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Legislative Update: Brief Overview of Bill 28 and Bill C-78

Prepared for: Legal Education Society of Alberta
52nd Annual Refresher: Family Law

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Legal Education
Society of Alberta

For presentation in:
Lake Louise, Alberta – May 5 - 7, 2019

LEGISLATIVE UPDATE: BRIEF OVERVIEW OF BILL 28 AND BILL C-78

A Brief Overview of Bill 28: The *Family Statutes Amendment Act*, 2018

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A Brief Overview of Bill 28, The Family Statutes Amendment Act, 2018

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November 2018

About the Bill

Alberta Bill 28 will amend two provincial statutes, the Family Law Act and the Matrimonial Property Act. The Family Law Act will be changed to allow children 18 and older to qualify for child support if they are unable to live independently of their parents by reason of illness or disability. The Matrimonial Property Act will be renamed as the Family Property Act and be changed to: extend the property rights currently enjoyed by married spouses to couples qualifying as adult interdependent partners; allow both spouses and adult interdependent partners to make agreements about the valuation date of property; and, clarify the division of pensions. Related amendments will be made to the Employment Pensions Act, the Estate Administration Act and the Law of Property Act, and the Married Women's Act, legislation aimed at eliminating the disabilities of married women under the common law, will be repealed.

The bill was tabled in the legislature for first reading on 21 November 2018. To become law, the bill must pass second reading, the committee stage and third reading, and then receive royal assent. If the bill becomes law, section 9 of the bill provides that the portions relating to property rights will come into force on 1 January 2020. The portions relating to child support will come into force on the date of royal assent.

There are a number of dates relevant to the passage of Bill 28. The last day of the fall sitting of the Legislative Assembly is 6 December 2018. No dates have yet been set for the beginning of the spring sitting; should government fail to issue a sessional calendar to the contrary, the first day will be 11 February 2019. As well, the next provincial election must occur at some point prior to 31 May 2019.

The Family Law Act

Section 46 of the Family Law Act defines the term "child" for the purposes of child support obligations and entitlements. A "child" is a person under the age of 18, the provincial age of majority, or a person who is between age 18 and age 22 who is unable to withdraw from their parents care because they are a full-time student. The federal Divorce Act defines a similar term

more broadly. Under that act, a child over the age of majority may be entitled to support indefinitely where the child is "unable, by reason of illness, disability or other cause" to withdraw from their parents' care.

As the Divorce Act only applies to married spouses, while the Family Law Act applies to all parents regardless of the nature of their relationships, the difference between the two statutes means that the children of unmarried parents are only entitled to receive child support after the age of 18 if they are in school full-time, not for any other reason, and that their entitlement ends at age 22, regardless of their status in school.

Under section 1 of Bill 28, section 46 of the Family Law Act will be amended to allow children age 18 and older to potentially qualify for child support where they are unable to withdraw from their parents' care because of:

a) full-time attendance at school;

b) illness or disability; or,

c) "other cause."

There will be no prescribed age at which an entitlement to child support terminates.

The effect of this amendment will be to bring the Family Law Act in line with the Divorce Act and give the children of unmarried parents an entitlement to child support equivalent to that enjoyed by the children of married parents.

The Matrimonial Property Act

The Matrimonial Property Act provides the rules under which property is divided between married spouses who have separated. It does not apply to people leaving unmarried relationships, regardless of the nature or duration of those relationships.

Under section 2 of Bill 28, the Matrimonial Property Act will be renamed the Family Property Act and the rules for the division of property between married persons will apply, with small differences, to persons qualifying as adult interdependent partners under the Adult Interdependent Relationships Act. Under section 3(1) of this act, couples in romantic relationships become "adult interdependent partners" in one of two ways:

a) by living with another person in a "relationship of interdependence" for at least three years, or for less time if the couple have had a child together; or,

b) by signing an adult interdependent partner agreement, regardless of how long the couple have lived together.

It is important to note that under section 3(2) of the Adult Interdependent Relationships Act, people who are blood or adoptive relatives can also become adult interdependent partners by signing an adult interdependent partner agreement. The amendments proposed in Bill 28 do not discriminate between adult interdependent partners who are in a romantic relationship and those who are related to each other.

Definitions

Section 1 of the Matrimonial Property Act will be amended to provide that the terms "adult interdependent partner" and "relationship of interdependence" are defined as they are under the Adult Interdependent Relationships Act.

