, Domestic Violence Knowledge and Custody-Visitation Recommendations\*](#); Daniel Saunders (2017) [\*State Laws Related to Family Judge's and Custody Evaluators' Recommendations in Cases of Intimate Partner Violence: Final Summary Overview\*](#); Michael Davis et al. (2011) [\*Custody Evaluations When There are Allegations of Domestic Violence: Practices, Beliefs, and Recommendations of Professional Evaluators\*](#); Jason Hans et al. (2014) "The Effects of Domestic Violence Allegations on Custody Evaluators' Recommendations" in *Journal of Family Psychology*, 28(6), 957-966; Jennifer Hardesty et al. [\*Divorcing Mothers' Demeanour in Custody Evaluations\*](#) (National Council of Juvenile and Family Court Judges); Samantha Jeffries, Rachael Field, Helena Menih, Zoe Rathus (2016) [\*Good Evidence, Safe Outcomes in Parenting Matters Involving Domestic Violence? Understanding Family Report Writing Practice from the Perspective of Professional Working in the Family Law System\*](#) 2016] *UNSW LawJI* 50, (2016) 39(4) *UNSW Law Journal* 1355. See also the problems identified in Linda C Neilson et al. (2001) note 10 and Linda C Neilson (2018) [\*Parental Alienation Empirical Analysis: Child Best Interests or Parental Rights?\*](#) (Vancouver: The FREDA Centre for Research on Violence Against Women and Children, 2018).
- 16 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.
- 17 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.
- 18 Pamela Cross (2018) note 13.
- 19 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.
- 20 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.

child’s age and capacity’ to ‘*giving due weight to the child’s views in accordance with the age and maturity of the child*’ in order to make the *Divorce Act* consistent with the *Convention*. Although values in the *Convention* are influential when interpreting Canadian statutes, the appeal cases tell us that international *Conventions* have no direct application until incorporated into Canadian law (e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 (SCC); *Sin v. Canada*, 2016 FCA 16, leave to appeal dismissed with costs in *Alexander Sin v. Her Majesty the Queen*, 2016 CanLII 34007 (SCC); *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286; *Bhajan v. Bhajan*, 2010 ONCA 714). A reference to *Convention* rights in the list of best interests of the child factors to be considered would help to ensure that every provision in the *Divorce Act* associated with child best interests will be interpreted in accordance with Canada’s obligations, pursuant to article 19 of the *Convention* “to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.” Family law legislation in other countries, for example Australia, does incorporate a reference to child rights pursuant to the *Convention* into family law legislation.<sup>21</sup> Moreover Bill C-78 itself incorporates into Canadian law other international *Conventions* endorsed by Canada (governing international recovery of child support and the 1996 *Convention* on international recognition and enforcement of parental responsibilities). Incorporating into Canadian divorce law child rights pursuant the *Convention* should have equal if not greater importance. Children’s rights to be heard and to be protected from abuse and violence are critically important, not only in connection with post-divorce parenting agreements and orders but also in connection with relocation and contact orders.<sup>22</sup>

**2) Remove the best interests of the child consideration in section 16(3)(c) “each spouse’s willingness to support the development and maintenance of the child’s relationship with the other spouse”.**

The provision, as currently worded, is dangerous in a family violence context<sup>23</sup> (and in other cases where, as a result of negative parenting practices or parental incapacity, the child does not have an established safe and supportive relationship with the other spouse). Section 16(3)(c) will discourage women and children from seeking protections that limit the child’s relationship with the other spouse when, for example, as a result of family violence, child abuse, or negative parenting, the relationship is not beneficial and safe. Every parent/spouse has a duty during marriage to develop a positive parenting relationship with the child. When a parent/spouse has failed in that duty, mandating consideration of the other parent/spouse’s willingness to support the development of such a relationship as a best interests of the child factor creates a dangerous situation for women and children. Women and children will be concerned that resisting parent-child relationships that are not beneficial and safe will be held against them as a negative best interests of the child factor. The concern is not merely speculative. Family lawyers, mediators, evaluators and judges, who do not understand that family violence is a child harm/child abuse issue,<sup>24</sup> are currently failing to investigate and consider women and children’s concerns about parenting and safety in favor of punishing parents – primarily mothers (and children) when children resist contact with the other parent.<sup>25</sup> Children are being forcefully removed from the parents they prefer and are being forced into homes and parenting relationships they resist (on the basis that the mother did not sufficiently forcefully insist on the child’s relationship with the other parent).<sup>26</sup> Children are running away (*L. (N.) v M. (R.R.)*, 2016 ONSC 809; *N.L. v. R.R.M.*, 2016 ONCA 915;

21 [Australian Family Law Legislation Amendment \(Family Violence and Other Measures\) Act 2011](#).

