



SOCIETY *of*
UNITED PROFESSIONALS
IFPTE 160

SUBMISSION FOR BILL 207: MOVING ONTARIO FAMILY LAW FORWARD ACT, 2020

SUBMITTED BY THE SOCIETY OF UNITED PROFESSIONALS
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ABOUT THE SOCIETY OF UNITED PROFESSIONALS

The Society of United Professionals represents more than 8,500 professional workers across Ontario, including engineers, scientists and lawyers. The Society's membership includes almost 400 staff lawyers and articling students working at Legal Aid Ontario (LAO), including roughly 140 staff lawyers practicing family law exclusively or in addition to criminal law. Our Legal Aid Ontario bargaining unit consists of research counsel, policy counsel, and family, criminal, and immigration counsel. Our clients are some of the province's most vulnerable people.

In the period between June 2018 and March 2020, Society-represented Legal Aid staff lawyers provided assistance to almost 120,000 family law and child protection clients per year¹. Our members assist clients with a broad range of family law issues, both in terms of substantive and procedural guidance as well as through duty counsel and advice lawyer services. Duty counsel assist clients in court on motions, conferences, uncontested hearings, and first appearances in child protection matters, provide pre and post on-site mediation advice, and help parties negotiate and draft consent endorsement requests. In some locations and subject to local policies and resources, staff lawyers and legal aid workers are able to provide drafting assistance primarily for motions to change, including motion materials and conference briefs, act as advice counsel in Family Law Information Centres, and deliver telephone summary family law advice through the Summary Legal Advice Family program. Staff lawyers assess clients' eligibility (legal and financial) for certificate services and make these referrals for eligible clients. Legal Aid staff lawyers contribute to the court's ability to deal with matters efficiently through the range of services we provide to eligible self-represented clients, and help provide these clients with the support they need to effectively put their case before the court. Given this role, we are intimately aware of the challenges our clients face trying to navigate the family court system.

It is from this perspective that we provide these submissions regarding Bill 207, Moving Ontario Family Law Forward Act, 2020.

¹ This figure is based on quarterly figures provided at: <https://www.legalaid.on.ca/documents/lao-update-spring-2020-edition>. It is also consistent with annual client assistance statistics for civil cases of which family is the predominant service provided: <https://www.legalaid.on.ca/wp-content/uploads/LAO-annual-report-2018-19-EN.pdf>

BILL 207 – OVERARCHING PERSPECTIVE

Speaking generally, Bill 207 is useful legislation to align the provisions of provincial family law legislation with the provisions of the amended Divorce Act, which will come into force on March 1, 2021. These positive changes include a shift from the charged and status related terms “custody and access” to the more neutral and functional terms “decision making responsibility, parenting time, and contact”, a codification of the case law with respect to mobility cases and a process for allowing mobility issues to be more easily addressed outside of court, recognizing the harm of involving children in conflict between parties, and exhorting parties and counsel to utilize negotiation, mediation, and collaborative law, where appropriate.

While these are generally positive provisions, it would be unfortunate if Bill 207 represented the “once in a lifetime” review of family law statutes in Ontario. The access to justice crisis is most pronounced in family law, the area with the highest rate of self-represented parties. It is worth noting that this crisis exists despite the efforts and dedication of court staff, the judiciary, members of the private bar/certificate lawyers, paralegals, and staff, and the host of professional associations and agencies serving family law litigants.

It is beyond the scope of this submission to delve into all of the challenges experienced by people seeking resolution of their family law disputes. It is clear, however, that this bill will not likely result in the transformation of family law and the delivery of services to help Ontarians resolve their parenting, support, property entitlements, and other related issues, including the cross-cutting issue of domestic violence. It is also important to recognize, without going into greater depth, that family law issues and their resolution exist within the context of broader socio-economic conditions and the availability of things like affordable housing, shelters and domestic violence services, supervised access centres, mental health services, and a host of other programs and services. This, of course, includes funding for legal aid services, the Office of the Children’s Lawyer and other agencies necessary to give effect to legislative objectives. Policy regimes, such as drug policy, can also have significant implications.

