Presentation by Luke's Place Legal Director, Pamela Cross to the

Association of Family and Conciliation Courts Ontario

ANNUAL CONFERENCE
October 18, 2019

Is Canada's new *Divorce Act* good enough for women and children fleeing abuse**?**

Introduction

I am really happy to be here with you today to talk about Canada's amended *Divorce Act.* My presentation is focused on the impact of the revisions – both positive and negative -- on women who are leaving abusive relationships, as well as – of course – on their children.

It is based on the work I have been involved with for more than 30 years now, most recently primarily with Luke's Place, where I am the Legal Director.

Luke's Place provides a wide range of family court support services to women in Durham Region who are fleeing abusive relationships. We also work on the provincial and national levels, developing and delivering training, engaging in research, creating resources and leading and participating in law reform advocacy: all focused on family law and violence against women. Needless to say, we were very actively involved in responding to Bill C-78 as it made its way through the legislative process.

Some context

I think it is important to situate any discussions about the new *Divorce Act* in the broader context of the history of attempts to reform this legislation over the past 20+ years. No doubt, most of you are already familiar with this, so I am just going to take a minute to lay some historical groundwork.

The *Divorce Act*, in particular its provisions dealing with custody and access, have been of concern to feminists – frontline workers, advocates, lawyers and academics – for decades. Various attempts to revise the Act, many of them driven by so-called fathers' rights activists, have failed.

Since at least 1997, when the *Child Support Guidelines* were introduced by the federal government, "fathers' rights" organizations have advocated for a presumption of equal-parenting. Couched in unsupported, gender-neutral, best interests of the child claims in favour

of equal parenting, these organizations took the position that the Guidelines unfairly preferred mothers over fathers, empoverishing fathers with unreasonable child support requirements while not ensuring they had adequate time with their children. Despite the pleas for a shared parenting presumption in law, there can be little doubt that these organizations were largely driven by men who saw so-called shared parenting as a way to save money while also maintaining abusive power and control over their former partners.

For more than 20 years, there has been a concerted and organized attempt by these organizations to paint a picture of hapless, loving fathers being discriminated against and victimized by vindictive women seeking to take all their money and deny them a relationship with their children. They have claimed the family law system in Canada was biased against men and in favour of women, going so far as to accuse women of lying about family violence to demonize fathers and "win" custody battles. They have engaged in vigorous lobbying at the provincial, territorial and federal levels to have family law set out a legal presumption in favour of shared parenting. Their activities have also included high-profile PR stunts to gain attention for their point of view.

Despite the lack of any kind of meaningful evidence – their strategy has been called a "personal troubles discourse" – they have garnered public and political sympathy, and a number of private member's bills in both the House of Commons and the Senate since 1997 have attempted to introduce the concept of shared parenting into the *Divorce Act.* Fortunately, none of these attempts has been successful and, it appears, passage of Bill C-78, has put the threat of presumptions to rest for the foreseeable future.

Positive changes

The amended *Divorce Act* offers many long overdue substantive improvements for families in this country who turn to it to resolve disputes at the time of family breakdown.

I am sure I was not the only one in this room who was doing a bit of nail-biting as the Bill awaited a positive vote from the Senate before the government broke for its summer recess and to move into pre-election mode.

Before I talk about some of my concerns about the new *Act*, I want to fully acknowledge the revisions that will have an enormously positive impact on the women we serve at Luke's Place and others who are leaving abusive relationships.

I want to be explicit about my language. Men can be victims of family violence committed by their female partners and men and women can be victims of abuse by their same sex partner. However, the vast majority of victims of the most serious forms of family violence—coercive

controlling abuse – up to and including domestic homicide, are women, and the vast majority of those who engage in that kind of violence are men.

My language today, in particular my use of pronouns, reflects that reality, but is not meant to deny or be disrespectful of the fact that men and those who identify as non-gendered or non-binary can also be victims of violence within the family.

Enumerated best interests of the child test

Having an enumerated BIC test is such a big step forward. Of course, the court still retains discretion in terms of determining the weight to be attached to each criterion, but the list provides a really helpful starting point; perhaps one that will make it easier for parties to use FDR systems to forge their own parenting arrangements.

The provision requiring the court to give "primary consideration to the child's physical, emotional and psychological safety, security and well-being," which is a positive way to begin the list of required criteria, especially in the context of the family violence definition and factors to be considered.

Expansive definition of family violence

The inclusion of not only a definition of family violence, but an expansive one, embeds the reality of violence within the family in what legal advisors, judges and others must consider when making parenting determinations.

This definition sets out important principles:

- The conduct does not have to be criminal to be considered in family law cases.
- The most serious cases are those involving coercive, controlling violence. This is the insidious, sometimes almost invisible to outsiders abuse that many women are subjected to. It often continues after separation and can leave the survivor, even long after court proceedings are over, fearful for her safety. It can also be difficult to prove in the context of determining appropriate parenting arrangements.
- The inclusion of psychological and financial abuse in the list of examples of family violence
- The explicit inclusion of threats to kill or killing or harming of animals. I am sure many of you have heard, as have I, from clients whose partners have terrorized them by threatening to harm, or actually harming, beloved pets or, in the rural context, farm animals

Family violence factors to be considered

The list of family violence factors courts are to consider in parenting determinations is another positive change to the *Divorce Act,* in particular:

- The frequency and timing of the violence, which will allow the court to consider whether it is likely to continue
- Whether there is a pattern of coercive and controlling behaviour
- The involvement/exposure of children
- Any compromise to the safety of children or other family members
- Fear
- Whether the person who has engaged in the violent behaviour has taken any steps to change their behaviour

What's not so positive?