22 For an example of family law legislation incorporating a reference to child rights pursuant to the *Convention*, see [Australian Family Law Legislation Amendment \(Family Violence and Other Measures\) Act 2011](#).

23 The provision replicates reasoning that is causing problems for women and children documented in Linda C Neilson (2018) note 15.

24 Refer to references cited in note 15.

25 Linda C Neilson,(2018) note 15; Lois Shereen Winstock (2014) *Safe Havens or Dangerous Waters?* PhD dissertation. Law, York University (York University); Isabelle Côté and Simon Lapierre (2019) *L’Aliénation Parentale*; *La Presse*, March 9, 2019 citing parental alienation research conducted by University of Ottawa researcher, Simon Lapierre.

26 *Ibid.*

*R.G. v. K.G.*, 2017 ONCA 108); some children are being killed.<sup>27</sup> Researchers are currently documenting the contributing role of family courts in child deaths as a result of family court orders mandating children into unsupervised parenting relationships with abusive fathers.<sup>28</sup>

Section 16(3)(c) as currently worded, will encourage the continuation of such practices. Children, on the other hand, are telling researchers to ask family courts and those associated with family courts to listen and consider more respectfully children’s views on contact with perpetrators of family violence (some children desire contact, others do not) and to pay more attention to children’s concerns about their own and their siblings’ safety. Children are also asking researchers to ask family courts to hold perpetrators of domestic and family violence accountable for harm done to the family and to ensure that perpetrators accept responsibility, apologize and make amends prior to insisting on parenting rights.<sup>29</sup> If section 16(3)(c) is not altered, the provision will silence protective parents and vulnerable children instead of promoting perpetrator accountability and responsibility in family violence cases.

**Alternative:** Assuming that the intention is to enable courts to consider, as a negative best interests of the child factor, a spouse’s active undermining of a child’s beneficial relationship with the other spouse, removing the words “the development and” and including the qualifying phrase “when the relationship is in the best interests of the child” would serve the same purpose without creating the problematic reverse onus discussed above. Section 16(3)(c) would become “*each spouse’s willingness to support the child’s relationship with the other spouse when the relationship is in the best interests of the child.*”

**3) Include in section 7.7 duties on the part of legal advisors to acquire family violence education, to screen cases for the presence of family violence, and, unless the circumstances of the case make it inappropriate to do so, to ensure that risk and lethality assessments are conducted when family violence is identified. Also include in section 7.8 a duty on the part of courts to ensure that family law cases are screened for the presence of family violence and, if family violence is present, unless the**

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- 27 Lori Chambers et al. (2018) “[Paternal Filicide & Coercive Control](#)” 51(3) *UBC Law Review* 671-704; Mary Ellen Turpel-Lafond (2009) [Honouring Christian Lee — No Private Matter: Protection Children Living with Domestic Violence](#) (Legislative Assembly British Columbia); Alberta Government (2018) [Family Violence Death Review Committee Case Review No.3; Saskatchewan Domestic Violence Death Review Report](#) Released May 24, 2018 (Ministry of Justice); David Olszowy et al. (2017) [Children and Domestic Homicide: Understanding the Risks](#) (Canadian Domestic Homicide Prevention Initiative); Myrna Dawson (2015) “[Canadian Trends in Filicide by Gender of the Accused, 1961-2011](#)” 47 *Child Abuse & Neglect* 162-174; Sarah Cotton and Gillian Calder (2018) Comment: Connecting the dots in family-violence cases *Times Colonist*; Andrew and Lukas, former children of Pauline Gallant in New Brunswick.
- 28 Lori Chambers et al. (2018) *ibid.*; Mary Ellen Turpel-Lafond (2009) *ibid.*; Alberta Government (2018) and Saskatchewan (2018) *ibid.*; Sarah Cotton and Gillain Clader (2018) *ibid.*; [Case Study – Different systems may have information relevant to risk assessment in Chapter 2 – Risk assessment](#) in Department of Justice *Marking the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems* (Ottawa: Department of Justice). United States: Center for Judicial Excellence (2017) [U.S. Divorce Child Murder Data](#) and [58 Children Murdered By A Parent Who Could Have Been Saved Filicide in U.S. Family Courts: A Snapshot](#); Lauren L. Sabatino (2009) [Looking at Family Court-Involved Domestic Violence and Child Abuse Fatality Cases Through a Lens of Prevention](#) (Institute for Court Management, Florida); United Kingdom: Women’s Aid (2016) [Nineteen Child Homicides](#) (Bristol: Women’s Aid, 2016).
- 29 Katie Lamb, Cathy Humphries, Kelsey Hegarty (2018) “Your behavior has consequences: Children and young people’s perspectives on reparation with their fathers after domestic violence” 88 *Children and Youth Services Review* 164-169; Rachel Carson et al. (2018) [Children and young people in separated families: Family Law system experiences and needs](#) (Australian Government, Institute of Family Studies); Backbone Collective (2017) [Seen and not Heard Children in the New Zealand family Court Part one – Force](#) and (2018) [Report Five- Seen and Not Heard – Lawyer for child](#); Gillian Macdonald (2017) “[Hearing children’s voices? Including children’s perspectives on domestic violence in welfare reports prepared for the English courts in private family law proceedings](#)” 65 *Child Abuse & Neglect* 1-13; Jane Fortin, Joan Hunt and Lesley Scanlan (2012) [Taking a longer view of contact: The perspectives of young adults who experienced parental separation in their youth](#) (Sussex Law School, University of Sussex); Audrey Mullender et al. (2002) *Children’s Perspectives on Domestic Violence* (London: Sage).

