

The New Divorce Act

The *Divorce Act* ^[1] has been around since 1985. It hadn't changed much over the last 35 years or so, except when the Child Support Guidelines ^[2] were introduced in 1997 as a regulation to the Act. On 1 March 2021, it changed a lot.

On 18 June 2019, Parliament passed Bill C-78 ^[3], "An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act." The changes to the *Divorce Act*, and to the other laws listed in that very long title, came into effect on 1 March 2021. This page provides an overview of some of the more important amendments to the *Divorce Act*.

Introduction

The federal *Divorce Act* is the main Canadian law on marriage breakdown and divorce. It only applies to couples who are or were married to each other, and it applies to them regardless of where they were married. It talks about:

- getting divorced and foreign divorce orders,
- parenting after separation,
- paying child support and paying for children's expenses,
- paying spousal support, and
- changing orders about parenting after separation, child support, and spousal support.

Bill C-78 ^[3] has changed how we talk about parenting after separation, and the things the court thinks about when making orders about parenting after separation. It also imposed new duties on married spouses and lawyers, requiring them to try to resolve problems out of court before deciding that a problem has to be resolved in court. It created a new way to get and change orders about child support and spousal support when one or both spouses have moved to different provinces. And, it added a new test to help decide what should happen when someone wants to move away after separation.

The other parts of the *Divorce Act*, the parts about divorce, foreign divorce orders, and making and changing orders about child support and spousal support when spouses live in the same province or territory, haven't changed at all.

For married people living in British Columbia, the changes to the *Divorce Act* will make the federal law a lot more like the provincial law. The federal law will use similar language and similar concepts to talk about parenting after separation. The *Divorce Act* will also talk about moving away after separation in a way that's similar to how British Columbia's *Family Law Act* talks about the issue.

Remember that the *Divorce Act* only applies to people who are, or were, legally married to each other. If you never married your partner, the *Divorce Act* doesn't apply to you, no matter how long you lived together. Any legal problems you have can only be handled under the provincial *Family Law Act*.

Parenting After Separation

When spouses separate, they have to make decisions about how they'll care for the children. These decisions include how much time the children will spend with each spouse, including whether they'll spend time with other people, and about how the children will be raised. Both the federal *Divorce Act* and the provincial *Family Law Act* have rules about these issues, and about how the court makes decisions on those issues when spouses can't agree.

Parenting Orders and Contact Orders

The biggest change in Bill C-78 ^[3] is about how we talk about parenting after separation. Say goodbye to "custody" and "access." Instead, say hello to:

Parenting time, which refers to the schedule of the children's time with each spouse.

Decision-making responsibility, which is about making decisions about important aspects of the children's lives, like where they go to school, how they get treated when they get sick, what sports and other activities they'll be involved in, or if they will be raised in a religion.

Contact, which refers to the time someone other than a spouse spends with the children.

It's not just the names of these things that have changed. We have to think about parenting after separation differently too. The changes to the *Divorce Act* try to focus attention on the rights of children rather than on the entitlements of their parents. As a result, *both* spouses have parenting time with their children, not just one of them, and spouses don't have the right to make important decisions for the children, they have the *responsibility* to make those decisions.

Parenting Orders

A *parenting order* is an order about parenting time and decision-making responsibility. Parenting orders can talk about:

- how parenting time will be divided between spouses,
- how decision-making responsibilities are shared or divided between spouses,
- how spouses communicate with each other,
- whether a spouse's time with the children must be supervised,
- whether the spouses must use mediation, collaborative negotiation or arbitration to resolve disagreements about parenting, and
- whether the "relocation" of a child should be prohibited.

More on relocation in a bit.

The *Divorce Act* does not contain any presumptions that parenting time should be divided in any particular way, including equally. When the court has to make decisions about parenting time, those decisions must be made considering only the best interests of the child.

Likewise, the *Divorce Act* does not contain any presumptions that decision-making responsibilities should be shared in any particular way, including that just one spouse should have all decision-making responsibilities or that both spouses should have all decision-making responsibilities. The court can make orders like that, of course, if the order would be in the best interests of the child. The court can also mix it up a bit and order that only one spouse should have responsibility for making certain decisions, while both spouses are responsible for making other decisions.

A spouse who has parenting time or decision-making responsibility is entitled to make day-to-day decisions about the child during their parenting time without having to consult the other spouse. These decisions include little decisions, like what the child will have for lunch or what the child will wear to school. They also include big decisions in emergencies, like about taking the child to a doctor after an accident.

