



Standing Committee on Justice and Human Rights
Room 622
180 Wellington Street
House of Commons
Ottawa, Ontario K1A 0A6
JUST@parl.gc.ca

Dear Members of the Standing Committee:

Attached is the submission from the Alberta Council of Women's Shelters (ACWS) to the Standing Committee regarding Bill C-22: Amendments to the Divorce Act. As you prepare for final hearings on Bill C-22 the Alberta Council of Women's Shelters (ACWS) ask that you give serious consideration to the comments and recommendations made in this submission.

We are pleased that Bill C-22 is taking some important steps in the right direction including a reference to family violence and the elimination of the maximum contact principle, the absence of a presumption in favour of 'shared parenting' and the introduction of criteria to be used in applying the best interests of the child test. We encourage you to support these provisions.

We are seriously concerned, however, with other proposed changes particularly the elimination of the terms custody and access, the narrow definition of violence, the possibility of shared parenting becoming a de facto reality and the lack of provisions to ensure women's access to justice and equality.

The Divorce Act has a profound effect on divorcing families. Now is the time to ensure that it is written in such a way as to protect the interests of the most vulnerable – most often, women and children. We strongly urge you to support those sections of the Bill that move positively in this direction and call for changes to those that do not.

Sincerely,

Jan Reimer
Encl.



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Tel. 780 456-7000 Fax. 780

August 22, 2003

To all Alberta MP's

Re: Bill C-22: Amendments to the Divorce Act

Dear Members of Parliament for Alberta:

Attached is the submission from the Alberta Council of Women's Shelters (ACWS) to the Standing Committee regarding Bill C-22: Amendments to the Divorce Act. As you prepare for final hearings on Bill C-22, the Alberta Council of Women's Shelters (ACWS) ask that you give serious consideration to the comments and recommendations made in this submission.

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Sincerely,

Jan Reimer
Attachment

Bill C-22
Recommendations for
Amendments to the
Divorce Act

Submission to the Standing Committee on Justice and
Human Rights

By the Alberta Council of Women's Shelters (ACWS)

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August 2003

ADDRESSING VIOLENCE WITHIN FAMILIES IN BILL C-22: CUSTODY AND ACCESS CONCERNS

The Alberta Council of Women's Shelters (ACWS) is a charitable umbrella organization representing 41 women's shelters across the province on issues relating to violence within families. Since 1983, ACWS has worked to support to our member shelters and the women and children they serve and to achieve legislative, policy and attitudinal changes that will acknowledge and promote the rights of women and children to live in a world free from violence and abuse.

Our focus is abused women and their families. Our perspective is rooted in research and experience. It is from this perspective that we offer the following comments and recommendations on Bill C-22: An Act to Amend the Divorce Act particularly in relation to issues of custody and access.

INTRODUCTION

Violence in families is a serious social issue. It not only affects the direct victims – usually women, but also children who live in families where spousal abuse is a reality. While most conflicts around custody and access are resolved by parents themselves outside court, those cases that do end up in the court system involve higher levels of violence compared to the general population of divorcing adults. The Muriel McQueen Fergusson Centre found, for example, that although researchers suggest between 40 and 60% of separating partners disclose abuse, overwhelmingly against women, the information is not included in most files.¹ Given the high prevalence of violence in cases of divorce and separation, it is critical that any proposed reform of the *Divorce Act* and other family law processes feature consideration of violence against women (properly defined) and the impact of child exposure to violence as an overriding consideration in all aspects of family law and especially custody and access decisions.²

Custody and access legislation in Canada has lagged behind other political jurisdictions, such as New Zealand, Australia and some American states, in terms of identifying violence within families as a significant factor that must be considered in custody and access decisions. Too often, these decisions are weighted in favour of the assumed value of "parental right of access to the child" without considering the safety of the child and victimized parent. This has led to tragic consequences including deaths of children and continued harassment and intimidation of the abused parent.

The Alberta Council of Women's Shelters believes that custody and access provisions in the legislation can be greatly improved by recognizing the reality of family violence and the right of women and children to live without violence. This submission provides specific recommendations in some key areas of concern.

¹ Linda C. Neilson (2001) "*Spousal Abuse, Children and the Legal System.*" Part IV B, Assessing Abuse—Gender and Reporting Rates.. Muriel McQueen Fergusson Centre for Family Violence Research, University of New Brunswick

² Ontario Women's Network on Custody and Access, June 2001 "Brief to the Federal, Provincial and Territorial Law Committee on Custody and Access

Recommendations:

Preamble to the Divorce Act:

1. ACWS believes that the Divorce Act must begin with a preamble that includes a specific acknowledgement of the prevalence of violence against women and children within families including physical, emotional, sexual, psychological and social abuse. This preamble must provide a gendered definition and analysis of violence within families, and must acknowledge that control and abuse issues are present in significant numbers of families, particularly in those families appearing in court regarding custody and access issues.

