

NOT IN THE BEST INTERESTS OF WOMEN AND CHILDREN: An Analysis of Bill 422: An Act to Amend the *Divorce Act*

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Introduction:

On June 16, 2009, Saskatoon-Wanuskawin Conservative Party MP Maurice Vellacott introduced Bill C-422 to the House of Commons. This Bill is the latest incarnation of a series of Bills, Motions and other legal and political manoeuvrings that have attempted to eliminate the concepts of custody and access from the federal *Divorce Act* in favour of a presumption in favour of equal parenting.

Mr. Vellacott's Bill may appear laudable to the general public, especially on a first read -- after all, who does not like the notion of children spending time with both parents?

However, on closer examination, it becomes clear that Bill C-422 at best ignores and at worst denies many of the realities of families in this country. For this reason, the National Association of Women and the Law and many other women's equality-seeking organizations oppose Bill C-422 just as we have opposed similar Bills and Motions in the past.

Bill C-422 purports to do four things:

- to clarify that Parliament recognizes that society has an interest in ensuring that children do not lose either parent unnecessarily, and to move away from the model of "custody" to the model of "parenting time"
- to define "best interests of the child" as served by maximal ongoing involvement by both parents with the child, to be implemented in the *Divorce Act*, as the rebuttable presumption of equal parenting as the starting point for judicial deliberations
- to clarify relocation determinations as recognizing the right of the child to continuity of relationships with both parents and placing the onus on the parent moving to justify a change to a parenting time agreement
- to require the systematic collection of consistent court statistics².

¹ This analysis draws heavily on research conducted by the Ontario Women's Network on Custody and Access for its Brief to the Federal Provincial Territorial Family Law Committee on Custody and Access, June 2001, which was co-authored by Andree Cote, Pamela Cross, Carole Curtis and Eileen Morrow

² *Backgrounder for Equal Parenting Private Member's Bill C-422*, Maurice Vellacott, June 2009

The analysis and recommendations that follow focus on the first two of these stated objectives.

Background:

Bill C-422 did not appear from nowhere when it was introduced by Mr. Vellacott earlier this year. Since 1997, there has been a veritable flurry of consultations, special committees, government and private members' bills and public discourse, often led or heavily influenced by an increasingly powerful "fathers' rights" lobby.

The Fathers' Rights Lobby

This special interests constituency became extremely active in 1997, in response to the introduction of the Federal Child Support Guidelines in 1997. These guidelines significantly changed the child support regime in Canada. Many fathers, who are most often the parent paying support and who faced increased child support obligations as a result of the guidelines, were deeply resentful.

They quickly seized on one of the exceptions: the guidelines allowed for a very different calculation of the amount of support to be paid if the children were spending at least 40 per cent of their time with each parent.

Using this "40% rule", the fathers' rights lobbyists began to call for a presumption of joint custody or shared parenting. They mounted an emotional media campaign and argued that family courts discriminated against fathers by systematically granting custody to mothers. They legitimated their claim by representing themselves as the objects of sexual discrimination, in a legal system that they claimed held biases in favour of women. Using a "personal troubles discourse,"³ they successfully positioned themselves as victims. They also organized a vigorous and strong-armed lobby on both national and provincial levels, as well as a network of local grassroots groups.

They received considerable support in the Senate, where a number of senators threatened to block approval of the child support guidelines unless there was an immediate examination of the issues of custody and access.

In order to ensure passage of the child support guidelines, then Minister of Justice Alan Rock established the Special Joint Committee on Child Custody and Access, which included representatives from both the House of Commons and the Senate. This committee held hearings about custody

³ C. Bertoia, J. Drakich, "The Fathers' Rights Movement: Contradictions in Rhetoric and Practice" (1993) *Journal of Family Issues* 592

and access across the country. Many of the hearings featured open hostility to representatives of women's organizations. Violence against women and child sexual abuse were routinely dismissed or ignored as critical issues.

