Family Law Reform in Ontario: increasing safety for women and children and bringing more consistency between the *Children's Law Reform Act* and the *Divorce Act*

Submission by the Barbra Schlifer Commemorative Clinic

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Introduction

We are pleased to provide the following recommendations for amending the *Children's Law Reform Act*, to assist women who are accessing Ontario's family law legal system for safe and fair resolutions following family breakdown. We believe the following recommendations will increase safety for women and children. In addition, we believe these recommendations will bring more clarity and consistency to the family law system overall for all women, regardless of whether they are married or seeking a divorce.

Background on Barbra Schlifer Commemorative Clinic

The Barbra Schlifer Commemorative Clinic ("the Clinic") is the only clinic of its kind in Canada, providing specialized services for women who have experienced violence. The Clinic has extensive experience and expertise serving and representing women who have experienced intimate partner or "domestic" violence. The Clinic's expertise also includes a vigorous history of advocacy on all issues of violence against women. The Clinic is located in Toronto, and since its founding in 1985, the Clinic has assisted more than 70,000 women who have experienced gender-based violence. In 2019, the Clinic assisted 9,000 women, with 3,300 of those women receiving access to their legal rights through a Clinic lawyer.

The Clinic's Interest in Family Law Reform in Ontario

The Clinic performs a substantial amount of legal work in the area of family law, at our offices and in three Family Courts in the Toronto area, assisting women who have survived and continue to survive violence. We assist women with such family law issues as applying for a restraining order, obtaining an order regarding child custody and access, and getting child support. Often these issues are associated with multiple legal issues such as immigration and criminal law, as well as housing and social support challenges.

Changes to the federal *Divorce Act*[1], scheduled to come into force on July 1, 2020, have made important improvements to the law and will have a significant impact on Ontario women seeking a divorce, especially from an abusive spouse.

Ontario's *Children's Law Reform Act* (*CLRA*)[2] applies to unmarried couples who decide to separate, as well as to couples who are legally married but have decided to separate without obtaining a divorce for a variety of reasons. In order for women who are not married, or will not seek a divorce when they separate, to benefit from these advances in family law under the *Divorce Act,* the *CLRA* should be similarly updated.

In addition, increasing correspondence between the federal and provincial family law statutes will reduce complication, confusion and potential lengthy litigation about family law principles, and will lead to outcomes without differences resulting from the marital status of the partners.

Noted below are some of the areas of the *CLRA* which the Clinic believes should be amended.

We believe our recommendations will lead to increased safety for women and children, especially in cases involving family violence. It is important to note, however, that many burdens, inequities and violence against women and children are related to the high rates of poverty among women following separation. While our recommendations here are limited to statutory amendments, we emphasize that other measures including increased funding for Legal Aid, shelter services, affordable housing and other specialised services for survivors of abuse remain an important factor in increasing the safety and wellbeing of women and children in Ontario.

Context: Intimate Partner Violence in Canada

Violence by men against their female intimate partners is a persistent tragedy in Canada.

There were over 99,000 victims of intimate partner violence aged 15 to 80 in Canada in 2018, and the majority, almost 8 in 10 victims (79%), were women.[3] The risk of intimate partner violence increases at the time of separation[4], and the risk of death is higher for women who were never legally married to their abusive partner. Between 2007 and

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[1] R.S.C., 1985, c. 3 (2nd Supp.)
[2] R.S.O. 1990, CHAPTER C.12
[3] Juristat Article – Family Violence in Canada: A Statistical Profile, 2018. https://www150.statcan.gc.ca/n1/en/pub/85-002-x/2019001/article/00018-eng.pdf?st=v5quOLDp
[4] Canadian Women's Foundation Factsheet https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm

2011, women were four times more likely to be killed by a common-law partner than by a legally married spouse.[5]

It is also important to note that in Canada, intimate relationships between unmarried partners are becoming increasingly prevalent, while married couples are declining as a proportion of all families in Canada (Statistics Canada 2012).[6] Rates of femicide were significantly higher in unmarried couples as compared to couples in legal marriages (13 victims per million versus 3 victims per million).[7]

Abuse and violence between partners are often present in the family law process. It is known that partner abuse often begins, continues and escalates after a relationship ends[8], and non-married women leaving abusive partners are at even higher risk of partner violence than women who are married and seeking a divorce.

