

## **Bill C-223: *Keeping Children Safe Act***

**Brief By:** Luke's Place Support and Resource Centre

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## **Who we are**

[Luke's Place](#) is an award-winning non-profit organization solely devoted to improving the safety and experience of women and their children as they proceed through the family law process after leaving an abusive partner. Luke's Place is 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 was unsuccessful in obtaining, an order for supervised access.

Since 2003, Luke's Place has been delivering legal support services to women who are leaving relationships in which they were subjected to abuse. We work at the provincial and national levels, providing training and conducting research and law reform advocacy on the issue of violence against women and the law. The Ministry of the Attorney General (MAG) designed the Family Court Support Worker (FCSW) program based on our service delivery model. Luke's Place now trains FCSWs throughout Ontario and moderates their online resource hub. We also deliver FCSW services for the Durham Region. We also operate a provincial legal clinic where unrepresented women can access family law legal advice and court form drafting support from staff lawyers and a roster of volunteer lawyers from across Ontario. We also deliver public legal education workshops and create resources for women and those who support them. Our resources have been adapted for jurisdictions across Canada, including Yukon, British Columbia, New Brunswick, and Newfoundland and Labrador.

## **Introduction**

The intersection of family violence and family law is at the core of our organization's mandate. The purpose of this Brief is to advocate in favour of Bill C-223 and the inclusion of more provisions in the federal *Divorce Act* focused on identifying and addressing family violence in family court decisions.

As in all our work, Luke's Place brings an intersectional, gender-based analysis focused on the lived realities of women in all their diversity and gender-diverse people to the development of our brief. In this brief, we use gender-specific language to refer to those who are harmed by violence within the family and those who cause that harm. We believe it is important to acknowledge that, in Ontario and Canada, women in all their diversity and gender diverse people are overwhelmingly those who are subjected to abuse, and men are primarily those who engage in abusive behaviour. We also acknowledge the diversity of women and families in this country and the continued adverse impacts of colonization, misogyny, homophobia, transphobia and heteronormative culture.

## **Background and Context**

The extent and pervasiveness of violence against women within the family is well-established in Canada and around the world. In Canada, a woman is killed approximately every six days by her current or former partner. More than 4 in 10 women have experienced some form of intimate partner violence (IPV) in their lifetime.<sup>1</sup>

The risk of being subjected to violence and the impact of this violence is even more severe on some communities of women and girls, particularly those who are marginalized within Canadian society: Indigenous women and girls; older women; Black and racialized women; immigrant and refugee women; Two-Spirit, lesbian, gay, bisexual,

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<sup>1</sup> Stats Canada: <https://www150.statcan.gc.ca/n1/daily-quotidien/210426/dq210426b-eng.htm>

transgender, queer, intersex, and additional sexually and gender diverse (2SLGBTQI+) people; women with disabilities; and women living in northern, rural, and remote communities.

Separation is the time that is most dangerous for women and children. Reports from Ontario's Domestic Violence Death Review Committee routinely note that pending or recent separation is a high-risk factor for violence escalation. Separation is also when women enter the family court system.

IPV within the context of family law is central to our mandate at Luke's Place. We see the failure of this system every day with the hundreds of women we support each year. As the system exists now, it minimizes the severity of violence, re-traumatizes survivors, and places them and their children at risk of ongoing violence and harm.

### ***Past Legislative Amendments: Bill C-78***

Through the passage of Bill C-78 in 2019, significant changes were made to the *Divorce Act* that were directed in part at assisting family courts to better address family violence.<sup>2</sup> The amendments make it mandatory for a judge to consider family violence when making decisions about what parenting arrangements would be in the best interests of a child. These changes also introduced an expansive definition of "family violence" that goes beyond physical to include patterns of coercive control when deciding what parenting arrangements will be best for a child post-separation. These changes, along with various others, were an important step forward in the law.

