**CONSULTATION REPORT**

**REFORM OF FAMILY LAW IN RELATION TO CHILDREN**

**February 18, 2020**

**Department of Justice and Public Safety**

**Invitation to Provide Comment**

**The Deadline for comments on the issues raised in**

**this report is March 6, 2020.**

The purpose of issuing this Consultation Report is to allow interested persons an opportunity to consider the proposed changes to Prince Edward Island’s family law legislation respecting children and to make their views known to the Department of Justice and Public Safety. Any comments sent to the Department will be considered in the development of new legislation on this topic.

You can contact us to provide your comments or questions about this document by fax, mail or e-mail to:

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This consultation is a public process. **The Department of Justice and Public Safety assumes that comments received on this Consultation Report are not confidential unless specifically indicated.** The Department may quote from or refer to your comments in whole or in part. The Department may attribute comments provided by organizations. If you would like your comments to be treated confidentially, please request confidentiality in your response or submit your comments anonymously.

Any personal information received by the Department through this consultation process is subject to the *Freedom of Information and Protection of Privacy Act*. If you have any questions or concerns, please contact the Legislative Specialist by means of the contact information indicated above.

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**I. INTRODUCTION**

Provincial law respecting the matters that typically arise in family law disputes about children is currently addressed in three statutes: the *Child Status Act* (parentage), the *Custody Jurisdiction and Enforcement Act* (custody and access), and the *Family Law Act* (child support obligations). Additionally, children whose parents are married may be subject to the rules contained in the *Divorce Act* (Canada) in relation to custody, access and child support.

The decision to undertake a review of federal family law legislation was made by the Government of Canada in recent years, resulting in amendments to the *Divorce Act* (Canada) and related federal support enforcement statutes. Most of the amendments to the *Divorce Act* (Canada)will come into force on July 1, 2020, and changes to federal support enforcement laws will come into force within two years. The proposed changes are intended to promote faster, more cost-effective and lasting solutions to family law disputes, reducing the burden on courts and leading to better outcomes for families. In particular, the following goals were advanced by the Government of Canada: (i) promoting the best interests of the child, (ii) addressing family violence, (iii) reducing child poverty, and (iv) making Canada’s family justice system more accessible and efficient.

The Department of Justice and Public Safety in Prince Edward Island (the “Department”) is embracing the opportunity provided by the recently enacted amendments to the *Divorce Act* (Canada) to review and update provincial family law legislation with a view to pursuing similar goals to those articulated by the Government of Canada. The information and recommended changes to Prince Edward Island’s family law legislation described in this Consultation Report are based, in part, on the *Divorce Act* (Canada) amendments, best practices in other jurisdictions and model legislation recommended by the Uniform Law Conference of Canada.

**II. PROPOSED CHANGES TO FAMILY LAW LEGISLATION RESPECTING CHILDREN**

**1. Promoting out-of-court dispute resolution where there is a family law dispute respecting a child.**

It is becoming increasingly clear that family legal needs are different than other legal needs. Further, there is increasing recognition around the unique needs of, and challenges inherent to, family law disputes, including emotional needs, the impact on children, and the post-dispute continuation of relationships between family members.

Although thousands of Canadians enter the justice system each year to resolve family law issues, there is a growing awareness around some of the challenges and limitations of the traditional legal system to adequately meet the needs of families and to fully address the dynamics that drive family conflict. To respond to this awareness, there has been an uptake in the use of out-of-court dispute resolution approaches across the country to address family law issues that more effectively meet the needs of the families involved.

Out-of-court dispute resolution processes typically involve a neutral third party who helps parties resolve their legal and familial disputes. Dispute resolution processes present a number of distinct advantages over the traditional family justice model, specifically with regard to the flexibility of dispute resolution approaches and the outcomes that are generated. Dispute resolution approaches are often cited as a more meaningful way to address family and child-related legal issues, primarily because dispute resolution encourages collaborative problem-solving and produces benefits which reflect the needs and situation of the family. Accordingly, out-of-court dispute resolution often generates long-term and lasting effects, as the outcomes are created by the parties as opposed to being created for them by the court.