The term "matrimonial home" is replaced with "family home," and defined as a property owned, leased or occupied by one or both spouses or adult interdependent partners.

Similar amendments will replace the word "matrimonial" with "family," as in "family property order" rather than "matrimonial property order," and add "or adult interdependent partner(s)" after the word "spouse(s)," in the definitions section and throughout the rest of the act.

Standing

A new section 5.1 will allow adult interdependent partners to apply for family property orders under conditions similar to those for married spouses under the existing section 5. They may apply if:

a) they have become *former* adult interdependent partners;

b) they are living separate and apart and a partner has or may transfer or gift property to a third party; or,

c) they are living separate and apart and a partner is dissipating property.

A new section 1.1 will define how adult interdependent partners become former adult interdependent partners:

a) by signing an agreement that evidences their intention to live separate and apart;

b) by living separate and apart for at least one year;

c) by a partner marrying a third party or entering into an adult interdependent partner agreement with a third party; or,

d) by obtaining a declaration of irreconcilability under section 83 of the Family Law Act.

A new section 3.1 will impose residency requirements on adult interdependent partners applying for family property orders similar to those imposed on married spouses under the existing section 3.

Time limits

The needlessly complex rules about the timing of applications for family property orders necessitated by the needlessly complex conditions precedent for such applications are extended to adult interdependent partners under a new section 6.1.

The running of the time limits for adult interdependent partners will be tied to "the date the applicant first knew, or in the circumstances ought to have known, that the applicant had become a former adult interdependent partner."

Exempted property

The provisions of section 7(2)(c) regarding the exemption of property acquired before marriage from division between spouses will be extended to also exempt property acquired before the beginning of adult interdependent partnerships, including for couples who subsequently marry. Three categories of property are therefore exempted:

a) property acquired before marriage, for couples who weren't in a "relationship of interdependence with each other" before they married;

b) property acquired before the "relationship of interdependence" began, for couples in such a relationship before they married; and,

c) property acquired before the "relationship of interdependence" began, for couples who became adult interdependent partners.

The term "relationship of interdependence" is defined in section 1(f) of the Adult Interdependent Relationships Act as

> … a relationship outside marriage in which any [two] persons
>
> (i) share one another's lives,
>
> (ii) are emotionally committed to one another, and
>
> (iii) function as an economic and domestic unit

and includes people in romantic interdependent relationships as well as people who are relatives by blood or adoption.

Valuation dates

Section 7(2) of the Matrimonial Property Act will be amended to allow people to make agreements about the valuation date of property, failing which the valuation date will be the date of trial.

The date for determining the market value of property exempted from division will be adjusted to reflect the changes to section 7(2)(c), in a new subsection (2.2):

a) for couples who weren't in a "relationship of interdependence with each other" before they married, the valuation date will be the date of marriage or the date the property was acquired, whichever is later;

b) for couples in relationship of interdependence before they married, the date will be the date the relationship of interdependence began or the date the property was acquired, whichever is later; and,

c) for couples who became adult interdependent partners, the date will be the date the relationship of interdependence began or the date the property was acquired, whichever is later.

Division of property

A number of subsections in sections 7 and 8 of the Matrimonial Property Act will be changed and duplicated to adapt the existing provisions to the circumstances of married couples living in relationships of interdependence before marriage and adult interdependent partners. None of the changes and duplications appear on first reading to alter the essential scheme of the act.

Death of party

Sections 11, 12, 13, 14 and 15 of the current act regarding the effect of death on applications for family property orders will be changed to also apply to adult interdependent relationships and surviving adult interdependent partners.

Family home

Part 2 of the act regarding the occupancy, possession and use of the family home will be changed to also apply to adult interdependent partners without altering the essential scheme of the act.

Regulatory powers

Section 32 of the Matrimonial Property Act will be changed to expand the power of government to issue regulations for the implementation of the bill and to "remedy any confusion, difficulty, inconsistency or impossibility" resulting from the transition between the two regimes.

Application of legislation

Important transitional rules are set out at sections 39 and 40 of the bill. The current legislation will continue to apply to married spouses, prior to 1 January 2020, if:

a) the spouses are divorced;

b) the spouses' marriage has been annulled;

c) the spouses have obtained a judicial separation; or,

d) the spouses have obtained a declaration of irreconcilability.

For other spouses, the act as amended will apply upon its coming into force.

Where litigation under the current act is underway prior to 1 January 2020, the spouses may agree to apply the amended act. The current act will otherwise continue to apply.

