Remarks to the Standing Committee on Bill C-78

Background: On November 22, 2018, Luke's Place testified as a witness before the Standing Committee on Bill C-78, An Act to amend the Divorce Act. Luke's Place, in collaboration with the National Association of Women and the Law (NAWL), prepared a Joint Brief and Discussion Paper. The Brief was endorsed by more than 40 Canadian organizations. These are remarks Luke's Place Legal Director, Pamela Cross, delivered to the Standing Committee.

Good afternoon. Thank you for this opportunity to appear before you and share some of my thoughts about Bill C-78.

I am the Legal Director of Luke's Place Support and Resource Centre in Durham Region, Ontario. We are named after Luke Schillings, a 3½ year old boy who was murdered by his father on his first unsupervised access visit, after his mother had sought but been unable to obtain an order for supervised access.

We deliver direct family court support services to women who are leaving abusive relationships. We also work on the provincial and national levels, doing research, training and law reform advocacy on the issue of violence against women and the law. Naturally, family laws at both the federal and provincial levels have a huge impact on the women we serve as well as their children, so we have been involved in advocacy in this area for many years.

We are delighted to see Bill C-78. As you all know, the *Divorce Act* has not been amended for more than 20 years – 20 years in which the realities and needs of families in Canada have changed considerably.

As my colleague has already noted, this Brief, prepared jointly by Luke's Place and NAWL, is the product of many wise minds. My comments will focus on some of the key issues not already noted by her.

The Brief reflects the expertise that comes from our work with women fleeing abuse who are engaged with legal systems as well as my own experience as a family law practitioner, perspectives that we think are critical for the government to consider when amending the *Divorce Act.*

First, I would like to congratulate the Minister on presenting a Bill that has many positive elements. We especially commend her for:

- Placing the well-being of children at the centre of the Bill
- Developing clear criteria for the best interests of the child test, which will assist unrepresented litigants, lawyers and the judiciary to understand what needs to be taken into account when determining arrangements for children
- The clear identification of family violence as an issue to be taken into account in divorce proceedings:

- The inclusion of coercive control, psychological, financial and animal abuse in the description is extremely important
- Recognizing that family violence exists whether or not the conduct constitutes a criminal offence is critical if women, who are the primary victims of abuse within the family, are to receive appropriate outcomes in divorce proceedings

➢ Not introducing a presumption in favour of shared parenting. Because of the unique circumstances of every family, any such presumption would not be in the best interests of children.

Of course, we also have some concerns about the Bill that I wish to raise with the Committee.

Best interests of the child

There are some elements of the best interests test that are problematic in situations of family violence.

1. Keeping mothers – who remain the primary parent in most separated families in Canada -- safe enhances the well-being and best interests of their children. We would like to see section 16 amended to clarify this. (Recommendation 4) Mothers need to be able to keep themselves and their children safe, without their behaviour being labelled "parental alienation."

2. Section 16(3)(c) requires each spouse to support a relationship between children and the other spouse, and 16(3)(i) requires spouses to communicate and cooperate with one another on matters related to the children.

   Our work with women has shown us, repeatedly, that these are not appropriate in cases of family violence. Indeed, communication and cooperation may be impossible where the abusive spouse engages in coercive and controlling behaviours. Such a requirement places women at risk of ongoing abuse – both physical and emotional – including lethal violence, and leaves children living in an environment of fear. Furthermore, it is our experience that parents who are able to cooperate and communicate effectively are not turning to the law to work out post-separation arrangements for their children. Court orders for joint or shared parenting are something of an oxymoron.

   It is for these reasons that we have recommended removal of these two clauses or, in the alternative, rewording of them to identify situations of family violence as exceptions. (Recommendation 4.1. and 4.2)

3. Provision 16.2(1) sets out the principle that a child should have as much time with each parent as is consistent with their best interests. This is highly problematic for mothers who have left an abusive spouse, who often have serious and legitimate concerns for the safety of their children when in the care of their father.

This is not appropriate or necessary and should be removed. The Bill would be strengthened by the addition of clauses setting out specifically that the court should not presume that any particular arrangement is in the child's best interests. (Recommendations 6.1. and 6.2)

Language

1. We are not convinced that changing the language of custody and access to parenting time and decision making responsibility will have the results the Minister is hoping for. (Recommendation 8)

2. The definition of decision-making responsibility at the beginning of the Bill is general and lacks detail. Coupled with clause 16.2(3), which says that a person with parenting time has "exclusive authority" to make day-to-day decisions about the child, the Bill creates a broad opening for an abusive spouse to intentionally interfere with the other spouse's ability to make decisions about the children. Children's lives do not neatly divide into big decisions and day to day decisions; a reality that can be easily manipulated by a spouse who seeks to maintain control over the other spouse rather than to ensure the children's best interests. We have seen this time and again in our work with women.

We suggest providing a detailed but non-exhaustive list of the kinds of decisions a parent with decision-making responsibility would have. We also recommend changing the provisions with respect to day to day decision making to replace the phrase "exclusive authority" with "may, subject to compliance with best interests of the child principles, make decisions" and adding a provision that those decisions shall not conflict with decisions made by the parent with decision-making responsibilities. (Recommendations 8 and 9)

Family dispute resolution

We do not oppose the use of FDR, even in cases involving family violence. We have worked with women who have found the process empowering and who have emerged with satisfactory outcomes.

However, we do not support the prioritizing of FDR over litigation and have concerns that the present wording in the Bill does this. Families have different needs, concerns and abilities and so should be made aware of ALL options for the resolution of their dispute.

We would like to see the duty on parties to resolve matters via FDR rephrased to include a specific reference to family violence. (Recommendation 14)

We also recommend rewording the duty on legal advisors with respect to FDR to require them to screen all clients for family violence and to discuss ALL available processes with their clients rather than encouraging them to use FDR.

Contact orders

We appreciate the inclusion of a provision to speak to non-parental time with children, an arrangement that is a reality for an increasing number of families in Canada where grandparents, in particular, play a significant role in the lives of their grandchildren.

However, we do not want to see this provision used by an abusive spouse who has limited time with his children because of safety concerns, who manipulates his parents into seeking contact as a back-door way to allow him to see his children.

We propose stronger language to require that the best interests of the child test be applied as well as other relevant factors when a contact order is being considered. (Recommendation 10)

Relocation

The clarity that the relocation provisions will provide is badly needed and much appreciated. Our concerns relate strictly to situations involving family violence.

The family violence exemption from the notice requirement needs to be clearer, and we have offered some wording that could assist with this. (Recommendation 11)

The burden of proof sections are ambiguous and confusing, particularly for unrepresented litigants, and think the language of "substantially comply" should be removed. However, we do NOT support the implementation of detailed time calculations in their place. Recommendation 13)

One last note on the Bill: While we did not comment on these provisions in our Brief, largely due to time and space constraints, we fully support those sections of the Bill that will make income disclosure and enforcement of support orders both easier and more efficient. Many women and children live in poverty post-divorce because the present systems are cumbersome and slow.

Finally, subject to any questions you may have for me, let me say that, while I hope the Committee will be persuaded by the recommendations in our Brief, I also hope this Bill is able to move quickly through the remaining stages so the *Divorce Act* can become a law that protects the best interests of children, that understands family violence, that reduces child poverty and that increases access to justice for families in Canada.