At the time Bill C-78 was introduced, Luke's Place, in partnership with the National Association of Women and the Law (NAWL), made submissions on the importance of the proposed changes as well as the need for the Bill to go even further to ensure family violence and violence against women was properly recognized and addressed in family court.<sup>3</sup> Bill C-223 is a welcome step in that direction.

### **General Comments about Bill C-223**

Bill C-223 is an important advancement in addressing challenges within existing legislation for survivors of IPV. Luke's Place supports the Bill and its focus on improving the way in which family violence is identified and addressed in family court.

However, what is arguably more important than further legislative changes is training and education for **all** legal system professionals. To give meaningful effect to existing laws, let alone new ones, professionals giving legal advice and advocating in court, as well as those making decisions, must be able to identify IPV and understand its pervasive effects on survivors and their children. More changes to laws without this fundamental understanding and knowledge will do very little to actually change the experiences and outcomes of survivors in family court. While the passing of Keira's Law was an important step forward when it comes to judicial education, it is permissive, not mandatory, and accountability measures need to be put in place to ensure it is meaningfully implemented.

When it comes to the specific changes to the *Divorce Act* proposed by Bill C-223, some aspects are consistent with amendments Luke's Place and NAWL suggested back in 2018 in response to Bill C-78. Importantly, Bill C-223 targets some of the family-court barriers identified in the section above in the following ways:

- **Making it mandatory for all lawyers to screen their clients for family violence (s. 7.7(2.1)):** There is currently no explicit legislative direction for family law lawyers to screen all clients for IPV. This requirement

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<sup>2</sup> Bill C-78: <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-78/royal-assent>

<sup>3</sup> Brief by Luke's Place and National Association of Women and the Law: <https://lukesplace.ca/wp-content/uploads/2018/11/NAWL-Lukes-Place-Brief-on-C-78-final-for-submission-2.pdf>

only exists by law when it comes to family law arbitrators in Ontario.<sup>4</sup> As a result, not all lawyers screen their clients, instead relying on clients to self-disclose, even when the research tells us this does not always occur.<sup>5</sup>

- **Addressing the challenges of parental alienation allegations against survivors and the harms of existing legal remedies (s. 16(3.1) and (3.2), s. 16.1(4.1)):** Parental alienation allegations have been a challenging issue for many women leaving abusive partners. A common claim by an abusive partner is that the mother is intentionally alienating the children from him when, in fact, she is engaging in protective parenting because she is concerned for the children's safety. The allegation of parental alienation often overshadows the court's analysis of the parenting issues and detracts from focusing on the violence that has been perpetrated in the family. There needs to be clear guidance in the legislation to judges and lawyers about how to navigate competing claims of family violence and parental alienation. The legislation also needs to eliminate reliance on remedies designed to improve parent-child relationships that risk causing more harm.
- **Precluding decision-makers from relying on myths and stereotypes about the violence and the survivor when making decisions (s. 16(5)):** Legal system stakeholders continue to rely on harmful myths and stereotypes about IPV and survivors.<sup>6</sup> These myths and stereotypes serve to discredit many survivors in family court, with their experiences being ignored and their concerns being silenced. Adding a section to the *Divorce Act* that expressly dispels common myths and misconceptions about family violence will help guide legal system professionals and provide an accountability mechanism aimed at ensuring these myths do not continue to influence decision-making.
- **Preventing a court from finding that a mother's decision to seek safety by leaving the home to go to a shelter or another jurisdiction is in and of itself contrary to the best interests of the child (s. 16(5.1)):** Some of the women we support at Luke's Place are vilified in court for leaving the family home and seeking safety in a shelter or with family in another jurisdiction. This decision, in and of itself, is viewed as strategic and not child-focused. Courts must be expressly precluded from finding that this behaviour alone is presumptively not in a child's best interests.
- **Prohibiting reliance on a presumption of shared parenting in family court cases (s. 16(6)):** Family court culture prioritizes collaboration and compromise and encourages people to come together and find a mutually agreeable solution that involves as much contact with both parents as possible. Although Bill C-78 removed the language of "the maximum contact principle" and endeavoured to place more focus on the best interests of the child as opposed to the rights of the parents, we still see legal decisions that rely on the assumption that children should spend as much time as possible with both parents. This assumption is harmful and potentially dangerous in cases of family violence. Simply removing the language of "maximum contact" was not sufficient to remove this pervasive presumption in practice.
- **Modifying the language in the best interest of the child test to better address family violence (s. 16(3)(i), 16(3)(j)(i), 16(4)(g)):** Family violence should not be viewed as simply one factor among many to consider when making parenting orders. It has an impact on other factors that the court has to consider. Many of the proposed