The Department is proposing that Prince Edward Island’s family law legislation be changed to promote out-of-court dispute resolution where there is a family law dispute respecting a child. Specifically, the following changes are being recommended:

(a) Lawyers representing a party to a family law dispute involving children should have a statutory duty to discuss with the party the dispute resolution processes available to attempt to resolve one or more of the issues outside of court. This duty is similar to one already present in the *Divorce Act* (Canada) and the family law statutes of many other provinces.

(b) Legislation should expressly permit certain dispute resolution professionals to facilitate settlement of specified matters outside of court. Currently, PEI’s *Custody Jurisdiction and Enforcement Act* provides for the use of a qualified Parenting Coordinator to resolve certain issues. The Department is proposing to expand the use of dispute resolution professionals, including Child Support Adjudicators (to determine child support payable in complex cases) and Family Mediators, so that fewer contentious matters need to be determined through costly, adversarial, and time-consuming court proceedings.

(c) Legislation should require a party to a family law dispute involving children to participate in a dispute resolution process or information session before taking a further step in a legal proceeding after the proceeding is commenced. This change would require all parties to learn about the availability, benefits and appropriateness of different dispute resolution processes on Prince Edward Island.

**2. Updating statutory presumptions respecting parentage.**

The *Child Status Act* sets out certain presumptions as to which persons are presumed to be the mother and father of the child. It also provides a process to have the Supreme Court declare that a person is or is not a parent of a child, such as where a presumption is not applicable or it is uncertain which presumption applies. A section dealing with “assisted conception” was added to the *Child Status Act* in 2008, and presumes a person to be the parent of a child if the person was the spouse or in a conjugal relationship with the birth mother at the time the mother was inseminated. The *Child Status Act* does not contemplate the use of assisted reproduction by persons other than the birth mother and her spouse.

The implications of not having a presumption of parentage related to surrogacy arrangements can be significant for the intended parents and surrogate. These implications include:

(i) the surrogate is presumed to be the parent of the child, even after surrendering the child to the intended parent(s);

(ii) the intended parent(s) are required to apply to the court, at their expense, for a declaration of parentage respecting the child.

The Department is proposing that Prince Edward Island’s child status legislation be updated to align with best legislative practices adopted in other Canadian jurisdictions to address presumptions of parentage where there is use of assisted reproduction. The following presumptions are being recommended:

(a) The legislation should continue to presume that a male person is the biological father in specified circumstances unless the contrary is proven or there are two male persons to whom the presumption could apply. On the birth of a child not born as a result of assisted reproduction, the presumption will continue to be that the child’s parents are the birth mother and the child’s biological father. The legislation will also continue to provide that the court may order an approved parentage test, such as a blood test.

(b) The presumption of parentage should no longer require that one of the intended parents provide reproductive material in the case of children conceived through assisted reproduction. The inclusion of this requirement in the *Child Status Act* unnecessarily excludes intended parents who are unable to, or choose not to, provide reproductive material and is not relevant to ensuring that the child’s best interests are served.

(c) The legislation should directly address the presumptions of parentage to be applied when intended parents enter into a surrogacy agreement with a prospective birth mother of a child. These presumptions should align with best practices that have been previously researched and adopted or recommended by law reform commissions, the Uniform Law Conference of Canada and other provincial or territorial governments.

(d) The legislation should continue to provide a mechanism to have the court declare parentage where the presumptions of parentage do not fit, for example, where it is intended that the child have more than two recognized parents. In such cases, the court is best placed to assess whether the proposed declaration is in the child’s best interests.

**3. Aligning provincial statutes with the *Divorce Act* (Canada).**

When Prince Edward Island’s legislation respecting child custody, access and child support was originally enacted, it aligned with the *Divorce Act* (Canada) and the family law legislation of other provinces and territories. The benefits of alignment are numerous; (i) alignment helps ensure similar rights and expectations across Canada’s family justice system, which is particularly helpful to families migrating to or from Prince Edward Island, (ii) alignment facilitates training of legal professionals, (iii) Prince Edward Island’s family justice system is able to benefit from jurisprudence developed in the courts of other jurisdictions, and (iv) Prince Edward Island is able to benefit from the extensive family justice policy development and research that has taken place in larger jurisdictions at little-to-no cost.