The vulnerability of women leaving a relationship is increased by the high prevalence of poverty among women following separation,[9] which can contribute to precarious housing, employment, and health.[10]

It is imperative for Family Courts and the family law process to understand this violence and prevent it from continuing to impact women and children. Recent changes to the *Divorce Act* are positive steps in this direction. It is vitally important that Ontario women and children whose lives will be determined under Ontario legislation are equally protected.

Recommendations for family law reform in Ontario

1. Family Violence is Predominantly Violence Against Women: the statutory definition of "family violence"

[5] Family Violence in Canada: A Statistical Profile, 2011. https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm

[6] Family Violence in Canada: A Statistical Profile, 2011. https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm

[7] Family Violence in Canada: A Statistical Profile, 2011. https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm

[8] Statistics Canada – *Family Violence in Canada: A Statistical Profile 2011: Section 3: Intimate Partner Violence.* Retrieved from https://www150.statcan.gc.ca/n1/pub/85-002-x/2013001/article/11805/11805-3-eng.htm

[9] https://www.canadianwomen.org/sites/canadianwomen.org/files/PDF-FactSheet-EndPoverty-Jan2013.pdf; https://www.canada.ca/en/public-health/services/health-promotion/stop-family-violence/prevention-resource-centre/women/violence-against-women-resource-guide/reality-poverty-violence.html

[10] Furthermore, in Ontario, non-married partners ending a relationship do not have statutory rights to equalization of family property as married spouses do (*Family Law Act, R.S.O. 1990, CHAPTER F.3, ss. 1(1),5(1)*), increasing the vulnerability and risk of poverty among this group of women.

Amendments to the *Divorce Act* include an expansive definition of family violence in s. 2(1). The new section recognizes the many forms of violence in a family and family violence is recognized as a significant consideration when determining the best interests of the child. We support this broad definition and recommend that the same language be incorporated into the *CLRA*.

We also believe it is important to include this definition of family violence in the introductory definitions section 1(1) of the *CLRA* so that the whole statute is understood within this framework.

We believe it is equally important to acknowledge that family violence is predominantly violence against women[11] and arises from historic and systemic discrimination against women and stereotypes about women as intimate partners and mothers.

We are concerned that the definition of family violence in the *Divorce Act* does not explicitly acknowledge the gendered reality of family violence. This omission obscures the reality that women and gender non-conforming individuals are at most risk of experiencing family violence[12].

Finally, it is also important to recognize that "women" do not represent a uniform demographic group in Canada. Women with different racial, community, cultural and religious identities, as well as Indigenous women, older and younger women, and women with different mental and physical abilities, experience violence in different forms, and family violence is experienced through intersecting identities.

Recommendations:

The Clinic proposes:

- including a definition of family violence in the interpretation section of the *CLRA*, which adopts the definition of family violence added to s. 2(1) of the *Divorce Act;*
- adding a Preamble to the *CLRA* that explicitly outlines the gendered nature of family violence and states that the purpose of the *CLRA* is to protect women and children, recognizing that:
    - the majority of partners subjected to family violence are women and gender non-conforming individuals
    - the majority of partners who are abusive and violent are men
    - it is in the best interests of children that their mothers are safe from any form of violence
    - women have diverse lived experiences with family violence

[11] 70% of survivors of family violence in Canada are women and girls: women are 4 times more likely than men to be killed by their intimate partner: Canadian Women's Foundation Factsheet https://canadianwomen.org/the-facts/gender-based-violence/

[12] It is still difficult to access data on the extent of intimate partner violence among gender non-conforming individuals, however, anecdotal evidence in the gender-based violence sector suggests that such violence is prevalent.

