

Out-of-court dispute resolution focus of *Divorce Act* overhaul

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In the most significant overhaul of the *Divorce Act* since its enactment in 1985, the federal government has proposed significant changes to the way family law disputes are resolved in Canada.

Many of the changes proposed were recommended by experts in the field years ago. Others reflect changes in public values regarding how these disputes should be resolved.

The Family Dispute Resolution Institute of Ontario (FDRIIO) applauds these changes.

While Bill C-78 is exhaustive (191 pages) and will require careful study, the following are some of its highlights:

1. The terms "custody" and "access" will be removed from the legislation. Instead, courts will be given power to make parenting orders for "the exercise of parenting time or decision-making responsibility." Provincial legislation that also addresses these issues will have to be amended in the same fashion.
2. When making a parenting order, a court shall only take into consideration the best interests of the child. The act sets out a lengthy non-exhaustive list of factors that the court must consider in determining a child's "best interests." The proposed amendments are progressive in their definition of family violence and also in the clarity to the profession around the significance of domestic violence when parenting plans are being crafted.
3. A person who has parenting time or decision-making responsibility in respect of a child who intends to relocate must give the other party at least 60 days written notice of his or her relocation plan. Where the child spends the vast majority of its time in the care of the person who intends



Lorne H. Wolfson
Partner, Family Law

PHONE
416 777 5414

EMAIL
lwolfson@torkinmanes.com

A senior member of the Family Law bar and a senior partner in our Family Law Group, Lorne's practice includes all aspects of family law, including divorce, custody and access, property, support, and domestic contracts. He conducts litigation before every level of court in Ontario, as well as providing mediation and arbitration services.

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

4. To the extent that it is appropriate to do so, parties will be required to try to resolve disputes through a family dispute resolution process (which includes negotiation, mediation and collaborative law).
5. Legal advisors will have a new duty to:
 - a. Encourage clients to attempt to resolve disputes through a family dispute resolution process; and
 - b. Inform clients of the family justice services that may assist the client in resolving disputes and in complying with court orders.
6. Subject to provincial law, a court order may direct the parties to attend a family dispute resolution process.

It will likely take years before we can fully assess the impact of these reforms. Some of the language is vague and will ultimately require either further amendment or interpretation by the courts. We don't know if judges will actually use their new powers to direct parties to use dispute resolution services. It also remains to be seen if lawyers will take seriously their new duty to encourage parties to utilize dispute resolution services before considering court.

In order for this new emphasis on diverting parties away from the courts is to be successful, the divorcing public must be better educated as to the dispute resolution alternatives and dispute resolution services (both public and private) will need to be made available across the country where they currently are not.

That will be the challenge for governments and private service providers as we go forward.