With respect to adult interdependent partners, the amended act will only apply to those becoming former adult interdependent partners on or after 1 January 2020.

Other Statutes

The Employment Pensions Plan Act

Under section 3 of Bill 28, this act will be changed so that Division 4, concerning the division of pensions on marriage breakdown and pursuant to matrimonial property orders, will apply to the breakdown of adult interdependent partnerships and family property orders. These changes will come into force on 1 January 2020.

The Estate Administration Act

Under section 4 of the bill, this act will be changed to require personal representatives to provide a personal representative's notice and applications for grants to adult interdependent partners as well as spouses. These changes will come into force on 1 January 2020.

The Law of Property Act

Under section 5 of the bill, the portions of this act relating to the court's power to stay proceedings for the partition and sale of the matrimonial home will be changed to the terminology proposed in the bill. These changes will come into force on 1 January 2020.

The Married Women's Act

Under section 8 of the bill, this legislation will be repealed on the date the Family Statutes Amendment Act, 2018 receives royal assent.

A Brief Overview of Bill C-78: An Act to Amend the *Divorce Act* and Related Legislation Part 1

Prepared for: Legal Education Society of Alberta
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A Brief Overview of Bill C-78, An Act to Amend the Divorce Act and Related Legislation

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June 2018

Part I: Amendments Other than Those Relating to Interjurisdictional Agreements and Treaties

About the bill

Bill C-78 was tabled for first reading in the House of Commons on Tuesday 22 May 2018 by the Minister of Justice. The bill addresses a variety of outstanding issues that have been accumulating over the past decade or so and represents the first truly significant amendment of the *Divorce Act* since the present act became law in 1985; the Child Support Guidelines, a regulation to the act, were introduced in 1997. The bill must yet endure second reading, the committee process, the report stage and third reading in the House of Commons before proceeding to the Senate to repeat the process. There is about a year left in the current legislative session within which the bill must pass both chambers or die on the order table.

It is possible, but unlikely, that the bill will become law in its current form. Proposals for amendment may be made by both the House and Senate committees and are probable during the report stage. At present, the bill represents the will of government but is subject to change; the final form of any resulting legislation is at present unknown. Although other attempts to amend the *Divorce Act* have been tabled in the past and failed to become law, it is nonetheless important for family law lawyers and judges dealing with family law cases to appreciate the amendments proposed in the present bill.

The bill proposes a number of significant reforms that will reshape family law in Canada. The bill owes much to the legislatures of Alberta and British Columbia. Alberta's *Family Law Act* became law in 2003, repealing the former *Domestic Relations Act*, and replacing language about custody and access with "parenting orders" that allowed the court to allocate or share the "powers, responsibilities and entitlements of guardianship" among guardians, allocate "parenting time" to guardians and allowed persons other than guardians to apply for "contact" with a child. This was the same approach to terminology taken in British Columbia's 2011 *Family Law Act*, which also added a lengthy list of factors, including family violence, to be considered in determining the "parenting arrangements" that are in the best interests of the child, a test to assist the court in determining relocation applications, and a number of admonitions designed to

encourage parties and counsel to pursue dispute resolution options other than litigation. The case developing in these provinces, British Columbia in particular, may be of assistance in interpreting whatever changes may eventually be made to the *Divorce Act*.

Definitions

The bill would repeal the definitions of *custody* and *access* in section 2(1) of the *Divorce Act*, add definitions of a number of important new terms and make a consequential amendment of the definitions of *corollary relief proceeding* and *divorce proceeding*:

a) a "contact order" is an order providing access to a child for a person other than a spouse under section 16.5(1);

b) "decision-making responsibility" is a power akin to guardianship, formerly subsumed in the broad interpretation given to custody under the *Divorce Act*;

c) "family dispute resolution process" means an out of court dispute resolution process, including negotiation, collaborative negotiation and mediation, all of which are identified in the definition, as well as arbitration;

d) "family justice services" means public or private services in relation to separation or divorce;

e) "family violence" is a broadly-defined term that bears a strong resemblance to the definition provided in British Columbia's *Family Law Act* and includes physical abuse, sexual abuse, threats of harm to persons, pets and property, harassment, psychological abuse and financial abuse;

f) "parenting order" is an order under section 16.1(1) allocating decision-making responsibility and parenting time;

g) "parenting time" is the allocation of access to a spouse and includes, under section 16.2(3), the exclusive authority to make day-to-day decisions affecting a child; and,

h) "relocation" means a change in the residence of a child or spouse that may have a "significant impact" on the child's relationship with a spouse or a person with contact.