    - women have different and diverse identities, affecting their unique experiences of violence;
- including in the Preamble that an intersectional gender-based lens will be used to assess all cases, and will be specifically considered in relation to understanding family violence.

2. Changing terminology: use "Parenting", "Decision-making" and "Contact" instead of child "Custody" and "Access"

Changes to the *Divorce Act* eliminate the language of child "custody" and "access," replacing it with new terms: "parenting time", "parenting orders," "decision-making responsibility" and "contact orders" (s. 16).

The *CLRA* in s. 20 continues to use the historical language of child "custody" and "access" to describe different parenting roles and responsibilities after parents separate.

The Clinic supports the change in language away from "custody" and "access" in favour of "parenting" and "decision-making" and "contact".

The *Divorce Act* changes were made in part to move away from historical language that tended to reinforce "winning and losing" in relation to the parents' post-separation roles with their children. In addition, there was often confusion about exactly what rights and responsibilities a parent had if they were awarded custody of or access to a child. The updated language in the *Divorce Act* may serve to reduce the perceived "zero-sum" of winning custody of a child, and also provides a more clear understanding of a Court order relating to parenting time, parenting decision-making responsibility, and contact with a child.

There is also a benefit for federal and provincial law to use the same language for separated and divorced parents in Court orders related to the care of children. This will help reduce confusion and reduce the possible appearance of different rights and responsibilities for parents dependent on whether they married. In the area of family law, the possibility of confusion or uncertainty should be reduced, especially for vulnerable women and children.

Recommendations:

The Clinic proposes:

- removing the terms "custody" and "access" from the *CLRA;*
- adopting the terms "parenting time", "parenting orders", "decision-making responsibility" and "contact orders" for consistency with the language of the *Divorce Act*, subject to the recommendations with respect to the meaning of these terms, as discussed below.

3. Day to Day Decision-making

The new *Divorce Act* s. 16.2(3) dealing with parenting and decision-making provides for decision-making when a parent is spending time with a child: "During parenting time, that parent has the exclusive authority to make day to day decisions affecting the child."

We have concerns that this provision may be misused by an abusive partner to deliberately contravene and undermine the decision-making role of the other parent, particularly when the other parent has primary decision-making responsibility under a parenting order to make significant decisions in the best interests of a child.

Such tactics may be used by an abusive ex-partner to control, manipulate, intimidate and frustrate the other parent and could provide an opportunity for ongoing abuse.

We suggest that the *CLRA* clarify the scope of "day to day decision-making" to avoid this potential for abuse, which would also undermine the intent of legislative changes to prevent ongoing abuse and to protect women and children.

***Recommendation*:**

The Clinic proposes:

- the definition of day to day decision-making should provide the authority to make daily decisions for a child during parenting time, however, such decisions may not conflict with the decisions made for the child by the parent who has authority to make significant decisions for the child.

4. Contact Orders

The new *Divorce Act* s. 16.6(1) provides that a person other than a divorcing spouse may obtain an order from the Court for contact with a child of the marriage. This may preserve the opportunity of grandparents and other family members or caregivers to maintain a relationship with the child.

While we support this potential opportunity in the best interests of the child, we are concerned that an abusive parent may use this opportunity to influence the person who is awarded a contact order to interfere with the child's relationship with an abused partner, thereby continuing the abuse of the former partner while also acting against the best interests of the child.

Family and friends of an abusive ex-partner may be influenced to manipulate the child's views of the other parent, may disparage the other parent, and may encourage more contact with the abusive partner. This negative influence may be worse in families where the mother is an immigrant or refugee, who does not have extended family and supports in Canada.

Recommendations:

The Clinic proposes:

- family violence should be added as a factor to consider when determining whether to make a contact order;
- where a contact order may allow for negative and/or abusive influences on a child against a parent, the court should expressly include conditions or restrictions regarding influence and behaviour with the child within the terms of the contact order.