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<sup>4</sup> O Reg 134/07, *Family Arbitration* at s. 4.

<sup>5</sup> [HELP toolkit: Identifying and Responding to Family Violence for Family Law Legal Advisers, \(2021\)](#)

<sup>6</sup> E.g. Koshan, J "Challenging Myths and Stereotypes in Domestic Violence Cases" (2023) 35 Can J. Fam L 33; Rise Women's Legal Centre, "Why Can't everyone just get along?" at pages 46-47(2021); Rise Women's Legal Centre, "[Are we Ready to Change? A Lawyer's Guide to Keeping Women and Children Safe in BC's Family Law System](#)" (2021)

changes to the language of aspects of the best interests of the child test are positive and will ensure that family violence and its impacts are considered more fully when making parenting decisions.

- **Highlighting the importance of the children's views and preferences in parenting decisions (s. 16.1(1.1)):** Children have a right to be heard in decisions that affect them. The proposed amendments strengthen this aspect of the *Divorce Act* and align it with Ontario's *Children's Law Reform Act*, which already legislates a child's right to be heard.

### **Recommendations for Change**

While we support the passage of Bill C-223, we have some recommendations to strengthen it and ensure it meets its objectives in a way that is feasible within the family law system. Our suggestions are set out in more detail below.

### **Recommendations**

#### **1. *Strengthen the language to make it clear that all legal advisers must screen for family violence and eliminate the duty to implement a safety plan (s. 7.1(2.1) and (2.2))***

This section could be strengthened by clarifying the language to make it clear that all legal advisers, including those who may be acting on behalf of the spouse who is causing the harm, have a duty to identify whether there is a history of family violence and assess the risk of ongoing violence.

We are concerned that s. 7.7(2.2), which requires that legal advisers take steps to “implement an appropriate plan” is overreaching when it comes to what should necessarily be within the purview of a family law service provider and lawyer. While they must understand what a safety plan is, advise on court orders that may form part of this plan, and know what services are available in their local community to support with safety planning, it is not their role to create a survivor's safety plan or to implement it. A safety plan belongs to the survivor and is implemented by the survivor. Legal advisers can assist survivors in connecting with community organizations that are better trained and equipped to support in creating a comprehensive safety plan.

#### ***Proposed wording changes:***

Duty to assess risk of violence

(2.1) It is the duty of every legal adviser who undertakes to act on a spouse's behalf in a divorce proceeding to identify whether there is a history of family violence and consider whether there are reasonable grounds to believe that there is a risk of family violence towards ~~the either~~ spouse or another family member that could adversely affect

(a) the safety of the spouse on whose behalf they act, or the other spouse, or the safety of a family member of the spouse; or

(b) the ability of the spouse to negotiate a fair agreement.

(2.2) ~~If there are reasonable grounds to believe that there is such a risk of family violence, it is the duty of the legal adviser to take steps to implement an appropriate plan, ensure that the family has a safety plan and inform the spouse of the support services known to the legal adviser. Where there is a risk of family violence, the legal adviser will inform the spouse on whose behalf they are undertaking to act of the support services known to them and advise on court orders that may form part of a safety plan to address the risk.~~

**2. Preserve consideration of each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse and make it mandatory to consider the impact of family violence on this factor. (s. 16(3)(c))**

This aspect of the best interests of the child test can be very problematic in situations of family violence. It often results in women feeling pressure to maintain a child's relationship with an abusive partner, even where they have significant concerns for the safety and well-being of the child while in the other parent's care. They put themselves and their children in harm's way so that this factor cannot be used against them in family court.