**circumstances of the case are of such a nature that it would be inappropriate to do so, to ensure that risk or lethality assessments have been or will be conducted.**

The earlier discussion, Overriding Education and Process Issues, explains why these provisions are important. Note that screening and risk assessment are not the same. Screening is designed to identify particulars of family violence. Risk assessment ascertains the level of risk associated with those particulars. Screening questions for use in family law cases are available now (for example, Pamela Cross et al. (2018) [What You Don't Know Can Hurt You](#): The importance of family violence screening tools for family law practitioners (Ottawa: Department of Justice) at Appendix C; Gabrielle Davis, Loretta Frederick and Nancy Ver Steeg (2015) [Practice Guides For Family Court Decision-Making in Domestic Abuse-Related Child Custody Matters](#) at “Initial Domestic Abuse Screening Guide” and “Domestic Abuse Interview Guide”).<sup>30</sup> In connection with risk and danger, although risk and danger assessment requires specialized expertise in the domestic violence field, the risk and danger indicators are well known and publicly available to everyone: see Chapter 8 of Linda C Neilson (2017) [Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases](#) (Ottawa: Canadian Legal Information Institute).<sup>31</sup>

**4) Include an explicit acknowledgement in the Bill that engaging in family violence in a child's home is a form of child abuse.**

The reasons for this recommendation are set out in the introductory comments. Section 16(4) should include as one of the factors relating to family violence- “*engaging in family violence in a child's home is a form of child abuse*”.<sup>32</sup>

**5) Revise section 16(3)(j). This provision is inappropriately framed.**

Considering the perpetrator's willingness to parent is contraindicated in a family violence context. Perpetrators of family violence are very willing to seek extensive parenting responsibility because orders that enable control of children facilitate continuing control of the whole family. Misuse of parenting provisions to maintain coercive control in family violence cases is well documented.<sup>33</sup> Thus LEAF's brief on Bill C-78 to the House of Commons stated:

“The central concern should be what the patterns of behaviour associated with the family violence tell us about the perpetrator's capacity to parent. Patterns of behaviour associated with perpetrating family violence are commonly replicated in parenting practices. The priority, therefore, is to ...assess carefully risks to the child as well as the parenting practices of perpetrators in each case. ...The duty to consider parenting in family violence cases should be framed as a question of the child's best interests and needs not parental willingness.”

I endorse these comments as well as LEAF, Luke's Place and NAWL's recommended rewording of section 16(3)(j) as follows:

*(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*

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30 Practitioners should note, however, the need to modify questions in order to identify forms of family violence associated with particular social and cultural contexts (Indigenous, Immigration/refugee status, religion, disability, sexual identity, marital status, rural location). See chapters 19 to 22 of Linda C Neilson (2017) note 6.

31 The author is currently updating this e-book. A revised 2019 edition is anticipated shortly.

32 The wording avoids the need to include extensive guidance in the Bill on forms of child exposure (such as the guidance found in Australian legislation cited earlier). In any event the term ‘exposure’ is misleading. When a child lives with toxic levels of stress in the home as a result of family violence, the child is being harmed regardless of type or degree of ‘exposure’.

33 See references in note 10 as well as Danielle McLeod and Steve Flood (2018) [Coercive control: Impacts on children and young people in the family environment](#) (Cafcass); Samantha Jeffries (2016) [In the Best Interests of the Abuser: Coercive Control, Child Custody Proceedings and the “Expert” Assessments that Guide Judicial Determinations](#) 5(14) *Laws*.