The Committee's 1998 report, entitled *For the Sake of the Children*, recommended a presumption in favour of shared parenting and criteria to define the "best interests of the child" test, which ignored the issue of violence within the family and focussed on extensive contact between the child and both parents. It envisioned highly punitive consequences for custodial parents who failed to facilitate access time by the non-custodial parent.

In March 2001, the Federal/Provincial/Territorial (F/T/P) Family Law Committee, in collaboration with the Department of Justice undertook a further national consultation about custody and access.

Past Law Reform:

In November 2002, then Justice Minister Martin Cauchon introduced Bill C-22, which contained significant amendments to the custody and access provisions of the *Divorce Act*.

It offered a number of promising innovations, including criteria to better determine what is in the child's best interests; recognition of the relevance of family violence to the security and well-being of children and the elimination of the maximum contact/friendly parent rule, while not introducing a presumption of shared parenting or mandatory mediation, despite considerable pressure from some special interest groups to do so.

Bill C-22 died on the order paper when Parliament dissolved for a federal election and was not re-introduced by the new government.

A year ago, in June 2008, Maurice Vellacott introduced Motion M-483, in which he suggested that the government should propose amendments to the *Divorce Act* that would ensure "that children benefit from equal parenting from both their mother and their father, after separation or divorce."

The government did not introduce such a bill, so Mr. Vellacott presented Bill C-422 this spring as a Private Member's Bill. Private Member's Bills do not generally have a high level of success, but this Bill is different. It has been endorsed by Rob Nicholson (Niagara, Ontario), the federal Minister of Justice. As well, Liberal MP, Raymonde Folco (Laval les Iles, Quebec) has expressed her support for the Bill. There is likely other Liberal party support for the Bill, as there has been in the past.

While Michael Ignatieff has not commented publicly on Bill C-422; in his book, *The Rights Revolution*, he wrote, in reference to groups supporting shared parenting: “These are sensible and overdue suggestions, and the fact they are being made shows that men and women are struggling to correct the rights revolution so that equality works for everyone.”

The Women’s Equality Perspective:

Equality is the law of Canada. The Canadian government has committed itself, domestically and internationally, to evaluating the impact of its laws and policies on women, by doing a gender-based analysis. Indeed, in May 1995, the Federal, Provincial and Territorial Ministers Responsible for the Status of Women agreed “on the importance of having gender-based analysis undertaken as an integral part of the policy process of government”. A few months later, Status of Women Canada published a paper in which it stated: “the federal government will, where appropriate, ensure that critical issues and policy options take gender into account”⁴. More specifically, this document states:

A gender-based approach ensures that the development, analysis and implementation of legislation and policies are undertaken with an appreciation for gender differences. This includes an understanding of the nature of relationships between men and women, and the different social realities, life expectations and economic circumstances facing women and men. It also acknowledges that some women may be disadvantaged even further because of their race, colour, sexual orientation, socio-economic position, region, ability level or age. A gender-based analysis respects and appreciates diversity⁵.

Internationally, Canada participated in the development of the 1995 Commonwealth Plan of Action on Gender Development that called for a gender-based management system. It also endorsed the *Beijing Platform for Action* (“PFA”) that calls on governments to “seek to ensure that before policy decisions are taken, an analysis of their impact on women and men, respectively, is carried out”. More specifically, the *Beijing PFA* calls on governments to “review policies and programmes from a gender perspective” and to “promote a gender perspective in all legislation and policies”⁶. Canada has also endorsed “*Further actions and initiatives to implement the Beijing Declaration and the Platform for Action*,” which was adopted by the U.N. Special Assembly on June 10, 2000.

⁴ Status of Women Canada 1995, *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, Ottawa SWC para 35

⁵ *Ibid* para 23

⁶ United Nations, Report of the Fourth World Conference on Women, Beijing, China 4 – 15 September 1995. *Beijing Platform for Action* para 204

Without a comprehensive gender equality analysis and strategy, any legislation on custody and access will promote women's continued inequality. It will not enable women to act in their own best interests or in the best interests of their children in matters of custody and access; interests that are inextricably linked.