However, we understand that in situations that do not involve family violence, this may be an important factor to consider. Therefore, instead of eliminating this provision in its entirety, we propose making it conditional on a consideration of family violence. This is consistent with the proposed amendment to the language of s. 16(3)(i) as found in s. 4(2) of Bill C-223.

**Proposed wording change:**

s.16(3)(c). each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse, taking into consideration any evidence of family violence.

**3. Modify the language addressing parental alienation to provide a more nuanced approach to addressing the issue (s. 16(3.1) and (3.2))**

We strongly agree with the intent of Bill C-223 to address the misuse of parental alienation accusations against women to detract from their reports of family violence. However, we are concerned that the proposed wording of s. 16(3.1) and (3.2) will be challenging to implement in the family court. In assessing the best interests of the child, a court must be able to consider any allegations that a spouse is intentionally trying to undermine the other spouse's relationship with a child. This kind of behaviour takes place, and a court cannot be precluded from considering it. In fact, in many cases, it is the abusive partner who engages in this behaviour to continue exerting power and control over their former spouse.

We appreciate the exception to this prohibition as found in the new s. 16(3.2.), which allows a court to consider claims that a spouse is intentionally interfering in the other spouse's relationship with the child in cases where the spouse who is alleged to be interfering has perpetrated family violence. This is important. However, the wording of the third aspect of the exception as found in subsection (c), is unclear and may result in some confusion when it comes to implementation.

We propose a simplified approach to parental alienation, which we refer to as a form of parent-child contact problem. Our proposed amendment would require the court to consider allegations of family violence first before assessing any competing claims of parental alienation.<sup>7</sup> Where family violence is found, parental alienation claims will only be considered to the extent that it is a tactic used by the person found to be perpetrating the majority of the family violence. Moreover, our proposed wording precludes reports of family violence themselves from being used as evidence to support a claim for parental alienation. We believe this more nuanced approach appropriately addresses concerns about the misuse of parental alienation accusations against survivors while also not creating a blanket prohibition in all cases.

**Proposed wording changes:**

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<sup>7</sup> Joan Meier, "Getting Real About Abuse and Alienation: A Critique of Drozd and Olesen's Decision Tree" (2010) Journal of Child Custody (219-252): [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1767422](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1767422)

(3.1) Where a case involves both a claim of family violence and an allegation that a spouse has, or is likely to, through deliberate manipulation, persuade or encourage a child to become estranged from or resist contact with the other spouse, the court shall determine the allegations as follows:

- a. The claim(s) of family violence shall be determined first;
- b. Where family violence has been found, any allegation by the spouse who has been found to have perpetrated a majority of the family violence that the other spouse has engaged in conduct described in (3.1) shall not be considered, and;
- c. Where family violence has not been found, the claim of family violence itself by a spouse shall not be evidence of the conduct described in (3.1) above.

**4. Clarify the wording that addresses remedies for parental alienation and properly connect it to the alienation provisions (s. 16(4.1) and (4.2)).**

There is a lack of methodologically sound research on the efficacy of reunification therapy as a remedy in cases of parental alienation<sup>8</sup> and a growing number of concerns about their potential to cause more harm to survivors and the children.<sup>9</sup> If decisions are meant to be made based on the best interests of children, these harms must be recognized and the practices that cause these harms must be eliminated.