More generally, the Government of Prince Edward Island has committed in principle to aligning its regulatory requirements with other jurisdictions in recognition of the fact that differences can be costly, complex, and create duplication and delays, creating barriers to those individuals who are subject to regulation. This is also true for legal disputes involving children; the existence of two different legal regimes (federal and provincial/territorial) governing the same subject-matter requires legal professionals and their clients to learn and apply two different sets of rules.

The Department also supports the addition of specific references in the *Divorce Act* (Canada) to the best interests of children to confirm that the well-being of children should be the primary consideration of the court in decisions relating to parenting time and decision-making responsibility.

The Department is proposing that Prince Edward Island’s legislation be updated to align with the amendments to the *Divorce Act* (Canada), where reasonably possible. This will ensure that common approaches are used and similar outcomes are reached regardless of whether an individual initiates proceedings under federal or provincial legislation. More specifically, the following changes are being proposed:

(a) The legislation should substitute the concept and terminology of “decision-making responsibility” and “parenting time” for a child in place of “custody” and “access”. This change includes new express provisions respecting the duties of each parent in relation to a child, and is intended to better enable allocation of each parent’s time with a child and respecting decision-making responsibility so that it serves the best interests of the child.

(b) The legislation should expand on the concept of “access” that is currently incorporated in the *Custody Jurisdiction and Enforcement Act*. Once updated to align with the *Divorce Act* (Canada), provincial legislation will allow a person other than a parent, including grandparents, to apply to the court for an order providing for contact between that person and the child (a “contact order”). In determining whether to grant a contact order, the court would consider all relevant factors including whether a contact order is in the best interests of the child.

(c) The legislation should describe the factors to be considered by a court in determining the best interests of the child. Though the courts have accomplished this to a large degree through written decisions in numerous cases, the *Custody Jurisdiction and Enforcement Act* lacks a statutory description. A list of best interests of the child factors that highlights key factors related to children’s well-being will provide clarity and promote a shared understanding among parents, family justice professionals, lawyers and judges. A list of ‘best interests of the child factors’ that aligns with the description given in the amended *Divorce Act* (Canada) will also ensure alignment with the application of that principle under federal legislation.

**4. Improving access to the family justice system.**

Improved access to family justice services facilitates the timely and just resolution of legal issues respecting children that arise from separation and divorce, such as child custody, access and child support. An accessible family justice system provides real options for families, and provides services that meaningfully contribute to the resolution of complex family law issues. A family justice system that is accessible is responsive to the needs of families experiencing separation, divorce, and parenting from two or more homes, and to the best interests of the children at the heart of family law disputes. Improving access to the family justice system can help reduce and prevent some of the potential negative outcomes of separation and divorce for families and children. Difficulties in accessing the family justice system results in delays that negatively impact the families and children that remain involved in conflict over family law matters for longer periods. Further, a lack of options, or awareness of options, for resolving family law disputes prevents families from being able to choose and benefit from the dispute resolution processes that would best suit their particular family’s needs.

In addition to those changes that are proposed to align with amendments to the *Divorce Act* (Canada), the Department is proposing to improve access to the family justice system through a number of changes to provincial legislation. These initiatives include:

(a) Legislation should encourage the use of out-of-court dispute resolution processes to avoid the costly, adversarial and time-consuming court process that is ordinarily involved where there is a family law dispute respecting a child. The Department is proposing that certain dispute resolution professionals (such as Child Support Adjudicators and Family Mediators) be able to file their written determination or agreement, respectively, with the court. These professionals should have the opportunity to have the court confirm that determination or agreement as an order without need for a court application or a hearing.

* The legislation should allow development and implementation of a process called Child Support Adjudication to assist individuals with complex child support matters (such as self-employment, etc.), such as those individuals who traditionally would not be able to use the Administrative Recalculation Office, to determine their child support amount without being required to undergo a time-consuming and potentially costly court proceeding.
* Parties who work with a designated dispute resolution professional and come to a written agreement (for example, a parenting plan) or determination should have the opportunity to file their agreement or determination with the court and, if the court confirms the agreement or determination, it will have the full force and effect of a court order without requiring a time-consuming and costly court application.

