POTENTIAL FAMILY LAW AMENDMENTS
CONSULTATION

Introduction

The current version of the *Divorce Act* was passed in 1986. The federal government has introduced Bill C-78, which introduces comprehensive amendments to the *Divorce Act.* Saskatchewan's Ministry of Justice is considering potential amendments to *The Children's Law Act, 1997* to align with the proposed federal changes. We would appreciate your feedback on the subject matters and questions below.

Changes in Terminology

- Bill C-78 replaces custody/access terminology to "parenting time" and "decision-making responsibilities", which are set out in "parenting orders." Orders for access in favour of non-spouses will be termed, "contact orders."
- Both British Columbia and Alberta already use this terminology, and Nova Scotia is considering a similar change.

Question 1: Describe any concerns you may have with amending *The Children's Law Act, 1997* to adopt the new terminology in the *Divorce Act*?

Preparing for Canada to Implement the 1996 Hague Convention

- Canada has signed the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children. Canada will not ratify the Convention until it is ready to implement the Convention.
- Jurisdiction under the Convention is based primarily on the habitual residence of the child(ren). Habitual residence is defined in case law. These provisions also specifically respond to situations where one parent has wrongfully removed or retained a child from the province or territory in which he/she was habitually resident. The Convention also permits a State to exercise jurisdiction where a child's habitual residence can not be determined, including refugee and displaced children, and the child is physically present in the State. The Convention permits a State to exercise jurisdictions in situations of urgency, but any orders made lapse once a court in the State of the child's habitual residence makes a new order for the protection of the child. Finally, the Convention provides for transfers of jurisdiction (as opposed to declining jurisdiction). ARTICLE 6
- In terms of recognition, the Convention requires that orders made by a contracting State shall be recognized by other contracting States by operation of law. However, recognition may be refused where: the State which made the order did not have

jurisdiction in accordance with the Convention, the order was made without the child having had an opportunity to be heard; without a party having had an opportunity to participate in the proceeding leading to the order; the order is manifestly contrary to public policy; or if the order is incompatible with a later order made by a non-contracting State where the child habitually resides. On request, orders requiring enforcement may be declared enforceable or register for the purposes of enforcement, in the requested contracting State. The Convention requires there to be a simple and rapid procedure for this. States use their own enforcement law/mechanisms to enforce the order.

- Bill C-78 includes amendments to implement the 1996 Hague Convention. New jurisdictional provisions relating to applications for parenting time and decision-making responsibilities are set out. Foreign divorces, and foreign orders modifying custody/access/parenting orders made under the Divorce Act would be capable of recognition, subject to specified grounds for refusing to recognize.
- These amendments only come into effect in a province/territory which implements the Hague Convention.
- Part III of the *CLA* sets out the jurisdiction of a Saskatchewan court to make custody, access, and related orders. The primary basis, set out in section 15(1)(a), is that the child is habitually resident in SK at the commencement of the application for an order. This aligns with the Convention, although the meaning of "habitual residence" is likely different. The secondary basis for jurisdiction set out in s. 15(1)(b) and (c) are different than the secondary basis set out in the Convention. For example, in situations where a child's habitual residence can not be determined, all of the criteria set out in s.15(1)(b) must be met in order for a SK court to have jurisdiction. However, pursuant to the Convention, all that would be required in order to establish the jurisdiction of the Saskatchewan court is evidence that the child is a refugee or has been displaced, or that the child's habitual residence cannot be determined, AND the child is physically in Saskatchewan. It is also worth noting that the Convention does not allow parties to consent to a State having jurisdiction when it would otherwise not have jurisdiction.
- Saskatchewan's *CLA* does not provide for transfers of jurisdiction. However, section 16 permits a SK court to decline to exercise its jurisdiction where it may be more appropriate that another court exercise jurisdiction. Our legislation does not require the other court to agree to assume jurisdiction as a condition of the SK court declining jurisdiction, nor does the decision have to be based on the best interests of the child *per se*. The provisions of the Convention would prevent a situation of no State exercising jurisdiction.. A SK court could determine it had general jurisdiction based on habitual residence of the child but decline to exercise it because another State's court may be more appropriate, without any contact with that court to determine whether it would accept jurisdiction. If the other court either determines it does not have jurisdiction under domestic law, or declines to exercise jurisdiction, this would leave a family with no remedy, or a much delayed remedy if it returns to

a SK court months later. It also is possible for court proceedings to be taking place in more than one jurisdiction, leading to uncertainty about which court order should prevail if both courts make orders.

Question 2: Should *The Children's Law Act* be amended to change jurisdictional, recognition and enforcement provisions to align with the *Divorce Act* changes and prepare Saskatchewan for future implement of the 1996 Hague Convention?

Best Interest Criteria

- The court is directed to only take into consideration the best interests of the child. Bill C-78 sets out a list of criteria to consider in determining the best interests.
- These factors are quite similar to the criteria set out in the CLA . However, the federal best interests criteria (BIC) includes any family violence and its impact on:
  a) the ability of the person who engaged in the violence to meet the needs of the child, and
  b) the appropriateness of making an order that would require the parents to cooperate.
- The BIC also includes the existence of any civil or criminal proceeding, order, condition or measure relevant to the safety, security and well-being of the child.
- The court must give primary consideration to the child's physical, emotional, and psychological safety, security, and well-being.