"Parenting plan" is defined at section 16.6(2) as a written agreement concerning parenting time, decision-making responsibility and contact.

Jurisdiction

The bill would provide modest updates to the jurisdictional requirements currently set out in sections 3 (divorce), 4 (corollary relief) and 5 (variation of orders for corollary relief) and the

transfer of divorce, corollary relief and variation proceedings under section 6 where a child is most substantially connected to another province. The most significant updates are that:

a) the federal court will no longer have jurisdiction where spouses commence proceedings on the same date in different provinces, but will determine the court of the province that is the "most appropriate" to hear the matter; and,

b) the "most substantially connected" test is replaced by a determination of the province that is the child's "habitual residence."

New provisions will provide tests for jurisdiction where:

a) contact orders are sought, under section 6.1;

b) a child is wrongfully removed from a province, under section 6.2; and,

c) a child is not habitually resident in Canada, under section 6.3.

Duties of parties and counsel

The bill would impose a number of new duties on parties under sections 7.1, 7.2, 7.3 and 7.4:

a) persons with parenting time, decision-making responsibility or contact are required to exercise the right in a manner consistent with the best interests of the child;

b) parties are required to protect children from conflict arising from the *Divorce Act* proceeding;

c) parties are required to try to resolve a matter that could be the subject of a *Divorce Act* order through family dispute resolution processes; and,

d) parties must provide complete, accurate and up-to-date information, presumably financial information where support is at issue.

Lawyers would be required to inform of, and encourage parties to attempt, to resolve disputes through family dispute resolution processes and to inform parties of any family justice services that may help a party to resolve a dispute or comply with an order, under section 7.7(2).

Parties would be required to, as lawyers are a present, sign a certificate that they are aware of their duties under the act under section 7.6 when commencing or responding to a proceeding.

Duties of the court

The bill would require the court to consider certain other proceedings in corollary relief proceedings, under section 7.8(2):

a) any civil protection orders;

b) any child protection proceedings or orders; and,

c) and criminal proceedings, undertakings, recognizances or orders.

Collusion

The definition of *collusion* at section 11(4) is amended to exclude agreements between the parties relating to support, the division of property and parenting orders.

Best interests of the child and family violence

The best interests of the child will continue to be the only consideration applied by the court in making a parenting order or contact order, however the bill would provide a non-exhaustive list of factors to be taken into account in determining a child's best interests, of which the court would be required to "give primary consideration to the child's physical, emotional and psychological safety, security and well-being" under section 16(2). The enumerated factors are provided at section 16(3) and include:

a) the child's needs;

b) the child's relationship with the spouses, any siblings, grandparents and "any other person who plays an important role in the child's life;"

c) the spouses' willingness to support the child's relationship with the other spouse;

d) the child's views and preferences;

e) the child's cultural and linguistic heritage;

f) the ability of each person to care for and meet the needs of the child;

g) the ability of the spouses to communicate and cooperate with each other; and,

h) the presence of family violence.

As is the case with British Columbia's *Family Law Act*, a list of factors is provided at section 16(4) to assist the court in assessing the impact of family violence under section 16(3). The factors include:

a) the serious and frequency of the family violence;

b) whether there is a pattern of coercive and controlling behaviour;

c) the extent to which the family violence is directed to a child, or to which a child is exposed to family violence;

d) the risk of harm to a child; and,

e) any steps taken by the perpetrator to prevent further family violence and improve their ability to care for the child.

Parenting orders

"Parenting orders" may be made under section 16.1 on the request of:

a) a spouse; and,

b) with leave, non-spouses who are parents, stand in the place of a parent for a child or intend on standing on the place of a child.

Parenting orders may, under section 16.1(4), include orders:

a) allocating parenting time;

b) allocating or sharing decision-making responsibility, under section 16.3; and,

c) specify how communication is to occur between persons with parenting time,

as well as:

d) orders requiring the parties to attend family dispute resolution, under section 16.1(6);

e) orders requiring supervision, under section 16.1(8); and,

f) orders prohibiting the relocation of a child or the relocation of a child without consent, under section 16.1(7) and (9).

Parenting plans may be included in parenting orders under section 16.6(1).

The maximum contact principle is preserved at section 16.2(1). The right of spouses with access to information about the health, wellbeing and education of children is preserved at section 16.4.

