

# Best Interests of the Child in the Context of Family Violence

October 29, 2019

*Presenter:*

Pamela Cross  
Legal Director  
Luke's Place





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Community Legal Education Ontario  
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## Disclaimer

This webinar is for **general information purposes only** and is not legal advice. It is not intended to be used as legal advice for a specific legal problem





## About our presenter...

Pamela Cross is a feminist lawyer; a well-known and respected expert on violence against women and the law for her work as a researcher, writer, educator and trainer. She is the Legal Director of Luke's Place Support and Resource Centre in Durham Region, where she leads the organization's provincial projects, including research, training and advocacy.

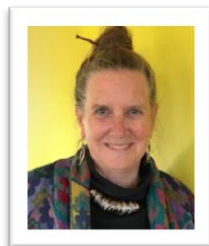
We acknowledge that the land from which we are presenting this webinar is the traditional territory of the Mississaugas of Scugog First Nation.

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# Luke's Place

- Durham Region: services for women who have left abuse & are engaged with family law
- Provincial & national level: research, resources, training & systemic advocacy



FamilyCourtAndBeyond.ca



LukesPlace.ca



LukesPlaceTraining.ca



# Disclaimer

This webinar is not to be interpreted  
as legal advice.

Only a lawyer can provide legal advice.



## We recognize

- Men can be victims
- Abuse happens in same-sex relationships
- Trans or non-binary folks may face abuse in relationships

Abuse rooted  
in misogyny  
& traditional  
male power

Women are  
subjected to  
most serious  
forms of  
coercive  
controlling &  
physical  
violence

We use  
gendered  
nouns and  
pronouns  
when talking  
about  
violence  
within  
families

# Best interests of the child test

## The test appears in

- Ontario's *Children's Law Reform Act (CLRA)*
- Canada's revised *Divorce Act*

## Applied by courts

- To determine parenting arrangements for families after the parents separate

# Two commonalities

between *CLRA* & *Divorce Act* tests

Only test used when deciding parenting arrangements

Keep focus on child rather than parents

- No legal concept of parenting rights in this context in Canadian law

No weight attached to criteria

Courts have discretion

- Past court decisions
- Knowledge, perspectives & values of individual judges

# The laws

Federal law



*Divorce Act*

Divorce, parenting arrangements, support, division of property



Applies to anyone in Canada who is married & wants to divorce

Where married doesn't as long as they lived in the jurisdiction where they are making their divorce application for at least 12 months

Changes effective  
June 2020  
For more see

CLEO:

<https://cleoconnect.ca/yourlegalrights-webinars/divorce-act-update/>

or

Luke's Place:

<https://lukesplace.ca/explaining-the-new-divorce-act-webinar/>

# Provincial / Ontario's laws

## *Children's Law Reform Act (CLRA)*

Custody & access, child support

## *Family Law Act (FLA)*

Spousal support, property division, restraining orders

Apply to anyone who lives in Ontario

Including separating married people who do not want to apply for a divorce

# Language

## Custody

- Decision-making responsibility for children

## Access

- Time children spend with non-primary parent

## Orders

- Sole or joint custody, shared custody, access, supervised access / exchanges

## *Children's Law Reform Act*

## *Divorce Act*

Parenting  
time

Decision-  
making  
responsibility

Parenting  
order

# ***Children's Law Reform Act's*** **Best Interest of the Child Test**



# Children's Law Reform Act

*24(2) The court shall consider all the child's needs and circumstances, including,*

- a) The love, affection and emotional ties between the child and,
  - i. Each person entitled to or claiming custody of or access to the child,*
  - ii. Other members of the child's family who reside with the child, and*
  - iii. Persons involved in the child's care and upbringing**

If kids close to paternal relatives explain how she will maintain contact with them, if safe to do so; include any safety concerns

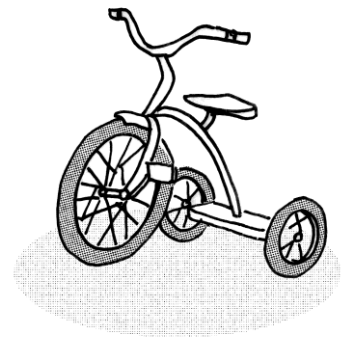
If kids not close to father/his family, argue that there are limited ties; position this in the context of family violence

# *Children's Law Reform Act*

*b) The child's views and preferences, if they can reasonably be ascertained*

The law does not set out a specific age at which children's wishes are to outweigh all the other factors in the best interests test

Either party can ask for the involvement of Office of the Children's Lawyer



# *Children's Law Reform Act*

*c) The length of time the child has lived in a stable home environment*

She can argue that while home is familiar, it is unstable because of the abuse

- If moving, try to stay close for school, friends, activities
- If in a shelter, steps she has taken to make life stable for kids



# *Children's Law Reform Act*

*d) The ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessaries of life and any special needs of the child*