5. Family Dispute Resolution

Several new sections of the *Divorce Act* encourage parties to a divorce proceeding to try to resolve their matters through a family dispute resolution process (ss. 7.3, 7.7(2)(a)). Additionally, every legal advisor representing a party to a proceeding under the *Divorce Act* is obligated to discuss with their client the possibility of reconciliation (7.7(1)). The *Act* states that reconciliation and family dispute resolution should be raised "unless the circumstances are such that it would be inappropriate to do so". Furthermore, a Court "may direct the parties to attend a family dispute resolution process" in a parenting order (s. 16.1(6)).

The *CLRA* does not have any provisions regarding family dispute resolution. However section 31(1) states that "upon an application for custody of or access to a child, the court, at the request of the parties, by order may appoint a person selected by the parties to mediate any matter specified in the order."

We are concerned that any mediation, family dispute resolution or encouraged reconciliation may be manipulated by an abusive partner to intimidate, coerce and lead to unfair results for, as well as further abuse of, the abused party.

We support the opportunity for voluntary mediation or other dispute resolution processes only in circumstances where there is screening for intimate partner violence conducted by a trained screener, and where a dispute resolution process many proceed only if the trained screener is satisfied that the power imbalances can be addressed, the process will be safe, and both parties' interests will be fairly reflected in any agreement.

We do not recommend that the *CLRA* include a requirement that legal advisors must discuss the possibility of reconciliation with their client. Lawyers are not all equally trained in issues of intimate partner violence. We are concerned that encouraging reconciliation in circumstances of abuse may perpetuate the cycle of pressure to stay in an abusive relationship which many women experience as a barrier to leaving an abusive partner.

Recommendations:

The Clinic proposes:

- the *CLRA* should clearly state that any mediation or another form of dispute resolution is voluntary, and may only proceed if both parties agree and have a clear understanding of the process;
- the *CLRA* should clearly state that if the parties consider mediation or any other form of dispute resolution, trained screening for intimate partner violence must be a pre-requisite to the process;
- the *CLRA* should clearly state that if there is a determination that there are circumstances of intimate partner violence between the partners, the trained screener must not proceed with the process unless it is determined that the process will be safe and fair;
- the *CLRA* should clearly state that if a party refuses to agree to or continue to participate in mediation or any other form of dispute resolution, that decision will not influence or impact the Court's determination of the family law matter;
- the *CLRA* should not impose a duty on legal representatives to discuss or encourage reconciliation between the parties, and there should be no requirement on the parties to discuss or consider reconciliation.

6. Best Interests of the Child Test

Changes to the *Divorce Act* include a detailed section regarding the factors to be considered when determining the best interests of the child (BIOC)(s.16). We believe that much of this section provides strong, clear and useful guidance. We also believe it is important for the BIOC test to be significantly consistent in both the federal and provincial statutes, to reduce confusion and provide essentially the same legal test to determine a parent's responsibilities and contact with a child regardless of whether the parents are married or seeking a divorce.

For these reasons, we support the replacement of s. 24 in the *CLRA* with the factors contained s. 16 of the *Divorce Act*, with the following qualifications.

Section 12(2):

***Recommendation*:**

We support the inclusion of this section in the *CLRA* with additional language (indicated in italics):

- "When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being *and it is understood that these factors are necessarily connected to the safety of the child's mother."*

Section 16(3)(b):

The Court is directed to consider "the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life".

We are concerned that an assessment of the "strength" of the child's relationship with each parent is not sufficiently clear or precise and may lead to circumstances that are not in the best interests of the child. In cases of family abuse, the abusive parent may be able to force greater contact with the child or influence the ways in which the other parent interacts with the child, thus manipulating the appearance of how strong the relationship is with one or the other parent.

***Recommendation*:**

- The Clinic proposes using the word "quality" instead of "strength" in this section of the BIOC text.

Section 16(3)(c):

The Court is directed to consider "each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse".