Contact orders

Contact orders are excluded from the definition of "parenting orders."

A person other than a spouse may apply for a contact order with leave under section 16.5(3). Contact orders may include:

a) orders for visits and means of communication between the person and the child, under section 16.5(5);

b) orders prohibiting the removal of a child without consent, under section 16.5(8).

Parenting plans may be included in contact orders under section 16.6(1).

Changes of residence other than relocations

A "person," not a *spouse*, with parenting time or decision-making responsibility who intends to move, with or without a child, must give notice to other persons with parenting time, decision-making responsibility or contact under section 16.8(1). Under section 16.8(2), the notice must:

a) be in writing;

b) state the date of the move; and,

c) state the address of the new place of residence and any other contact information for the person and the child.

Relocation

A "person," not a *spouse*, with parenting time or decision-making responsibility who intends to relocate, with or without a child, must give at least 60 days' notice to other persons with parenting time, decision-making responsibility or contact under section 16.9(1). Under section 16.9(2), the notice must:

a) be in writing;

b) state the date of the proposed relocation;

c) state the address of the proposed new place of residence and any other contact information for the person and the child; and,

d) provide a proposal as to how parenting time, decision-making responsibility or contact may be exercised.

A person with parenting time or decision-making responsibilities receiving notice may object to a proposed relocation, and must do so by filing an application within 30 days after the day on which notice is received, under section 6.91(b)(i). The court may make orders prohibiting the relocation of a child under section 16.1(7).

A person with contact is not entitled to object to a proposed relocation.

The person delivering the notice may relocate on the date specified in the notice if:

a) the court authorizes the relocation; or,

b) no objection is filed and there is no order prohibiting relocation.

A list of factors is provided at section 16.92 to guide the court's decision to authorize a relocation, or not, including:

a) the reasons for the relocation;

b) the impact of the relocation on the child;

c) the time the child has with each person with parenting time;

d) whether the relocating party has complied with the notice requirement;

e) whether each party has complied with any obligations under "family law legislation," an award or an order; and,

f) the reasonableness of the proposal as to how parenting time, decision-making responsibility or contact may be exercised made by the relocating party.

Under section 16.93(2), the court may *not* consider whether the relocating party would relocate without the child.

Section 16.93 establishes a shifting burden of proof:

a) if the parties have "substantially equal" time with the child, the relocating party bears the burden of establishing that the relocation is in the best interests of the child;

b) if the relocating party has the child for "the vast majority of [the child's] time," the burden of establishing that the relocation is *not* in the best interests of the child lies on the objecting party; and,

c) in cases falling in the mid-range between these extremes, both parties have the burden of proof.

However, under section 16.94, the court may determine that both parties have the burden of proof if the authorizing order sought is an interim order.

Where the court authorizes a relocation, the court may make an order apportioning the cost of exercising parenting time between the parties, under section 16.95

Change of residence or relocation by persons with contact

Under section 16.96, a person with contact with a child is required to notify persons with parenting time or decision-making responsibility of their intention to change their place of residence. The notice must:

a) be in writing;

b) state the date of the move; and,

c) state the address of the new place of residence and any other contact information for the person,

but where the change may have a significant impact on the child's relationship with the person, the notice must also:

d) be delivered at least 60 days before the move; and,

e) provide a proposal as to how contact may be exercised.

Variation applications

The bill would amend section 17 to distinguish between the variation of support orders, parenting orders and contact orders. Although a change in circumstances affecting the child will continue to be the threshold test for variation applications:

a) the relocation of a child is deemed to constitute such a change, under section 17(5.2); but,

b) the prohibition of a proposed relocation does *not* constitute such a change, under section 17(5.3).

Interjurisdictional variation of support orders

The bill would repeal sections 17.1 (variation orders by affidavit where spouses live in different provinces, 18 (provisional orders) and 19 (confirmation orders) and replace those provisions with a new regime that bears some resemblance to the provincial *Interjurisdictional Support Orders Acts* currently in place throughout Canada.

Under section 18.1, If former spouses live in different provinces, either may apply to vary a support order or recalculate a child support order by sending the application to the province's designated authority, which in turn sends the application to the authority in the other spouse's province. The authority receiving the application must serve the other spouse and the application is heard in that province.