While the amended *Divorce Act* will, without question, materially improve the situation of women fleeing abuse (if they use the *Divorce Act* to resolve parenting issues), it is not perfect.

Each parent's willingness to support the development and maintenance of the child's relationship with the other parent

Often, a parent who has survived family violence has serious and legitimate concerns about the other parent's capacity to parent appropriately. This criterion in the BIC test is, in effect, a presumption that it is always better for children to have a close relationship with both parents. While this is the ideal, it may not be the reality where one parent has been abusive to the other. Even without this provision, the BIC test in its totality, provides ample opportunity for both parents to put forward evidence about their parenting capacity. Including it puts undue pressure on mothers with concerns about their children's safety when in the care of their abusive ex-partner

Ability and willingness of each parent to communicate and cooperate, especially with one another, on matters affecting the child

This provision obscures the realities of family violence and, albeit unintentionally, risk endangering women and children. The complexities and pervasiveness of the impacts of past violence, and indeed the ongoing occurrences of violence themselves, do not end simply because divorce proceedings begin. The evidence is clear that violence by husbands often

intensifies in the months following a separation, making them the most lethal for many abused women.

Consequently, requiring that mothers continue to communicate and cooperate with an abusive spouse is not only inappropriate, it is dangerous, and potentially lethal. Nonetheless, mothers who are legitimately incapable of or unwilling to cooperate with an abusive spouse are frowned upon by the courts and may even lose custody of the children to the abusive spouse. Therefore, cooperation and communication provisions need to be flexible and clearly indicate that they may not be appropriate and should not be required in cases where there has been any history of family violence.

Maximum parenting time provisions

I have to tell you that I hated this provision in the old *Divorce* Act and I still hate it. It is a presumption, and presumptions are inappropriate in family law, where decisions must be made based on the best interests of the child in the case before the court. Maxmum parenting time with each parent is not in the best interests of all children, including some children where one of their parents has been abusive to the other

Decision-making provisions

I am sure you are all familiar with the new language in the *Divorce Act* related to decision-making responsibilities. Briefly put, the parent with decision making responsibility has the authority to make the significant decisions about the child's life and well-being, including decisions related to health, education, culture, language, religion and spirituality and significant extra-curricular activities. This responsibility can be given to one parent or shared between the two parents.

The new legislation also says that whichever parent the child is with at a given time has the authority to make decisions during that time. While the intention is that those decisions be related to the situation at hand (eg. what breakfast cereal to have or whether or not to take a raincoat to school) as well as emergency situations that could arise, the language is not as clear as it could be.

This will lead to challenges for women who have left an abusive relationship. For instance, an abusive ex could decide not to take the child to a swimming lesson or not to give the child medication, claiming that, even though the mother has primary decision-making responsibility, he has the right to make the decisions while the child is with him.

It is unfortunate that the drafters of Bill C-78 did not see fit to include a specific list setting out in some detail what decisions the parent with decision-making responsibility can make, such as:

a) where the child will reside;
b) with whom the child will live and associate;
c) the child's education and participation in extracurricular activities, including the nature, extent and location;
d) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
e) giving, refusing or withdrawing consent to medical, dental and other health-related treatments, including mental health treatments, such as counselling or therapy, for the child;
f) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
g) giving, refusing or withdrawing consent for the child, if consent is required;
h) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
i) requesting and receiving from third parties health, education or other information respecting the child;
j) starting, defending, compromising or settling any proceeding relating to the child, and
k) identifying, advancing and protecting the child's legal and financial interests;
l) exercising any other responsibilities reasonably necessary to nurture the child's development.

It would also be helpful to have a clause clarifying that day-to-day decisions cannot conflict with decisions made by the parent with decision-making responsibility.

Language related to family dispute resolution

I have seen FDR work well in situations of family violence. I think it is an important option for families to have available to them. Some women leaving abusive relationships find these processes empowering and/or better suited to their needs. The flexibility of family dispute resolution processes serves some families extremely well.

However, the language of section 7.7(2), that lawyers must "encourage" the use of FDR, even with the moderating clause "unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so," favours FDR over litigation in a way that is not appropriate for situations involving family violence. FDR, especially in cases of coercive controlling violence can provide abusive partners with an opportunity to manipulate and continue being abusive.

The new *Divorce* Act would better serve these families if legal advisors were required to inform spouses about all processes available to them.

What's missing

Screening

Universal screening for family violence by all family law practitioners would be very helpful. For a number of reasons, not all survivors of family violence self-disclose. If the survivor doesn't tell and the practitioner doesn't ask, the presence of family violence may never be brought up. This will affect the legal advice provided by the lawyer, the process options considered by the client and may affect the safety – in both the short and long-term – of the woman and her children

It is unfortunate that the amended *Divorce Act* did not reference the value in all family law practitioners using a standardized and validated screening tool.

Education

Harmful myths and misconceptions about the realities and dynamics of family violence still influence family law processes and decisions. Without education on family violence and gender equality as well as on the amended *Divorce Act,* even the positive changes will have limited effectiveness.

Conclusion

Overall, I think the revisions to the *Divorce Act* are good for women fleeing abuse and their children. Their impact will be better felt if universal FV screening is introduced and if all players in the family law system have relevant educational opportunities.

It is to be hoped that, over time, provincial and territorial legislation, including Ontario's *Children's Law Reform Act*, will be revised to mirror the positive changes made to the *Divorce Act* so that those for whom the *DA* is not an option – unmarried parents, people who can't afford the costs of a divorce or do not want to proceed with one right away – can access the potentially more positive outcomes it offers.