We are concerned with the broad way reunification therapy is currently defined in the proposed s. 16(4.2). This could result in courts not being able to order counselling in a variety of cases, not simply those connected to parental alienation and a formal reunification process. We also have concerns that the current wording of s. 16(4.1)(a) could be interpreted to mean that courts are precluded from any kind of order that reduces the primary parent's parenting time with a child. Some of the women we support at Luke's Place are the ones who have been alienated from their children by the other parent as part of a larger pattern of violence. These women often seek increased parenting time with the child through the family court, which would result in a restriction/reduction of the father's parenting time. The court should not be precluded from making this kind of order where it is found to be in the best interests of the child. Finally, we also think it is important to require that courts to consider a child's willingness to attend any form of reunification therapy before making the order. Forced participation in this type of process may cause harm to the child and may be counterproductive to the goal of repairing a parent-child relationship.

**Proposed wording changes:**

Not permitted in parenting order

(4.1) In cases involving conduct as described in (3.1) above, the court shall not, in the parenting order,

- (a) restrict significantly, restrict or eliminate the parenting time of a spouse with whom the child has a close connection for the sole purpose of improving a child's relationship with the other spouse; or

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<sup>8</sup> See Jean Mercer, "Are intensive parental alienation treatments effective and safe for children and adolescents?" (2010), *Journal of Child Custody*, 16:1, 67-113, DOI: 10.1080/15379418.2018.1557578.

<sup>9</sup> Jaffe P., Scott, K., Heslop, L., & Hooda, S. (2023). *Sober second thoughts about the benefits and limitations of reunification therapy*. Family Violence & Family Law Brief, 27. London, ON: Centre for Research and Education on Violence Against Women and Children, Western University. ISBN 978-1-988412-72-6

(b) require a child to attend reunification therapy or allow a spouse to consent to the child attending reunification therapy without seeking the consent of the other spouse and without considering the child's willingness to attend.

#### Definition of reunification therapy

(4.2) In subsection (4.1), reunification therapy is any specialized, intensive program with the sole purpose of ~~includes any intervention, program, treatment, service or practice whose purpose is to create,~~ creating, repairing or reestablishing a relationship between a child and a parent ~~from whom the child is estranged or~~ whom the child has rejected.

#### **5. Expand the list of myths and stereotypes that the court is restricted from relying on when considering the impact of family violence (s. 16(5))**

As set out above, myths and stereotypes continue to appear in family court and are often used to discredit survivors and their reports of violence. Courts should be expressly prohibited from relying on these myths and stereotypes when considering family violence and its impact on a family. We propose that an additional myth be added to prevent a court from assuming that the violence did not happen or was not that serious, where a survivor facilitates contact between the child and the abusive ex-partner following separation. There are many reasons why a survivor may facilitate this contact after separation, the least of which is fear of retaliation by the ex-partner and of being labelled as an alienator in family court. Additionally, we propose an amendment to s. 16(5)(e) to include other proceedings, not simply those under the Act and in criminal court. We know that survivors may also have been involved in other legal system proceedings in which statements about the violence were made, including child welfare, immigration and housing.

#### **Proposed wording changes:**

(e) in a proceeding, including a proceeding under this Act or in a criminal proceeding, there are inconsistent statements or conflicting evidence in relation to incidents of family violence;

(h) the spouse reporting family violence facilitated parenting time with the spouse after separation and/or communicated with the spouse for the purpose of facilitating parenting time after separation.

#### **6. Clarify the language for how children will be heard and participate in family court cases (s. 16.1(1.1) and (1.2))**

Children have a right to be heard in family law cases. The *Divorce Act* must signify the importance of this right. In Ontario, the governing parenting legislation has a similar provision to the one proposed in Bill C-223.<sup>10</sup> There are, however, a few notable differences that should be addressed through a minor modification to the language as proposed in the Bill. There should be no requirement for parental consent before a judge can decide to hear directly from a child. This requirement opens the possibility that parents will strategically withhold consent where they do not think the child's views and preferences align with their legal position. Additionally, there should be no obligation that this interview take place in the presence of an amicus curiae. This unduly complicates the process, requires the ready availability of an amicus, and overlooks the possibility that a child may already have a lawyer. Additionally, the inclusion of the option for a child to provide information in writing directly to the court is concerning, given that there is no way for the court to assess the circumstances surrounding the written document, including who actually wrote it and whether it was prepared in the presence of a parent. The procedural

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<sup>10</sup> *Children's Law Reform Act*, RSO 1990, c C.12, s. 64.

safeguards available for a judicial interview are simply not present when soliciting information from a child in writing.