Section 19 provides a process where the applicant spouse lives outside of Canada in country to be specified by regulation. (The countries identified in the schedule attached to the regulations to the *Interjurisdictional Support Orders Acts* seem an obvious potential starting point.) The applicant sends the variation application to the country's designated authority which in turn sends the application to the authority in the other spouse's province. The authority receiving the application must serve the other spouse and the application is heard in that province.

Under section 19.1, a similar process is provided where the applicant spouse lives in Canada and the other spouse lives outside of Canada in country to be specified by regulation. The application is heard in the other country, and the decision made in that country may be registered in Canada under the law of the applicant spouse's province.

Legal effect of *Divorce Act* orders

The bill would amend section 20(2) of the act to provide that the decisions of child support recalculation services also have legal effect throughout Canada.

Recognition of foreign divorces

The will would amend section 22 of the act to replace the "ordinary residence" test with a determination of the spouse's "habitual residence" in the foreign jurisdiction for at least one year.

Recognition of foreign parenting orders and contact orders

The bill would add section 22.1 to provide that the courts of a province with a "sufficient connection" to a matter must recognize foreign orders varying or suspending parenting orders and contact orders. The court need not recognize the foreign variation order if:

a) the child is not "habitually resident" in the foreign jurisdiction;

b) the decision was made without the child being provided with the opportunity to be heard;

c) a person whose parenting time, decision-making responsibility or contact was impacted by the decision was not provided with the opportunity to be heard;

d) the decision is contrary to public policy in Canada; or,

e) the decision cannot be reconciled with a later decision qualifying for recognition.

Child support calculation services

New sections 25.01 and 25.1 would allow the federal government to work with provincial governments to create child support calculation and recalculation services intended to determine the amount of child support payable under the Guidelines through an administrative process. Provisions are made for the appeal of such orders by spouses disagreeing with the services' calculations and recalculations.

Part II of this overview will concern the portions of Bill C-78 touching on the Convention on the International recovery of Child Support and Other Forms of Family Maintenance, the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act.

A Brief Overview of Bill C-78: An Act to Amend the *Divorce Act* and Related Legislation Part 2

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A Brief Overview of Bill C-78, An Act to Amend the Divorce Act and Related Legislation

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Part 2: Amendments Relating to Interjurisdictional Agreements and Treaties

Convention on the International Recovery of Child Support and Other Forms of Family Maintenance

Also known as the Hague Child Support Convention, this 2007 multilateral agreement is intended to "improve cooperation among States for the international recovery of child support and other forms of family maintenance," and establishes a procedure under which a person may:

a) apply for a support order *de novo* in another signatory state, referred to in the convention as "Contracting States;" and,

b) secure the recognition and enforcement of support orders made by the courts of one signatory state in other signatory states.

Under article 2, the convention applies to spousal support orders, in limited circumstances, and to child support orders "arising from a parent-child relationship" respecting children under the age of 21.

The bill would add a number of new provisions to the *Divorce Act* to provide the legislative framework necessary to implement the Hague Child Support Convention.

The bill would give the convention the force of law in Canada under section 28.1(1), and the convention would prevail in the event of any inconsistencies between it and any federal legislation under subsection (2).

Payees, including potential payees, residing in a signatory state may seek:

a) a support order *de novo*, under section 28.5(2)(a);

b) an order varying a support order, under section 28.5(2)(a);

c) the recognition of a foreign support order that has the effect of varying domestic child support order, under section 28.4; and,

d) the calculation or recalculation of child support, if a child support service exists in the payor's province of habitual residence, under section 28.5(2)(b),

by applying to the central authority in the province in which the payor is habitually resident. Payees may also apply directly to the courts of the payor's province of habitual residence for the recognition and enforcement of foreign support orders under section 29.3.

Payors residing in a signatory state may seek:

a) an order varying a support order, under section 29.1(2)(a);

b) the calculation or recalculation of child support, if a child support service exists in the payee's province of habitual residence, under section 29.1(2)(b); and,

c) the recognition of a foreign order that has the effect of suspending or limiting the enforcement of domestic child support order, under section 29,

by applying to the central authority in the province in which the payee is habitually resident. Payors may also apply directly to the courts of the payee's province of habitual residence for the recognition and enforcement of foreign orders that have the effect of suspending or limiting the enforcement of a domestic child support order under section 29.4.

Support orders that are made by the courts of signatory states and have been recognized by a domestic court will have legal effect throughout Canada.

