Written Submission to the House of Commons'

Standing Committee on Justice and Human Rights

Regarding: 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 another Act

By: Robert G. Harvie, Q.C.

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A Barrister and Solicitor, and
Member of the Law Society of Alberta

410 – 6th Street South
Lethbridge, Alberta T1K2C9

Telephone: 403-328-8856
Fax: 403-380-4050
rgh@huckvale.ca
www.huckvale.ca

RE: Review and Response to Proposed Bill C-78

Recommendations:

Recommendation 1: That the proposed section 16.93 be removed or be amended to affirm the law as stated in Gordon v. Goertz, namely, that there be no "presumption" in favor of either party, regardless of their circumstances, in the event of an application for parenting relating to a "relocation" of a parent.

Recommendation 2: That consistent with the United Nations Convention on the Rights of the Child, ratified by Canada in 1991, and the right of the child's "views and preferences" to be considered in determining a child's best interests in proposed section 16 (3) (e), the Government engages with the Provinces to assure that proper resources are in fact available to assure that the child's views are made available to the court in a manner which does not cause additional harm or distress to the child, and specifically:

a) That any lawyer appointed to represent a child be REQUIRED, prior to any such appointment being made, to obtain training to facilitate their ability to provide such representation;

b) That resources be allocated to assure that the child has access to psychologists or other child development experts who can most properly facilitate the child's views being expressed in a manner which causes the child the least psychological or emotional distress;

Recommendation 3: That coincidental with the aspirational goals contemplated in Bill C-78, specifically, those provisions relating to encouraging reconciliation and/or resolution outside of the litigation process contemplated in proposed section 7.7 the Government consider undertaking a joint effort with the Provinces to engage in a review of family litigation processes with an aim to create a broad, nation-wide effort to **require parties to actually engage in a non-litigation dispute resolution process** – with or without counsel, with those processes to be made available to all parties, regardless of their means.

Recommendation 4: That the Government, in consort with the Provinces, require that all parties engaging in family litigation be required to attend counselling to facilitate their ability to make decisions in their own best interests and the interests of their child.

Introduction:

I am a lawyer practicing almost exclusively in the area of Family and Divorce Law in Lethbridge, Alberta since my call to the Alberta Bar in July of 1986. Over those 32 years, I have engaged in a significant amount of litigation, but have also devoted a reasonable proportion of my practice to mediation and collaborative law, and more recently, have become trained as an arbitrator.

In the early 2000's, I took training as a Collaborative Lawyer, and helped to found the Association of Collaborative Lawyers of Alberta (now Collaborative Divorce Alberta Association) and sat as their Board President.

Beyond my general practice, I am a former Bencher with the Law Society of Alberta, and in the context of that position, I was the Chair of their Family Law Advisory Committee and their Access to Justice Committee. I have also acted, and continue to act, as an Advisory Board Member to the National Self-Represented Litigants Project, working with Dr. Julie Macfarlane and others, through the University of Windsor in helping to find more efficient, fair and effective responses to the growing self-represented litigants phenomenon in Canada.

In summary, I have, I believe, a wealth of experience not only in family law, but also in advancing the effort to improve Access to Justice, which has been a focal point of my interest as I have seen first hand how harsh family litigation can be to participants and their children, and remain convinced that a better approach is possible than the current model presents.

It has been in this context that I reviewed Bill C-78 and have formed opinions as to the value of the proposed changes contained therein, and as to amendments which I believe might be worthy of consideration.

Positive Aspects and Note of Appreciation:

Firstly, I would like to express my appreciation for the invitation to make these representations. My practice has been modest, taking place in a smaller city in Southern Alberta, and to be invited to provide my input has been a welcomed surprise. The willingness of this Government to consider the input of a lawyer "in the trenches" is, I believe, both welcomed and valuable in considering the practical application of the proposed changes to the Divorce Act.

Prior to providing my concern or criticism of Bill C-78, I would be remiss if I did not express my support and appreciation for changes to the Divorce Act in the following respects:

a) I believe the aspirational goals outlined in sections 7.1 to 7.7 are valuable in sending a message to the parties and their counsel that encourages resolution of family disputes in the best interests of children and in a fashion that seeks to minimize conflict;

b) I believe the change in nomenclature from "custody and access orders to "parenting orders" is more consistent with the reality that fathers and mothers continue to be "parents" post-divorce and diminishes the perception of children as chattels or prizes to be "won" between parents going their separate ways. This change is apt to reduce the sense of "loss" to a non-primary parent, and is also apt to reinforce the sense of responsibility of the non-primary parent improving cooperation and reducing, potentially, non-compliance with support obligations;

c) I believe the statutory requirement for parents to provide written notice of changes in residence or relocation is helpful and appropriate;

d) I believe the continued focus on the "best interests of the child" is both appropriate and necessary and the expansion of specific considerations on the part of the court in determining the best interests of the child in section 16 are helpful to the courts, to lawyers and to the parties themselves.

e) Finally, the expansion of provisions to assist in review and enforcement of support orders is also very helpful, particularly as parties increasingly find themselves moving from their provinces of origin, making review and enforcement of support obligations often very difficult and complicated.