(b) Legislation should allow development and implementation of an administrative process to determine (establish) a child support entitlement in non-complex cases, without parties having to incur the expense of hiring legal counsel or having to make a court application. Presently in PEI, child support can only be established for enforcement by the Maintenance Enforcement Program via court order or written agreement between the parties, rather than through an accessible, administrative-only process. Administrative establishment would not be permitted for cases where certain information is not available or for which the calculation is complex; for example, where income is not easily ascertainable from tax records. If one or both parties do not agree with the administrative determination, they would have the option to dispute the determination by making an application to the court for an order determining child support, similar to the existing administrative recalculation process. If the parties do not dispute the child support determination within a prescribed period, the determination would have the same force as a court order for child support.

(c) The legislation should permit the sharing of financial and contact information, despite the provisions of the *Freedom of Information and Protection of Privacy Act*, from the Maintenance Enforcement Program to the Administrative Recalculation Officer for the purposes of supporting recalculation through these services, to permit the timely, efficient, and accurate recalculation of support.

(d) The legislation should be drafted in a way that ensures the language of the legislation is clear and understandable. The Government of Prince Edward Island understands that legislation that is drafted clearly and in the plainest language possible, and that is clearly organized, assists with making the law more accessible to the public. In addition, the Government of Prince Edward Island is looking to streamline legislative sources of child-related family law matters. The legislation should combine and modernize the law covered presently in the *Child Status Act, the Custody Jurisdiction and Enforcement Act* and the child-related aspects of the *Family Law Act*.

**5. Addressing family violence.**

The Government of Prince Edward Island supports the changes to the *Divorce Act* (Canada) that were incorporated to address family violence. In its *Strategies for Addressing Family Violence* (2015), the Premier’s Action Committee on Family Violence Prevention noted “Past consultations have pointed to needs such as increased safety for women and children, removal of gaps and barriers in legislation and policy, increased appropriate information-sharing among involved parties, and protection of the best interests of children.”

The Department is proposing changes to provincial family law legislation governing disputes related to children that address family violence. Some of these changes include:

(a) Legislation should require the court to consider any family violence and its effect on (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.

(b) Legislation should require dispute resolution professionals and family law lawyers to consider whether family violence may be present.

**III. Recommendations**

**1. Promoting out-of-court dispute resolution where there is a family law dispute respecting a child.**

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(c) The legislation should permit the sharing of financial and contact information, despite the provisions of the *Freedom of Information and Protection of Privacy Act*, from the Maintenance Enforcement Program to the Administrative Recalculation Officer for the purposes of supporting recalculation through these services, to permit the timely, efficient, and accurate recalculation of support.

(d) The legislation should be drafted in a way that ensures the language of the legislation is clear and understandable. The Government of Prince Edward Island understands that legislation that is drafted clearly and in the plainest language possible, and that is clearly organized, assists with making the law more accessible to the public. In addition, the Government of Prince Edward Island is looking to streamline legislative sources of child-related family law matters. The legislation should combine and modernize the law covered presently in the *Child Status Act, the Custody Jurisdiction and Enforcement Act* and the child-related aspects of the *Family Law Act*.

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(b) Legislation should require dispute resolution professionals and family law lawyers to consider whether family violence may be present.

**Questions for your feedback**

1. Do you believe that Prince Edward Island’s legislation needs to promote out-of-court dispute resolution to resolve family law issues involving children, as an alternative to the traditional court process?

2. Do you have any concerns or suggestions related to the specific recommendations being made to promote out-of-court dispute resolution processes in legislation related to family law disputes involving children?

3. Do you agree that the legal presumptions respecting parentage of children need to be updated to address presumption of parentage where there is a surrogacy agreement?

4. Do you have any concerns or suggestions related to the legislative approach being proposed in this Consultation Report in relation to determining the parentage of a child?

5. Do you agree with the proposed alignment of provincial legislation with the recent amendments to the *Divorce Act* (Canada)? If not, please explain the reasons why you believe alignment is not appropriate.

6. Do you have any concerns or suggestions that the Government of Prince Edward Island should consider in updating its legislation related to parenting time, decision making and support of children?

7. Do you agree with the proposed changes to provincial legislation to improve access to the family justice system? If not, please explain the reasons why you believe these changes will not improve access.

8. Do you have any concerns or suggestions related to legislative proposals in this Consultation Report intended to address family violence? Do you have any suggestions for additional changes to better address family violence in the family justice system?

9. Do you have any concerns or suggestions related to current provincial family law legislation related to children or recommendations made in this Consultation Paper that you would like to share with the Government?