Convention on Jurisdiction, Applicable Law Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children

This succinctly-titled convention, also known as the Hague Convention on Parental Responsibility and Protection of Children, was made in 1996 and establishes procedures:

a) to determine the signatory state which has jurisdiction "to take measures" to protect a child or the child's property;

b) to determine the law to be applied by signatory states with jurisdiction; and,

c) for the recognition and enforcement of "measures of protection" among signatory states.

Under article 3, *measures* is given an expansive meaning that includes determining a parent's right to:

a) exercise parental responsibilities in respect of a child;

b) custody of a child, including the right to decide the child's place of residence;

c) guardianship of a child; and,

d) manage a child's property.

Under article 2, the convention applies to children under the age of 19.

The bill would add a number of new provisions to the *Divorce Act* necessary to address the Hague Convention on Parental Responsibility and Protection of Children.

The bill would give the convention the force of law in Canada under section 30.1(1), subject to certain provincial limitations expressed at section 30.3, and the convention would prevail in the event of any inconsistencies between it and any federal legislation under subsection (2).

The bill would supplement the jurisdictional rules in sections 4, 5, 6 and 6.1 of an amended *Divorce Act* with respect to applications for parenting orders under section 16.1 of the act, contact orders under section 16.5 and variation orders under section 17 as follows:

a) the courts of a province will *not* have jurisdiction where a child is habitually resident in a signatory state, under section 30.4, unless

    i. the child is present in the province and the child is a refugee or a displaced person under article 6 of the convention, under section 30.6,

    ii. the court would have jurisdiction under section 3 of the *Divorce Act* and at least one spouse has parental responsibility in respect of the child, under section 30.7(1)(a),

    iii. the court would have jurisdiction under section 3 and the spouses and anyone else with parental responsibility in respect of the child accept the jurisdiction of the court, under section 30.7(1)(b),

    iv. the court would have jurisdiction under section 3 and the court believes it is in the best interest of the child to take jurisdiction, under section 30.7(1)(c),

    v. there is an agreement between the court and the signatory state that the court will have jurisdiction pursuant to articles 8 or 9 of the convention, under section 30.9, or

vi. the case is urgent;

b) the courts of a province will have jurisdiction where the child has been wrongfully removed to that province and the child has become habitually resident in the province pursuant to article 7(2) of the convention, under section 30.5; and,

c) the courts of a province *may decline* to exercise jurisdiction where there is an agreement between the court and the signatory state that the signatory state will have jurisdiction pursuant to articles 8 or 9 of the convention, under section 30.8.

Under section 31.1, a "measure" taken by a signatory state that has the effect of varying a domestic parenting order or a contact order is deemed to be a variation order under section 17 of the act, subject to the discretion of the court on application under section 31.2(1), and may be enforced as a domestic order under s. 31.3.

Judicial decisions to recognize or to *not* recognize a "measure" have effect throughout Canada under section 31.2(2) and (3).

Family Orders and Agreements Enforcement Assistance Act

The *Family Orders and Agreements Enforcement Assistance Act* is a federal statute intended to assist in the enforcement of support orders, custody orders and access orders by allowing individuals and provincial agencies access to federal data, allowing federal funds owed to payors and other debtors to be garnisheed, and allowing federal licences to be suspended on the application of provincial agencies.

The bill would amend the definitions at section 2 of the FOAEAA to accord with the new language on parenting orders and contact orders proposed for the *Divorce Act*.

The more important other amendments proposed to the FOAEAA are these:

a) provincial child support services, the designated authorities referenced in the interjurisdictional support order portions of the *Divorce Act*, and the central authorities referenced in the Hague Child Support Convention portions of the act will be included among the agencies able to obtain information under the act;

b) federal data may be accessed when a support order *de novo* or a variation order are sought, not only as an enforcement measure when an order has been obtained;

c) provincial child support services may seek federal data when recalculating a child support order;

d) the definition of "order" for the garnishment provisions of the act is amended to include

i. agreements for the payment of support,

ii. orders and agreements for the payment of expenses related to the exercise of parenting time and contact, and

iii. orders for the payment of expenses related to the denial of or failure to exercise parenting time and contact;

and,

e) the definition of "support order" for the licence suspension provisions of the act is amended to include agreements for the payment of support;

Part I of this overview concerned the key portions of Bill C-78 amending the Divorce Act with respect to terminology, the duties of spouses and counsel, the best interests of children, parenting orders and contact orders, the relocation of spouses and children, the inter-jurisdictional variation of support orders and child support calculation services.