Definitions:

2. **A workable definition of abuse is needed.** : ACWS strongly encourages that policy makers refrain from using the terms “family violence” or “domestic violence”. These terms infer that violence is a “family problem” instead of a problem generally perpetrated by men against women and children. Using neutral words undermines the gendered nature of patterns of violence and therefore perpetuates and marginalizes the significance of such violence.³

3. Any definition of violence must include a recognition that abuse includes verbal abuse, psychological abuse, emotional abuse, physical abuse, financial abuse, and sexual abuse and should be understood to include any prolonged pattern of behavior that has as its goal the control of the woman’s behavior through humiliation, fear or isolation.⁴

Terminology:

4. **ACWS urges you to keep the language of “custody” and “access”** rather than introducing the concept of “parental responsibilities” and terms like “parenting time”. The introduction of new language, with no clear definitions provided, could create a *de facto* presumption in favour of shared parenting which puts women and children leaving abusive situations at risk. In countries where similar language changes have been made, studies have shown that:

- more women have to deal with husbands who try to control how the children are raised but do not share in the care giving work;
- more children are placed in the care of abusive and violent fathers,
- and more parents spend more time in courts arguing over the meaning of the language.

Women leaving abusive partners who are forced to comply with a parenting order that requires them to share “responsibility” for the child(ren) with a violent man will have a more difficult time effectively separating from them which is essential to pursue a life free from violence and abuse. Her safety and that of the children must not be compromised.

³ www.harbour.sfu.ca/freda/reports/custody.htm

⁴ *ibid*

5. **If, however, the language is to be changed,** the legislation must
- clearly tie together the responsibilities of care giving and decision-making to prevent abusive fathers from maintaining rigid decision-making control while abdicating any actual care giving responsibilities;
 - provide better guidance as to where a child will actually live
 - identify how “supervised parenting” is to be ordered and exercised
 - add provisions to ensure that shared decision making responsibilities will not jeopardize the safety interests of abused women

Best Interests of the Child:

6. **Legislation must recognize that the best interests of the child includes the well-being of the child AND the abused parent when there has been a finding of violence in the family** This principle must be given priority in guiding all custody and access decisions where the court is satisfied that violence in the family is a reality.

ACWS believes that the best interests of the child are intimately connected to the well-being of the primary caregiver, most often the mother. Safeguarding and ensuring the well-being of the primary caregiver, most often the mother, in cases where there is violence against women is a critical aspect of determining best interests of children. Violence undermines women’s ability to provide support and care for children. ⁵Recent research conducted by the Muriel McQueen Fergusson Centre for Family Violence Research in New Brunswick confirms the importance of considering the impact of violence on both the child and the child's caregiver, stating: " (Studies indicate) that the best predictors of children's well-being after separation and divorce, in high conflict families, are the psychological well-being of the primary caregiver and the children's freedom from continued exposure to conflict and abuse. ⁶ Studies also show that if these children’s mothers are safe from further abuse and given the support and resources they need to consistently parent their children, the negative effects of being exposed to abuse are lessened.

7. **Clear guidelines and standards must be established for defining the “best interests of the child”.** They must specifically acknowledge the reality of violence in families and the impact on children of being directly abused or being exposed to violence perpetrated by one parent on the other and acknowledge that the best interests of children can only be met by ensuring the well-being of the women who are their mothers.

8. **Legislation must include a presumption that exposure to abuse is not in the best interests of the child and that past history of abuse must be included in the best interests of the child test.** Exposure to violence in the family has a profound impact on children. Studies show that short and long term effects can be as damaging for many

⁵ D. Wolfe, P. Jaffe, S. Wilson & L. Zak (1985) “Children of Battered Women: The Relation of Child Behavior & Family Violence and Maternal Stress.” *Journal of Consulting and Clinical Psychology*, Vol 53. pgs. 657-665

⁶ Linda Neilson (2001) "*Spousal Abuse, Children and the Legal System*" Part IIIB, *Law in the Context of Research on the Interests and Welfare of Children*. Muriel McQueen Ferguson Centre for Family Violence Research, University of New Brunswick.

children as direct child maltreatment.⁷ A 1993 Stats Canada survey on “wife assault” found that children witnessed the violence in more than half of the incidents in which women feared for their lives.⁸ This high incidence of child exposure and its short and long term effects on children clearly support the inclusion of past history of abuse as one of the criteria in the ‘best interests’ test.

9. There must be a statutory presumption that it is not in the best interests of the child to be placed in the custody of or have unsupervised visits with a parent who has perpetrated acts of violence against the child, the child’s siblings or the child’s parent.

Custody and Access where Violence in the Family is present:

Custody, access and visitation decisions where violence in the family has been identified, are complex and need to be evaluated differently than where violence is not an issue. Research has shown that women who have children and are victims of abuse may be in particular danger when seeking a separation or divorce. It is very common for abusers to use family law processes to continue their harassment and control of a former partner, and abusive men are more likely than other men to seek sole custody or to insist on extensive access to their children. Given these considerations and the devastating impact of exposure to violence on children, the following recommendations are made with the best interests of the child and her primary caregiver in mind.