This is not about finances

History of abuse & children's exposure to it

- If she has been primary parent, make court aware by providing details about what she did on a regular basis

# Children's Law Reform Act

*e) Any plans proposed for the child's care and upbringing*

Courts want to know plans parents have made for the future

- If working, arrangements for children's care while she is at work.
- If relocating, explain why in children's best interests and plans for them to maintain close relationship with their father



# Children's Law Reform Act

*f) The permanence and stability of the family unit with which it is proposed that the child will live*

Instability after separation is common

Provide strong evidence of efforts to provide consistent environment for children (school, friends, relatives, activities)



# *Children's Law Reform Act*

*g) The ability of each person applying for custody of or access to the child to act as a parent*

# *Children's Law Reform Act*

*h) The relationship by blood or through an adoption order between the child and each person who is a party to the application.*

Informal step-parent relationships are recognized as part of stability



# *Children's Law Reform Act*

Section 24(3) A person's past conduct shall be considered only,

- a) In accordance with subsection (4); or
- b) If the court is satisfied that the conduct is otherwise relevant to the person's ability to act as a parent.

Section 24(4): In assessing a person's ability to act as a parent, the court shall consider whether the person has at any time committed violence or abuse against,

- a) His or her spouse;
- b) A parent of the child to whom the application relates;
- c) A member of the person's household; or
- d) Any child.

Section 24(5): For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.

***Divorce Act's***  
**Best Interest of the Child Test**

# Prior to 2019 revisions

## Section 16(8)

“the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child”

Revised  
*Divorce Act*

Must give “primary consideration to the child’s physical, emotional and psychological safety, security and well-being.” (Section 16(2))

Requires that the court focus on the child in all of the elements of the test

Creates opportunity to show relationship between family violence and children’s well-being

# Revised *Divorce Act*

- a) *The child's needs, given the child's age and stage of development, such as the child's need for stability*
- b) *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*

- Similar to *CLRA*
- Spells out relationship to grandparents

# Revised *Divorce Act*

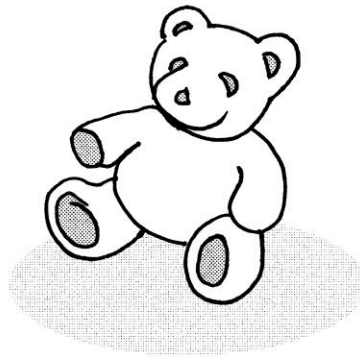
c) *each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse*

- A problem for women with abusive former spouses
- Provide strong evidence about parenting concerns if they wish to limit relationship

# Revised *Divorce Act*

## *d) The history of care of the child*

- Provide detailed and accurate evidence, 3<sup>rd</sup> party evidence
- Parenting role pre- and post-separation



# Revised *Divorce Act*

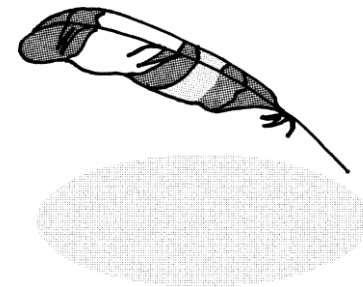
*e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained*



# Revised *Divorce Act*

*f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage*

- A small nod to the importance of considering a child's Indigenous heritage



# Revised *Divorce Act*

*g) any plans for the child's care*

# Revised *Divorce Act*

*h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child*

- Abusers often tell the court they are willing to care for the children, even if they little to do with it
- She will need to provide evidence about parenting before separation & impact of family violence on the children

# Revised *Divorce Act*

i) *The ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child*

- Talk about history of abuse, especially coercive controlling behaviours, to explain:
  - Why shared decision-making will not work
  - Why parenting order must not require frequent /ongoing communication/cooperation

# Revised *Divorce Act*

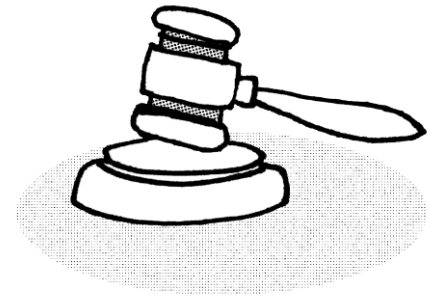
- j) Any family violence and its impact on, among other things,
  - i. the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and*
  - ii. the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child**

- Allows woman to raise her concerns about abuser's ability to care for child and appropriateness of a parenting order which requires cooperation

# Revised *Divorce Act*

k) *Any civil or criminal proceeding, order, condition or measure that is relevant to the safety, security and well-being of the child*

- Criminal charges or restraining order as further evidence for limited or supervised contact between father & children



# Revised *Divorce Act* webinar

CLEO: <https://cleoconnect.ca/yourlegalrights-webinars/divorce-act-update/>

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Changes effective June 2020



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For more information visit [www.stepstojustice](http://www.stepstojustice)



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