We are very concerned that this factor will have harmful effects on both women and children in abusive families. In abusive situations, there may be appropriate safety reasons for the abused partner to be unwilling to support the child's relationship with the abusive parent. In such situations, if the abused partner feels pressure to support the child's relationship with the abusive partner, this may jeopardize the safety of the child directly and indirectly through the continuation of family abuse. Furthermore, this would be an instance of systemic violence in which a policy that appears neutral has the effect of exacerbating the powerlessness and harm towards the abused partner.This will also create an undue hardship for women with precarious immigration status.

***Recommendation*:**

- The Clinic strongly recommends that this section in the *Divorce Act* should **not be included** in the BIOC test in the *CLRA*.

Section 16(3)(e):

The Court is directed to consider "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained".

We are concerned that in cases of family abuse, the abusive parent may be able to manipulate and unfairly influence the views of the child in relation to the other parent. We think it is important to direct the Court's attention to this possibility, when specifically considering this factor.

***Recommendation*:**

The Clinic proposes:

- the *CLRA* should adopt s. 16(3)(3) of the *Divorce Act* and add the following sentence: “In cases of family violence, the Court will also consider an objective assessment of the reasons for the child’s expressed views and preferences.”

Section 16(3)(i):

The Court is directed to consider “the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child”.

We are very concerned that this factor will have harmful effects on both women and children in abusive families. In abusive situations, the abusive partner has an interest in maintaining communication with the abused partner, in order to continue contact and the opportunity for manipulation, coercion and abuse. At the same time, an abused partner’s unwillingness to maintain communication with her abuser is reasonable and promotes her safety as well as the safety of the child.

Furthermore, cooperation implies the two parties have equal power and a willingness to compromise which is at odds with the power imbalance that exists in abusive relationships.

As a result, there may be legitimate reasons why an abused partner is unwilling and indeed unable to communicate and cooperate with the abusive ex-partner. In such situations, however, this factor favours the abusive partner. In addition, if the abused partner feels pressure to attempt to communicate and cooperate with the abusive partner, this may jeopardize the safety of the child directly and indirectly through the continuation of family abuse. Furthermore, this would be an instance of systemic violence in which a policy that appears neutral has the effect of exacerbating the powerlessness and harm towards the abused partner.

***Recommendation*:**

- The Clinic strongly recommends that this section in the *Divorce Act* should **not be included** in the BIOC test in the *CLRA*.

7. Factors Relating to Family Violence

The *Divorce Act* BIOC test also includes sections related to family violence.

Section 16(3)(j):

The Court is directed to consider "any family violence and its impact on, among other things,

> (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and
> (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child".

We support the inclusion in the BIOC of an express factor to consider the impact of family violence when determining the best interests of the child.

However, we have concerns about subsection 16(3)(j)(i), which directs the Court to consider the ability and willingness of an abusive partner to care for the child. We believe that willingness to care for a child is insufficient to determine whether a person who has engaged in family violence is truly *able* to care for and meet the needs of a child in the child's best interests. We believe when a person has engaged in family violence this creates a presumption that the parent is not able to act in the best interests of a child. We suggest that an objective assessment should be required to overcome this presumption and establish that an abusive partner is, in fact, both willing and able to care for and meet the needs of a child. This should then be considered in conjunction with subsection ii) regarding the appropriateness of requiring cooperation between parents in situations of family violence.

***Recommendation*:**

The Clinic proposes that the *CLRA* adopt s. 16(3)(j)(i) of the *Divorce Act* with the following changes (indicated in italics):

The Court is directed to consider "any family violence and its impact on, among other things,

> (i) "the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, *and will order an objective assessment to establish whether any person who engaged in the family violence is both able and willing to care for and meet the needs of the child*, and…"

Section 16(4):

We support the factors relating to family violence set out in this section with the exception of s. 16(4)(g), which directs the Court to take into account "any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child".

We are concerned that "steps" is too vague to provide the Court with adequate and reliable information that an abuser will not engage in family violence again, thereby improving their ability to care for and meet the needs of the child. As in the discussion of s. 16(3)(j)(i), we believe when a person has engaged in family violence this creates a

presumption that the parent is not able to act in the best interests of a child. We suggest that an objective assessment should be required to overcome this presumption and establish that an abusive partner has undergone successful re-education in order to prevent further family violence and improve their ability to care for and meet the needs of a child.