A spouse who has parenting time or decision-making responsibility is also entitled to ask for and receive information about the child's health, education and wellbeing from anyone who has that information, including doctors, psychologists, teachers and the other spouse.

Parenting Plans

A *parenting plan* is the part of a document that talks about parenting time and decision-making responsibility. Most of the time the sort of "document" the *Divorce Act* is talking about will be a written agreement, like a separation agreement, about parenting after separation. However, "document" also includes arbitrator's awards and the orders of other courts.

The court is required to include a parenting plan in a parenting order or a contact order unless it thinks that the parenting plan is not in the best interests of the child.

Contact Orders

A *contact order* is, not surprisingly, an order that someone other than a spouse have time with a child. However, someone who wants to ask for a contact order must get the court's permission to ask for the order first. Contact orders can talk about:

- when the person can spend time with the children,
- how the person can communicate with the children, and
- whether the person with contact should be prohibited from removing the children without the consent of a spouse.

Contact doesn't include all of the entitlements that go with parenting time. Someone who has contact *is not* entitled to make day-to-day decisions about the child during their contact. Likewise, someone who has contact *is not* entitled to get information about the child's health, education and wellbeing.

Older Orders, Awards and Agreements

The new *Divorce Act* does not cancel orders, awards and agreements that were made before 1 March 2021. Those orders, awards and agreements are still in effect, and are still binding on the parties to those older orders, awards and agreements, but you do have to do a bit of translation.

Parenting time and contact are what the old *Divorce Act* meant by "access," except that it's both spouses who have parenting time with a child, not just one of them. Contact is access as well, but refers to the time someone who is not a spouse has with the child.

Decision-making responsibility is sort of what the old act meant by "custody." It's about the rights and responsibilities involved in being the guardian of a child, and making responsible decisions on behalf of a child. Decision-making responsibilities are just like the "parental responsibilities" guardians have under the *Family Law Act*.

The Best Interests of the Child and Family Violence

The best interests of the children are the only consideration that the court can consider when making parenting orders. That's what the old *Divorce Act* said, but it really didn't say much about the things the court should take into account when considering the best interests of children. The new *Divorce Act* takes a much different approach and looks more like British Columbia's *Family Law Act*. Under the new *Divorce Act*, the court must "give primary consideration to the child's physical, emotional and psychological safety, security and well-being" in deciding what is in the best interests of the children, thinking about a long list of specific factors. These factors include:

- the children's needs,

- the children's relationships with the spouses, any brothers or sisters, grandparents and "any other person who plays an important role in the child's life,"
- the spouses' willingness to support the children's relationship with the other spouse,
- the children's views and preferences,
- the children's cultural and linguistic heritage,
- the ability of each person to care for and meet the needs of the children,
- the ability of the spouses to communicate and cooperate with each other, and
- the presence of family violence.

"Family violence" is defined as including: physical abuse; sexual abuse; threats of harm to persons, pets and property; harassment; psychological abuse; and, financial abuse.

How the *Divorce Act* talks about family violence and the best interests of children is another way that the *Divorce Act* resembles the *Family Law Act*. Where family violence is present, the court must think about another list of specific factors, just like the *Family Law Act* requires, including:

- the seriousness and frequency of the family violence,
- whether there is a pattern of coercive and controlling behaviour,
- the extent to which the family violence is directed to a child, or the extent to which a child is exposed to family violence,
- any risk of harm to the children, and
- any steps taken by the person who has been violent to prevent further family violence and improve their ability to care for the children.

Moving Away

The changes to the *Divorce Act* include a test to decide what should happen when one spouse wants to move away from the other spouse, with or without the children. This is another way that the new *Divorce Act* resembles the *Family Law Act*, but be careful! The test in the *Divorce Act* is not the same as the test in the *Family Law Act*, and the rules change depending on whether the move qualifies as a "relocation."

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.

Since not all moves will cause this sort of "significant impact," the *Divorce Act* distinguishes between moves that qualify as "relocations" and those which don't.

Moves that Aren't Relocations

When a person who has parenting time or decision-making responsibility wants to move and the move *will not* have a significant impact on the children's relationship with a spouse or a person with contact, the person must give notice of the intended move to anyone else who has parenting time, decision-making responsibility or contact. The notice must:

- be in writing,
- state the date of the move, and
- state the address of the new place of residence and provide any other new contact information for the person and the children.

Moves that don't qualify as relocations will usually be moves within a city or town, and other relatively close moves that won't have a huge impact on the existing schedule of parenting time or contact.