10. Legislation should articulate a presumption that custody of children should be with the parent that was the primary caregiver of the children prior to separation. This presumption would provide clear guidance for all who work in the justice system and would enshrine in law the well-recognized values of stability, consistency and continuity of care as being of primary importance for a child’s well being after separation and divorce. Determining the primary caregiver could be included in the list of factors or the definition of the best interests of the child.

11. Given the high incidence of violence against women and children in the cases that come to court regarding custody and access, legislation must require that there be routine screening for woman abuse in all custody and access cases and that mandatory risk assessments be conducted by experts trained in domestic violence in cases where there are allegations of abuse or where signs are present. Where woman abuse has occurred, it should override every other consideration in determining custody.

12. There must be a presumption that an abusive spouse is precluded from having either custody of, or unsupervised access to, any children of the relationship. Abusive men are more likely than other men to seek sole custody or to insist on extensive access to their children. The court should be given broad authority to impose whatever conditions are deemed necessary for the best interests of the child particularly for the purpose of protecting the safety of the child and the other parent while the right of access

⁷ “Custody & Access: Changes to the Law Threaten Women and Children.” Presentation by the National Association of Women and Law to the Federal, Provincial, Territorial Family Law Committee on Custody, Access & Child Support, June 6, 2001

⁸ “Wife Assault: The Findings of a National Survey.”, Juristat Service Bulletin, Vol. 14, No. 9, Pg. 1-22

conferred by the order is being exercised. The order should include a requirement for supervised access and monitored exchange.

13. Shared Parenting must not be legislated or even considered as it is not in the best interests of either children or women and has not worked in jurisdictions where it has been implemented. For women fleeing abuse or where there is a history of violence in the family, the extensive contact required by “shared parenting” can be dangerous and life-threatening as well as put children at risk. (We have similar concerns with the proposed terms “parenting time”, “parental responsibility” and “parenting orders”).

The legislation must

- **clearly spell out the circumstances in which shared “parenting time” is inappropriate including where there has been violence in the family.**
- **identify the violence risk factors that a court must assess to determine the safety of the child in the presence of an abusive parent**

14. A requirement for supervised access and exchange must be legislated in cases where the court is satisfied that a parent has used violence against the child or the other parent of the child. The services must be accessible, secure, free of charge to the custodial parent and provided by supervisors with expertise in child abuse and violence against women. **ACWS recommends that the federal government jointly fund safe visitation centres with the provinces.**

15. There must be a statutory presumption that courts not change a supervised order to an unsupervised order until the court is satisfied that the balance of probabilities ensure the safety of the primary caregiver and the child. In determining whether the presumption has been overcome, legislation should require the court to consider the best interests of the child and not just whether the child will be safe.

16. Lawyers, judges and all family court personnel must receive mandatory training on the realities of violence within families and in the new legislation.

Women’s Access to Justice:

Lack of access to legal aid and other resources, uninformed or misinformed professionals in the legal system, and court systems that still do not hold perpetrators of violence accountable, are among the many factors that continue to create barriers for women in accessing justice. Women need professional legal representation, women’s advocates and other systems to support them. Legal professionals and the courts must acknowledge the risk of continued woman abuse and the potential for increasing violence after separation and make custody and access decisions to protect both women and their children accordingly. Again, we emphasize that the safety and well-being of the mother is inseparable from the best interests of the child.

17. The definition of expert witness should be expanded to include women in transition houses and shelters who work directly with battered women. They should be allowed to give evidence of violence against women and the impact on both the women and children whom they serve.

18. Legal Aid services must be made available to all women who require them, regardless of economic status or where they live and cases involving domestic violence should have priority for legal aid representation. Most women experience a drop in standard of living and economic resources after separation. This affects their ability to retain professional counsel. Legal Aid plans must be expanded to allow all who require it to have access.

19. Legal aid lawyers and other actors in the legal system must be trained to understand the issue of woman abuse.

20. Perpetrators of abuse must be held accountable. . Legislation and other measures must be implemented to hold the perpetrators of woman and child abuse accountable and not continue to blame the victim. Mechanisms are needed that will prevent abusers from using the family court system as a means of continuing the abuse and harassment of their former partner.

21. Mediation must never be mandated as it presupposes that the parties are on equal footing. Mediation will not work where power imbalances exist and is never appropriate in situations in which a man has been violent or abusive to a female partner or their children. Screening for the predictability of violence must be done before any alternate dispute resolution process is suggested.

22. Canadian statutes should provide that an abused parent is able to request non-disclosure of her address if she is concerned about her safety or the safety of her children. Court documents can be served on a third party such as a lawyer.

Conclusion

The Divorce Act has a profound effect on divorcing families. Now is the time to ensure that it is written in such a way as to protect the interests of the most vulnerable – most often, women and children. We strongly urge you to support those sections of the Bill that move positively in this direction and call for changes to those that do not.

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