Recommendations:

Recommendation 1: ***That the proposed section 16.93 be removed or be amended to affirm the law as stated in Gordon v. Goertz[1], namely, that there be no "presumption" in favor of either party, regardless of their circumstances, in the event of an application for parenting relating to a "relocation" of a parent.***

The leading case relating to the ability of a parent to relocate the residence of a child post-divorce is the Supreme Court of Canada decision in Gordon v. Goertz. That decision was made in 1996, and has now stood for over 20 years, with, in my submission, marginal concerns on the part of the family bar. Most certainly, the determination of how to resolve a parenting dispute where one parent wishes to move the child to a location which will significantly reduce the relationship between that child and the other parent is difficult and fraught with competing interests.

However, I would suggest that in the Gordon decision, Madame Justice MacLachlin did a throughout and well-reasoned examination on the issue of "presumptions" in favor of a

[1] **Gordon v. Goertz**, (1996) CarswellSask 199, 1996 CarswellSask 199F, [1996] 2 S.C.R. 27 (S.C.C.)

primary parent, and, I would submit, in rejecting the notion of a presumption, and simplifying the question to “the best interests of the child”, came to the correct conclusion.

In rejecting the notion of presumption in favor of a primary parent, the learned Justice states:

> 28 The 1985 *Divorce Act* now instructs courts that the interests of the parents are no longer relevant in custody determinations. As noted previously, the child's best interests are not merely “paramount”, they are the *only* consideration. The revised Act also introduced statutory recognition of the principle that children generally benefit from contact with both parents. In the wake of these amendments, some judges began to question whether a presumption in favour of the custodial spouse should apply, and suggested that the only issue was whether the interests of the child would be better served by permitting the child to move with the custodial parent than by maintaining the status quo, where the move is contingent on the retention of custody, or transferring custody to the remaining parent: *Bennett v. Drouillard* (1988), 15 R.F.L. (3d) 353 (Ont. Fam. Ct.), at p. 358; *Appleby v. Appleby (De Martin)* (1989), 21 R.F.L. (3d) 307 (Ont. H.C.), at p. 315; *T. (K.A.) v. T. (J.)* (1989), 23 R.F.L. (3d) 214 (Ont. U.F.C.).

Further, at paragraph 44 of that decision, Madame Justice MacLachlin further states:

> 44 Fifthly and most importantly, a **presumption in favour of the custodial parent has the potential to impair the inquiry into the best interests of the child. This inquiry should not be undertaken with a mindset that defaults in favour of a preordained outcome absent persuasion to the contrary**. It may be that in most cases the opinion of the custodial parent will reflect the best interests of the child. In such cases, the presumption might do no harm. But Parliament did not entrust the court with the best interests of most children; it entrusted the court with the best interests of the particular child whose custody arrangements fall to be determined. Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the *Divorce Act* for a contextually sensitive inquiry into the needs, means, condition and other circumstances of “the child” whose best interests the court is charged with determining. “[G]eneral rules that do not admit of frequent exceptions can[not] evenly and fairly accommodate all of the varying circumstances that can present themselves”: *per* Morden A.J.C.O. in *Carter v. Brooks, supra*, at p. 62. The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected:

> 46 Finally, the proposed presumption in favour of the custodial parent may be

> criticized on the ground that it tends to shift the focus from the best interests of the child to the interests of the parents. As mentioned earlier, underlying much of the argument for the presumption is the suggestion that the custodial parent has the "right" to move where he or she pleases and should not be restricted in doing so by the desire of the access parent to maintain contact with the child. However, the *Divorce Act* does not speak of parental "rights": see *Young v. Young, supra*. The child's best interest must be found within the practical context of the reality of the parents' lives and circumstances, one aspect of which may involve relocation. But to begin from the premise that one parent has the *prima facie* right to take the child where he or she wishes may unduly deflect the focus from the child to its parents.
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> 47 For these reasons, I would reject the submission that there should be a presumption in favour of the custodial parent in applications to vary custody and access resulting from relocation of the custodial parent. The parent seeking the change bears the initial burden of demonstrating a material change of circumstances. Once that burden has been discharged, the judge must embark on a fresh inquiry in light of the change and all other relevant factors to determine the best interests of the child. There is neither need nor place to begin this inquiry with a general rule that one of the parties will be unsuccessful if he or she fails to satisfy a specified burden of proof.
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> 48 While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child and is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