Question 3: What criteria should be included in determining the best interests of the child pursuant to *The Children's Law Act, 1997*?

Family Violence

- As well as the inclusion of family violence in the BIC criteria, Bill C-78sets out a comprehensive definition of "family violence" which, like the definition of "interpersonal violence set out SK's *Victims of Interpersonal Violence Act,* includes: physical abuse including forced confinement, sexual abuse, threats to bodily harm to a person of the kill or harm an animal or damage property, damage to property of harming or killing of an animal, harassment, failure to provide necessaries of life. The *Divorce Act* definition also includes psychological abuse and financial abuse.
- Subsection 16(4) of the *Divorce Act* gives further direction to the court when family violence is present. In determing the child's best interests, the court shall take into account:
  - the nature, seriousness and frequency of the family violence and when it occurred;

- whether there is a pattern of coercive and controlling behavior in relation to a family member (which is the type of family violence most likely to continue post separation and most likely to result in harm to family members);
- whether the violence is directed toward the child and/or whether the child is exposed to the violence;
- the physical, emotional and psycholodigcal harm or risk of harm to the child;
- any compromise to the safety of the child or other family member;
- whether the violence causes the child or any other family member to fear for their safety; and
- any steps takem by the person who engaged in family violence to prevent further violence.

- The court **must** consider if any civil protection order or proceeding, child protection order/proceeding/measure, or order/proceeding/recognizance/undertaking in relation to a criminal matter, is in effect. "Civil protection order" is also defined. The court may make enquiries of the parties or review information that is available.

Question 4: How should interpersonal violence be considered under *The Children's Law Act, 1997?* Should a definition be included, and if so, what should the definition include?

Question 5: Should *The Children's Law Act, 1997* be amended to require that the court consider any civil protection order or other proceedings? Should the existence of family violence be included in the best interests criteria?

Relocation

- The Bill defines "relocation" as a move that is likely to have a significant impact on the child's relationship with a parent who has parental responsibility or parenting time.
- A person who has parenting time or decision-making responsibility who intends to move (but not relocate) must notify in writing any other person who has parenting time or decision-making responsibility or a contact order in their favour. The notice must set out the expected move date and new place of residence including contact information. (A victim of interpersonal violence may apply for an exemption from this notice requirement.) If the person is relocating, he or she must give 60 days notice with the information, but must also set out how he or she anticipates the parenting time and decision-making responsibility or contact could be exercised after the relocation.
- The person moving may apply to court to authorize the relocation. The person with parenting time or decision making responsibility may also apply to the court within 30 days of receiving notice, to request that the relocation be prohibited.

- The court shall consider the BIC, the reasons for the relocation, the impact of the relocation on the child, the amount of time spent with the child and level of involvement of each person entitled to parenting time, whether notice as described above was provided, the reasonableness of the proposed new parenting plan, and whether the parties have complied with their obligations under family law legislation. Where the parties have substantially equal parenting time, the party proposing to relocate has the burden or proving the relocation is in the child's best interests. Where the child spends the majority of their time with the parent who intends to relocate, the objecting party has the burden of proving that the move is not in the child's best interests.
- Section 6(5)(b) of the CLA currently requires a court to "include in the order a condition requiring any person who has custody of a child and who intends to change the place of residence of that child to notify any person who is granted access to that child or any other person who has custody of that child..." Such notice is to be at least 30 days in advance of the move unless the court specifies otherwise. Otherwise, the CLA is silent regarding relocation.

Question 6: Should *The Children's Law Act, 1997* parallel the proposed *Divorce Act* provisions regarding relocation?

Question 7: Are there alternate provisions that could or should be made to address situations of relocation?

Other Potential Changes

Agreements

The Family Property Act expressly sets out the requirements for an Interspousal Contract. *The Children's Law Act, 1997*, while encouraging parties to enter into custody/access agreements, sets out no criteria regarding the content or formalization required. Unfortunately, many entities/organizations do not recognize a Custody/Access agreement which doesn't appear as formal as an Interspousal Agreement.

Question 8: Is clarity needed regarding what makes a custody or access agreement valid and binding?

Question 9: Should *The Children's Law Act, 1997* clarify that an agreement has the same force and effect as an order?

Question 10: Would having a process for registering an agreement with the court, similar to that done for support agreements, be useful?

Police Assist Clauses

Section 24(1) of the CLA allows a court to order that a sheriff, peace officer or other person locate, apprehend and deliver a child to a person in order to give effect to his/her rights of custody. This clause has been used both in situations where a child is being withheld currently from the person entitled to custody, AND undefined future possible situations. Section 24(2) as currently worded may also prevent a peace officer from entering a dwelling to apprehend a child if the court has only made an order pursuant to s. 24(1) and not pursuant to both subsections.

Question 11: Should police assist clauses be available to address future potential situations?

Other changes

Question 12: In your view, are there other provisions in the CLA which should be amended? If so, which provisions? How should they be changed?