Moves that Are Relocations

Things get more complicated when the move *will* have a significant impact on the children's relationship with a spouse or a person with contact. In cases like this, the person who is planning to relocate, with or without the children, must give at least 60 days' notice to anyone else who has parenting time, decision-making responsibility or contact. The notice must:

- be in writing,
- state the date of the proposed relocation,
- state the address of the proposed new place of residence and provide any other new contact information for the person and the children, and
- provide a proposal about how parenting time, decision-making responsibility or contact may be exercised if the move goes ahead.

A person with parenting time or decision-making responsibilities who gets this notice may object to a proposed relocation. To object, the person must file a court application within 30 days of getting the notice. If a person with parenting time or decision-making responsibilities doesn't object, however, then the person who wants to relocate may move as long as there is no earlier order that says the person can't move.

A person with contact *is not* entitled to object to a proposed relocation. They're entitled to notice about a pending relocation, but there's nothing they can do to stop it under the *Divorce Act*.

If a person with parenting time or decision-making responsibilities objects in time, the new *Divorce Act* says that the court must consider certain factors in deciding whether to allow the move or not. The court must think about:

- the reasons for the relocation,
- the impact of the relocation on the children,
- the time the children have with each person who has parenting time with them,
- whether the relocating person has complied with the notice requirement,
- whether each party has complied with any obligations under other family law legislation, like the *Family Law Act*, or under an older award or order, and
- the reasonableness of the person's proposal about how parenting time, decision-making responsibility or contact could be exercised after the move.

That's a little complicated. But it gets worse. The act also says who has the job of proving that the move should happen or not, and this changes depending on how the spouses share parenting time:

- if the parties have "substantially equal" time with the children, the person who wants to move has to prove that the relocation *is* in the best interests of the children,
- if the person who wants to move has the children for the "vast majority" of the children's time, the person objecting to the move has to prove that the relocation *is not* in the best interests of the children, and
- in cases falling in the mid-range between these extremes, both parties have the burden of proof.

The problem is that don't have a definition of what "substantially equal" means, or of what "vast majority" means. It'll be up to the courts to figure this out, and that's going to take some time. (The courts will also have to figure out what "significant impact" means too!)

Moves by People with Contact

A person who has contact with the children is required to notify persons with parenting time or decision-making responsibility of their intention to move. The notice must:

- be in writing,
- state the date of the move, and
- state the address of the new place of residence and provide any other new contact information for the person.

However, if the move will have a "significant impact" on the children's relationship with the person who wants to move, the notice must also:

- be delivered at least 60 days before the move, and
- provide a proposal as to how contact may be exercised when the move happens.

No one gets to object to a move by someone with contact.

New Duties

Special duties for lawyers and the court were part of the old *Divorce Act*, and continue in the new *Divorce Act*. The court, for example, can't make a divorce order unless it is satisfied that adequate child support is being paid. Lawyers, on the other hand, have to talk to their clients about the possibility of reconciling and resuming their marriages. The new act puts additional duties on the court and on lawyers, and creates new duties for separated spouses.

Duties of Spouses and People with Contact

Under the new act,

- people with parenting time, decision-making responsibility or contact are required to exercise those entitlements in a manner that is consistent with the best interests of the children,
- spouses are required to protect their children from the conflict arising from their court case,
- people are required to try to resolve their disagreements through mediation, collaborative negotiation or arbitration rather than by going to court, and
- spouses must provide each other with complete, accurate and up-to-date "information," presumably financial information when child support or spousal support is an issue.

New Duties of Lawyers

Under the new act, lawyers are also required to tell their clients about the ways they can resolve their disagreements without going to court. Lawyers are also required to encourage their clients to try mediation, collaborative negotiation or arbitration instead of going to court, and to tell their clients about any family justice services that might help to resolve a dispute or comply with an order.

New Duties of the Court

When spouses are asking for orders about things other than divorce, such as orders about parenting after separation, spousal support and child support, the court must consider the existence of any:

- civil protection orders,
- child protection proceedings or orders, and
- criminal proceedings, and any undertakings, recognizances or orders made in those proceedings.

The purpose of this requirement is to make sure that the court is aware of any legal proceedings that might be going on outside the family law case, so that it doesn't, for example, give lots of unsupervised parenting time to a spouse who is accused of abusing the other spouse or the children.

Resources and links

Legislation

- the old *Divorce Act* ^[1]
- Bill C-78 ^[3]

Links

- An Overview of Bill C-78 ^[4] by John-Paul Boyd

This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, February 15, 2021.

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