**Proposed wording changes:**

Evidence from child

(1.1) Before making an order under subsection (1), in order to determine a child's views and preferences, the court may obtain information or evidence from the child directly ~~in writing or~~ by means of an interview with the child in camera ~~in the presence of an amicus curiae~~ if

- (a) it is in the best interests of the child to provide the information or evidence; and
- ~~(b) both spouses agree; and~~
- (c) the court is of the opinion that the safety and privacy of the child would not be compromised and there is no other appropriate way to obtain the information.

Disclosure

(1.2) Any information or evidence obtained under subsection (1.1) may be disclosed to the spouses only if the court is of the opinion that disclosure is in the best interests of the child.

Counsel

(1.3) The child is entitled to be advised by and to have their counsel, if any, present during the interview.

**7. Delay in passing provisions related to relocation until there is time for a more in-depth review of the interpretation and impact of the last legislative amendments**

A majority of relocation applications are brought by mothers, some of whom are seeking to relocate to escape family violence.<sup>11</sup> Under the existing legislative scheme, which came into effect in 2021, courts are already required to consider family violence when making relocation decisions. We have since seen some positive case law in favour of relocation in situations of family violence.<sup>12</sup> The highest court in Canada has stated that family violence is an important factor to be considered in relocation cases.<sup>13</sup> We do not believe that legislative changes are needed at this time without the opportunity to more fully examine the interpretation of existing provisions and application of case law.

We are also concerned about the possible negative impact on survivors of the change in wording to s. 16.92(2), which may result in courts making orders where the child resides primarily with their abusive ex-partner, even when the survivor decides not to relocate without the child. At this time, until more consideration is given to the possible negative effect of this change in practice, the existing s. 16.92(2) already precludes courts from considering whether a parent will move without the child or not relocate.

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<sup>11</sup> Bala et al, "A Study of Post-Separation/Divorce Parental Relocation" (2013) at 3.3.2: <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/spsdpr-edpads/p4.html#sec33>;

<sup>12</sup> E.g. *Barendregt v. Grebliunas*, 2022 SCC 22;

<sup>13</sup> *Ibid* at para 51.

We also do not think courts can and should be precluded from considering existing parenting arrangements when deciding whether to allow a child to relocate. A court must consider the child's current reality when determining whether the relocation will be in the best interests of the child.

#### **8. Remove the transitional provision (s. 9)**

The transitional provision included at the end of the Bill has the potential to be viewed as an open invitation to re-litigate any case where there was an allegation that a parent interfered in a child's relationship with another parent by stipulating that this will constitute a material change in circumstances sufficient to trigger a variation in a parenting order. This is a broad, sweeping provision that has the potential to be misused by abusive ex-partners to re-engage survivors in litigation and to bog down the court system with an influx of motions to change.

#### **Conclusion**

Luke's Place supports Bill C-223 and its aim at creating a family law system that is more responsive to issues of family violence. The safety and well-being of survivors and their children should be at the forefront of decision-making in family court. Though not the focus of Bill C-223, future legislative reform should strengthen provisions addressing other legal issues that impact survivors and their children, including provisions addressing support.

Key to the success of any legislative amendment is the need for consistent training and education for all legal system professionals. It is not enough to change the laws without also changing the attitudes and understanding of everyone who will be implementing these new laws. We urge the federal government to prioritize training and education initiatives and to hold the judiciary and governing bodies for lawyers accountable for offering extensive and regular training opportunities on issues of family violence and trauma.

It is only through the combination of legislative reform, legal education and increased availability of legal representation that we will meaningfully improve survivors' experiences and outcomes in family court.