And during the pandemic, availability of affordable internet and access to computers and other devices has taken on added significance. Despite the fact that the use of technology has in many ways increased the ability of some to engage with the court, it is clear that the access to justice barriers for people who are unable to access or use these technologies have been exacerbated. The challenges are also greater for members of equity seeking groups.

SPECIFIC CONSIDERATIONS RELATED TO BILL 207

The Society supports the submissions of the Ontario Association of Child Protection Lawyers, the Ontario Association of Children's Aid Societies, and the Office of the Children's Lawyer in calling for a direct appeal to the Ontario Court of Appeal as of right for child protection decisions. Access to timely hearings of appeals for other family Orders is important and should not be unduly compromised due to regional disparities in frequency of sittings, such as the sittings of the Divisional Court, or the level of court of the initial order.

It is important that the call for greater use of negotiation and mediation be supported with additional legal services for low- and middle-income Ontarians, including Legal Aid services. These services will be necessary to allow parties to make effective use of these processes with a clear understanding of their rights and obligations, and to facilitate a pathway for their agreements to be formalized in domestic contracts or court orders.

The legislation should explicitly provide for the use of domestic contracts to address issues of parenting and child support for parents who have not cohabited, as the current Family Law Act does not. Additionally, the government should consider making exclusive possession orders explicitly available for unmarried people and renters.

The definition of Habitual Residence in section 22(2) of the bill does not address the situation of children whose parents have never lived together and live in different jurisdictions. The addition of "primarily with" one parent may be useful. Section 22(2)(1) also references "both" parents and does not provide for situations when a child has more than two parents.

The "audience" for court orders goes beyond the parties and includes third parties, including schools and medical providers that look to these orders for clear direction about who they can rely on to make decisions for children. These third parties have an understanding of the term custody, but they may be confused by the use of "decision-making responsibility." While the Divorce Act amendments utilize this term, it may be beneficial for Bill 207 to use a slightly expanded term "decision making responsibility and authority".

With respect to the provisions of section 20(4) of the bill, which states that when parents separate and a child lives with one parent the other parent's entitlement to exercise decision-making responsibility is suspended. This provision can cause conflict at the time of separation because a parent who might otherwise leave a conflict situation may find it necessary to remain in the home to avoid losing decision-making responsibility. A continued status quo where parents retain joint decision-making responsibility jointly may be better to avoid unnecessary conflict at the time of separation and allow a parent to leave a toxic home environment without giving up parenting decision-making authority. This seems especially true in light of section 20(1) which states that "Except as otherwise provided in this Part, a child's parents are equally entitled to decision-making responsibility with respect to the child." This amendment would align with the bill's goal to help reduce unnecessary conflict and court proceedings.



As a practical matter, third parties generally will not act in accordance with the provisions of section 20(4) in the event that parents disagree about a parenting decision, as they will want a separation agreement or court order to rely on that provides explicit recognition of one parent's authority to make these decisions. In any event, by virtue of section 20(3) of the act, even decision-making responsibility is held jointly, "any one of them may exercise the rights and accept the responsibilities of a parent on behalf of them in respect of the child".

With respect to section 26(1) of the bill, it is rare for family law cases to be ready to proceed to trial within six months on the commencement of a proceeding, and in any event trial dates are often set at the conclusion of the settlement conference. It is also unlikely, especially now with the backlog and surge resulting from the pandemic, that trial dates will be available soon after the mandated appearance to fix the court date. While this provision may serve to create pressure on the court to set far-off trial dates earlier, the dates that are set will probably have more to do with the court's resources rather than the earliest date that is compatible with the just disposition of the application. It may also be helpful to clarify that "application" for the purposes of this section includes motion to change/variation proceedings.

FUTURE FAMILY LAW INITIATIVES AND CONSULTATION

The Society and our LAO Lawyers Local would appreciate the opportunity to provide additional feedback and support for further legislative and other initiatives to improve the family law framework and system of resolving family matters, both inside and outside a court process. We would be happy to meet with the Attorney General or his staff to discuss these issues at greater length.

The Society appreciates the opportunity to provide these submissions and thanks the members of the Standing Committee on Justice Policy for their efforts in reviewing this important bill.