***Recommendation*:**

The Clinic proposes that the *CLRA* adopt s. 16(4) of the *Divorce Act* with the following changes to subsection 16(4)(g) (indicated in italics):

"…the Court shall take the following into account:

> (g) *objective evidence that* the person engaging in family violence *has successfully completed re-education* to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child"

8. Past Conduct

Section 16(5) of the *Divorce Act* BIOC test deals with past conduct as a factor to determine the best interests of the child. We believe this section is inadequate as it fails to expressly discuss the relevance of past family violence in the determination of the best interests of the child. We believe a clearer direction to the Court about past conduct is needed to reinforce the sections related to family violence, and to avoid potential confusion and/or conflict with the BIOC test (s. 16 (3)).

***Recommendation*:**

- the Clinic strongly recommends that s. 16(5) in the *Divorce Act* should **not be included** in the *CLRA*;
- the Clinic supports maintaining *CLRA* ss. 24(3), (4) and (5) which address past conduct in conjunction with violence, abuse and self defence;
- the Clinic further proposes that additional language be added that "past conduct of family violence is relevant and shall be considered regardless of the nature of the conduct, the seriousness and frequency of the family violence, or when it occurred".

9. Child Relocation

Changes to the *Divorce Act* provide for changes in the place of residence, and relocation of a parent with parenting time or decision-making responsibility (ss. 16.7 through 16.96).

The exemptions to the notice requirements for change of residence (16.8(3)) and relocation (16.9(3)) state that on the application, the Court may modify or waive notice requirements "where there is a risk of family violence".

We are concerned that these sections do not adequately reflect the reality of many women fleeing abusive partners. Decisions may have to be made in secret and/or very quickly for safety. In these dire circumstances, the abused partners are frightened and often overwhelmed. In addition, the safety of themselves and their children may depend on ensuring that the abusive partner is not given advance notice, nor learns of the location of the new safe residence.

The exemption sections are discretionary, whereas we believe they should be mandatory. In addition, the exercise of discretion is based on an application made to the Court during the time that a woman is moving. We believe an automatic mandatory exemption to the notice requirement when there is a risk of family violence will provide greater safety for women and children at a very volatile and stressful time.

In addition, the Court is directed to consider the best interests of the child when deciding on an application to change residence or to relocate, based on a list of factors. We believe that an additional factor should be added that prohibits the Court from considering the child's new residence in a shelter for abused women, in the consideration of the best interests of the child.

Recommendations:

- the Clinic proposes that if there is a risk of family violence, the Court should be required to waive the notice requirement. Once the move has occurred, an application regarding notice may be submitted;
- the Clinic proposes that where there is a risk of violence, notice will not be required until there is sufficient evidence to determine what information about the change of residence or relocation can be disclosed to the abusive parent to ensure the safety of the abused partner and children;
- following an application for change of residence or relocation, with or without notice, the Court should be prohibited from considering the new residence in a shelter for abused women when considering the best interests of the child.

Conclusion

The above recommendations for family law reform in Ontario are respectfully submitted to the Attorney General. We believe these recommendations will improve the family law system in Ontario through clarity, substantial consistency with the federal *Divorce Act*, and by increasing the safety of women and children for partners who are separating but not divorcing.

It is especially important to make these changes to the *CLRA* because of the higher risk of violence to unmarried women who are ending relationships, as compared to married women. In addition, intimate relationships without a legal marriage represent an increasing proportion of families in Canada.

We would welcome the opportunity to provide any clarification or further information in support of this written submission. Please contact us at: executive.office@schliferclinic.com.

The Barbra Schlifer Commemorative Clinic

Deepa Mattoo
Barrister and Solicitor
Executive Director

Tamar Witelson
Barrister and Solicitor
Director Legal Services

Syeda Razia Husain
Student-at-law