*importance of protecting the physical, emotional and psychological safety, security and well-being of the spouse not engaging in 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.*

#### **6) Modify or remove the “Maximum Parenting Time” provision 16(6).**

As multiple briefs to the House of Commons stated, despite appellate case law to the contrary, family courts often interpret maximum contact or time provisions as presumptive. When the provision is interpreted in this way, courts tend to prioritize maximizing each parent’s time with the child over ensuring child and adult safety in family violence cases. Thus LEAF recommended removing the provision or **alternatively** changing the heading to *Best Interests and Parenting Time* and clarifying the intent of the provision by including the explanatory phrase “as is consistent with the child’s physical, emotional and psychological safety, security and well-being.” I endorse the LEAF recommendation.

#### **7) Minor changes to the family violence definition as follows**

While Canada would benefit from additional educational guidance in connection with family violence in the *Divorce Act*, Bill C-78 introduces positive changes that are critically important to Canadian families. In the interests of not delaying implementation, I recommend only minor changes to improve the definition.

Specifically:

**family violence** means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behavior or that causes that other family member to fear for their own safety or that of another person – and in the case of a child, the direct or indirect exposure to such conduct – and includes

(a) physical abuse, including forced confinement, but **excluding the use of force that is reasonable in the circumstances of the person subjected to family violence to protect themselves or another person**

(g) financial abuse, **such as failure to adhere to financial disclosure and support obligations**

**The person or spouse who engaged in family violence means the dominant aggressor who controlled and dominated the other spouse and the onset and pattern of family violence in the spousal relationship.**

**Explanation:** The current exclusion “excluding the use of reasonable force to protect themselves or another person” reinforces inadequate understandings of the dynamics of family violence in the legal system. As currently framed, the exclusion will create false attributions of responsibility for family violence when women (or other spouses) react with violence in order to resist continuation of family violence or to escape a violent relationship. The rewording is designed to correct the problem. Inclusion of the examples of financial abuse will help to discourage tactical litigation behaviors and delays that are producing family and child poverty.<sup>34</sup> The definition of ‘person or spouse who engaged in family violence’ is designed to correct inappropriate tendencies in the legal system to focus on incidents and to use a primary aggressor analysis to assess responsibility for family violence.<sup>35</sup>

#### **8) In addition to the recommended changes outlined above, minor modifications could help to reduce the gender imbalance in the Bill associated with the repetitive onus on parents subjected to family violence to prove exceptions to provisions on parenting, contact, relocation, maximum contact, cooperation, sharing of information and notice:**

<sup>34</sup> Perpetrators of family violence often delay or avoid compliance with financial disclosure and support obligations in order to harass, impoverish or regain control. For information on perpetrator litigation tactics, see perpetrator litigation tactics at 7.4 of Neilson (2017) note 6.

<sup>35</sup> For an explanation, review David Cropp (retired sergeant, Sacramento Police) [Domestic violence investigations: How to identify primary vs. Dominant aggression](#) on line accessed December 12, 2018; Linda C Neilson (2013) [Part 5](#) of *Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems* (Ottawa: Department of Justice); The Advocates for Human Rights, Stop Violence Against Women “[Determining the Predominant Aggressor](#)” for discussion of these concepts.

- In section 6.2(1) add under ‘unless the court is satisfied’: *that the child’s physical, emotional, and psychological safety, security and well-being necessitated relocation without notice and that the court in the province where the child is present is better suited to hear and determine the application.*
- In section 6.3(2) add under exceptional circumstances: *the seriousness of child or adult safety issues associated with family violence*
- In section 7.7(2) (a) insert after ‘unless the circumstances of the case’ ‘*such as those associated with vulnerability or power imbalances in family violence cases*’
- In section 16(3)(i) insert the qualification ‘*in cases that do not involve family violence*’
- In section 16(4)(g) insert after ‘the needs of the child’ ‘*and the steps have been successful in producing positive changes in behavior*’
- In section 16(5) insert after ‘past conduct of any person unless the conduct’ ‘*relates to family violence or parenting of a child and*’ before ‘is relevant to the exercise of their parenting time..’
- Insert at the beginning of section 16.2(2) before ‘unless a court orders otherwise’ ‘*Subject to the responsibility to make decisions in accordance with the best interests of the child and to ensure that decisions are consistent with the decision-making authority of the other spouse or person,*’
- At the beginning of section 16.4 before ‘Unless a court orders otherwise’ insert ‘*In cases that do not involve family violence,*’ and add at the end of that section: *In family violence cases, a person who has engaged in family violence and to whom parenting time or decision-making authority has been allocated is entitled to request and receive information about the child when the release of the information is consistent with the other adult and the child’s physical, emotional and psychological safety, security and well-being or in accordance with a spousal agreement or as ordered by a court.*
- Include in section 16.5 (4) after ‘including’ ‘*family violence and*’
- Modify section 16.8 (2)(b) the address of the new place of residence *except in family violence cases* and contact information of the person or child as the case may be
- Modify section 16.9 (2) (b) the address of the new place of residence *except in family violence cases* and contact information of the person or child as the case may be
- Add as a best interests of the child factor in section 16.92 (1) ‘*adult and child safety and well-being factors associated with avoiding family violence*’