With the greatest of respect, it is difficult to reconcile this well-reasoned decision, and in fact, the focus on the "best interests of the child" in proposed section 16(1), with the proposed section 16.93:

> ***Burden of proof — person who intends to relocate child***
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> ***16.93 (1)*** *If the parties to the proceeding substantially comply with an order, arbitral award, or agreement that provides that a child of the marriage spend substantially equal time in the care of each party, the party who intends to relocate the child has the burden of proving that the relocation would be in the best interests of the child.*
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> ***Burden of proof — person who objects to relocation***
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> ***(2)*** *If the parties to the proceeding substantially comply with an order, arbitral award or agreement that provides that a child of the marriage spends the vast majority of their time in the care of the party who intends to relocate the child, the*

party opposing the relocation has the burden of proving that the relocation would not be in the best interests of the child.

Burden of proof — other cases

(3) *In any other case, the parties to the proceeding have the burden of proving whether the relocation is in the best interests of the child.*

The creation of the shifting presumption in sections 16.93(1) and (2), it is submitted, is a step back away from "best interests" as the "only consideration" and returns to an examination of "fairness to the parent", which the S.C.C. in Gordon expressly warned against.

Further, it is unclear what "*substantially equal time*", or "*vast majority of time*" will be defined as, and if we learn anything in the family law process, we learn that ambiguity is the fountain of argument with motivated lawyers. Many days and many dollars will be spent by parties arguing about whether a 60/40 split in parenting time is "substantially equal" and whether a 65/35 split amounts to a "vast majority of time" with one parent. And, at the end, the court and the parties will be distracted from what should, in fact, be the prime and only concern being "the best interests of the child."

Accordingly, it is submitted that the proposed changes do not advance the interests of the child – which should be the focus, and should either be abandoned, or should be amended to follow the approach taken in Gordon, namely, that the court first determine that a "relocation" is contemplated , and then, if that threshold is me, the court would then embark on a fresh inquiry to consider what would be the best interests of the child, considering all relevant factors set out in section 16 and section 16.92.

Recommendation 2: ***That consistent with the United Nations Convention on the Rights of the Child, ratified by Canada in 1991, and the right of the child's "views and preferences" to be considered in determining a child's best interests in proposed section 16 (3) (e), the Government engages with the Provinces to assure that proper resources are in fact available to assure that the child's views are made available to the court in a manner which does not cause additional harm or distress to the child, and specifically:***

c) That any lawyer appointed to represent a child be REQUIRED, prior to any such appointment being made, to obtain appropriate training to facilitate their ability to provide such representation;

d) That resources be allocated to assure that the child has access to psychologists or other child development experts who can most properly facilitate the child's views being expressed in a manner which causes the child the least psychological or emotional distress;

The entitlement of children to be heard and to participate in the separation and/or divorce process has also been affirmed since Canada ratified the United Nations Convention on the Rights of the Child in 1991. The underlying consideration in that Convention and in its ratification in Canada is a concern for, and commitment to, allowing children more say in the legal decisions that affect their lives.

Article 12 of the Convention states that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 3 requires states to act in the best interests of children:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

In 1998 the Special Joint Committee on Child Custody and Access recommended that children in Canada have the opportunity to, "be heard when parenting decisions affecting them are being made" and to, "express their views about the separation or divorce to skilled professionals whose duty it would be to make those views known to any judge, assessor, or mediator making or facilitating a shared parenting determination".[2]

This obligation is recognized in the proposed section 16(3)(e) of the Divorce Act requiring the Court to consider:

> (e) *the child's views and preferences, by giving due weight to the child's age and maturity, unless they cannot be ascertained;*

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[2] Parliament of Canada, For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access (December 1998), available online at: http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=147&Lang=1&SourceId=36230

While there is no question that the child's preferences should be considered and that, in fact, there is an obligation to do so under the Convention, my experience relative to the actual application of that inquiry has been much less than positive, and in fact, has been that this inquiry if not attended to properly, will result in additional harm and trauma to the child.

In that regard, I would make the following observations:

- In the June 2016 Department of Justice Report, "JustFacts"[3] it was reported that at filing, court estimates suggest 64% to 74% of parties are not represented by legal counsel – as such, inviting parents to express the "wishes of the child" has always been, and in fact, is expanding as a concern relative to drawing children into litigation;

- Even where parties are represented by legal counsel, what is still missing is the infrastructure and funding necessary to assure that the child's views are obtained in a circumspect and appropriate fashion.

Between poorly trained experts, or more often of late, completely untrained legal counsel, and parents, children are being drawn into litigation even at very young ages, and essentially being asked, "which parent do you love more?"