**In conclusion**, while I strongly recommend that the Senate make changes to enhance this Bill in order to ensure that the family violence provisions operate as intended to promote family safety and well being, I also strongly support timely implementation of this Bill so therein lies a dilemma that our esteemed Senate must decide. In addition to legislation, extensive judicial and practitioner education on family violence, the effects on children and on parenting, the use of appropriate screening tools, and on risk and danger assessment processes will be critically important if this legislation is to be effective in promoting family and child safety.

#### **Summary of recommended changes:**

- Include in section 16(3) -best interests of child, factors to be considered-”*child rights as set out in the United Nations’ Convention on the Rights of the Child*”
- Remove the best interest of the child consideration in section 16(3)(c) or change to “*each spouse’s willingness to support the child’s relationship with the other spouse when the relationship is in the best interests of the child*”
- Insert in section 7.7 “*to acquire family violence education, to screen the case for the presence of family violence, and, unless the circumstances of the case make it inappropriate, to ensure that risk and lethality assessments are conducted when family violence is identified*”. Also include in section 7.8 a duty on the part of courts “*to ensure that family law cases are screened for the presence of family violence and, if family violence is present, unless the circumstances of the case are of such a*

*nature that it would be inappropriate to do so, to ensure that risk or lethality assessments have been or will be conducted”.*

- Include in section 16(4) in ‘factors relating to family violence’ “engaging in family violence in a child’s home is a form of child abuse”
- Revise section 16(3)(j): *(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; (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.*
- Remove section 16(6) or change the heading to *Best Interests and Parenting Time* and add “as is consistent with the child’s physical, emotional and psychological safety, security and well-being.”
- Make minor changes to the family violence definition: ‘family violence’ means...and includes (a) physical abuse, including forced confinement, but “excluding the use of force that is reasonable in the circumstances of the person subjected to family violence to protect themselves or another person” (g) financial abuse, “such as failure to adhere to financial disclosure and support obligations”.
- Add as part of the definition: “The person or spouse who engaged in family violence means the dominant aggressor who controlled and dominated the other spouse and the onset and pattern of family violence in the spousal relationship”
- In section 6.2(1) add under ‘unless the court is satisfied’: *that the child’s physical, emotional, and psychological safety, security and well being necessitated relocation without notice and that the court in the province where the child is present is better suited to hear and determine the application.*
- In section 6.3(2) add under exceptional circumstances: *serious child or adult safety issues associated with family violence*
- In section 7.7(2) (a) insert after ‘unless the circumstances of the case’ ‘such as those associated with vulnerability or power imbalances in family violence cases’
- In section 16(3)(i) insert the qualification ‘in cases that do not involve family violence’
- In section 16(4)(g) insert after ‘the needs of the child’ ‘and the steps have been successful in producing positive changes in behavior’
- In section 16(5) insert after ‘past conduct of any person unless the conduct’ ‘relates to family violence or parenting of a child and’ before ‘is relevant to the exercise’
- Insert at the beginning of section 16.2(2) before ‘unless a court orders otherwise’ ‘Subject to the responsibility to make decisions in accordance with the best interests of the child and to ensure that decisions are consistent with the decision-making authority of the other spouse or person,’
- At the beginning of section 16.4 before ‘Unless a court orders otherwise’ insert ‘In cases that do not involve family violence,’ and add at the end of that section. *In family violence cases, a person who has engaged in family violence and to whom parenting time or decision-making authority has been allocated is entitled to request and receive information about the child when the release of the information is consistent with the other adult and the child’s physical, emotional and psychological safety, security and well being or in accordance with a spousal agreement or as ordered by a court.*
- Include in section 16.5 (4) after ‘including’ ‘family violence and’
- Modify section 16.8 (2)(b) the address of the new place of residence *except in family violence cases* and contact information of the person or child as the case may be
- Modify section 16.9 (2) (b) the address of the new place of residence *except in family violence cases* and contact information of the person or child as the case may be
- Add as a best interests of the child factor in section 16.92 (1) ‘adult and child safety and well being factors associated with avoiding family violence’