The including of section 16(3)(e), without being supported by adequate and appropriate support, perpetuates an abuse upon children who want nothing more than to have a peaceful transition to a new parenting regime – without being asked to "pick a parent" – and then being in a position of facing the parent not picked for the balance of their lifetime.

Accordingly, while there is an obligation to assure the child has relevant input into the decision of what is in their best interests, it is absolutely necessary that a more functional support regime be put in place to facilitate that. Otherwise, a laudable goal will likely result in added, not reduced, trauma to children in divorce.

Recommendation 3: ***That coincidental with the aspirational goals contemplated in Bill C-78, specifically, those provisions relating to encouraging reconciliation and/or resolution outside of the litigation process contemplated in proposed section 7.7 the Government consider undertaking a joint effort with the Provinces to engage in a review of family litigation processes with an aim to create a broad, nation-wide effort to require parties to actually engage in a non-litigation dispute resolution process – with or without counsel, with those processes to be made available to all parties, regardless of their means.***

[3] Department of Justice, Research and Statistics Division, "**JustFacts**", June 2016, available online at: https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/jf-pf/srl-pnr.html

As referenced above, the inclusion of expanded duties on the part of the parties and their counsel contemplated in sections 7.1 to 7.7 are a positive effort to focusing the parties away from litigation as a primary resolution option.

However, without more, those goals are, at best, "aspirational". Without substance, support and consequence, they are unlikely to change the attitude and behavior of parties during high emotional trauma, or, for that matter, overly litigious counsel.

In 32 years of practice I have never had occasion for myself or any lawyer I am acquainted with, to be questioned relative to their compliance with s. 9 of the Divorce Act, and virtually every family lawyer I am acquainted with can name legal counsel who as a matter of course refuse to entertain mediation or collaborative process as a course of potential resolution of matters in issue.

Accordingly, I am most certain, that while the aspirational goals are laudatory, they are unlikely to have any impact on encouraging parties to reduce their vitriol and to consider more conciliatory efforts to resolve matters in issue.

For these reasons, I would strongly recommend that efforts be made to provide substantive support to reinforce those aspirations through working with Provinces to require non-litigation resolution process as a precursor to any litigation steps, with appropriate supports being made available to facilitate same.

Recommendation 4: That the Government, in consort with the Provinces, require that all parties engaging in family litigation be required to attend counselling to facilitate their ability to make decisions in their own best interests and the interests of their child, and that such assistance be made available to all parties, regardless of their means.

In 1967, psychiatrists Thomas Holmes and Richard Rahe examined medical records of their patients to consider how stressful events contributed to illness, reviewing a list of 43 life events, and scoring them relative to the "measure of stress" visited upon those individuals, creating the "Holmes and Rahe Stress Scale."[4] Their "stress scale" resulted in a determination that the top 4 events affecting an individual's welfare (in this order) were:

Death of a Spouse;
Divorce;
Marital Separation; and
Imprisonment.

Accordingly, it is apparent that almost all parties going through divorce are, in some

[4] McLeod, Saul (2010) "Stress and Life Events", on website, Simply Psychology: https://www.simplypsychology.org/SRRS.html

sense, in a diminished emotional and mental state resulting from what is actual trauma. As such, while we may create all of the aspirational goals we want – where the parties are essentially disabled, those aspirations for the most part will go unmet. The laudable goals expressed in the proposed Bill C-78 will go wanting as parties make decisions regarding resolution from a highly dysfunctional perspective.

As such, in my own practice, I make it a rule that my clients must seek out counselling at the outset of their file – regardless of how "well" they think they are – as my experience dictates (and, I would submit the larger experience of the courts, particularly with respect to self-represented litigants also dictates) that parties moving through a divorce are not doing so "as their highest selves" and would benefit greatly from assistance in healing over the trauma of divorce and separation.

Accordingly, I would strongly urge that the Government consider going beyond mere "aspirations" to actually provide support and assistance to parties going through family breakdowns, and mandate that the judicial process contains an aspect of counselling for participants to help make them more functional and less likely to waste court resources and their own resources in response to unresolved emotional difficulties related to the breakdown.

I am aware of the concerns of budgetary limitations, however, my experience is much court time, and expensive judicial resources are often wasted on seeking to "counsel" parties in divorce, and it would appear beneficial and likely more efficient to have less expensive and specially trained persons in the system to facilitate parties in dispute to be more capable or meeting their aspirations contained in the new section 7.1 to 7.6.

This report is respectfully submitted to the Committee, and again, I wish to express my appreciation to the Committee for being given the opportunity to express my thoughts on the proposed Bill C-78.

Robert G. Harvie, Q.C.

Huckvale LLP