In fact, as long as women remain the primary caregivers of children, women's equality *is* in the best interests of children, and law reform can and must simultaneously take into account and promote both the best interests of children and the equality interests of women.

The *Divorce Act*:

The current *Divorce Act* last saw significant reform in 1986. The provisions dealing with custody and access are flawed and long overdue for revision. They present significant challenges and barriers to women with children, especially but not only those who are leaving abusive situations, including:

- i. the absence of any spelled-out criteria in applying the best interests of the child test;
- ii. the maximum contact provision, often referred to as the "friendly parent rule," contained in Section 16;
- iii. the absence of any provisions specifically dealing with violence against women and children
- iv. the ban on any consideration of past conduct, unless it can be proven to be directly relevant to the best interests of the children

The Reality of Mothers, Fathers, Children and Families in Canada:

Much is made by those who favour equal parenting regimes of the changing role of fathers in Canadian families and of stay at home dads who spend at least as much time with the children as do the mums. Those of us who work for women's equality know such men and hope for continued and meaningful movement towards increased equality for family and home responsibilities between the sexes.

However, law reform must reflect and acknowledge reality and not individual exceptions or hopes for future change. Family law reform must take account of the fact that women continue to hold most of the responsibility for child rearing and general household management and tasks in most Canadian families, both before and after separation. It must promote women's equality within the family and in society at large.

"A woman with children is always a mother, whether in the work force or at home with her children. The presence of children affects women's lives

differently from the way it affects most men, in terms of both her life choices and her life chances.”⁷

In the vast majority of cases, women continue to be the primary caregivers for children and do most of the housework. According to data gathered in the 2005 General Social Survey, women spend 4.3 hours per day compared to men’s 2.5 on unpaid housework and child care.⁸ This at a time when more and more women, especially those with young children are employed outside the home: by 2004, 65% of women with children under the age of 3 were working, a figure which is more than double the employment rate for women in this category just 30 years before.⁹

Women miss more time from work because of family responsibilities: in an average week in 2004, 5% of women and only 2% of men missed work time due to family responsibilities. Overall that year, women missed 10 days of work and men just 1.5 to take care of family responsibilities.¹⁰

The inequality and disadvantaging of women in the labour market (women continue to earn just 73 cents for every dollar earned by men), in tandem with the heavy load of unpaid housework and caring for children and other family members, places women in a situation of social and economic inequality compared with their husbands, and increases their dependency.

The economic dependency of women in turn exacerbates their vulnerability to the power and control that may be exercised by a spouse after divorce, and their vulnerability to the volatility and violence exhibited by former spouses.

Women’s economic vulnerability only increases after separation. Women who are single parents of children under 18 years of age live below the poverty line at a rate more than double that for single parent fathers: 47% compared to 20%¹¹.

Before considering Bill C-422, it is important to look at the reality of custody and access determinations under existing legislation. In 44% of custody cases that go to court, the outcome is an order for joint custody, which is more than double the number from the mid 1990s and four times the figure when compared to the late 1980s. The rate at which women are

⁷ Christa Freiler, Felicite Stairs and Brigitte Kitchen with Judy Cerny 2001 *Mothers as Earners, Mothers as Carers: Responsibility for Children, Social Policy and the Tax System* SWC p 5

⁸ *The Daily*, Wednesday July 19, 2006

⁹ *Women in Canada: A Gender Based Statistical Report 2006* Status of Women Canada p 105

¹⁰ *Ibid.* p 109

¹¹ *Poverty Profile 2002- 2003* 2006 National Council of Welfare, Minister of Public Works and Government Services p 12

awarded sole custody in cases that go to court has fallen from more than 70% to just 44% from the late 1980s to 2003.¹²

In other words, even without legislation spelling out a mandatory shared parenting regime, courts are making such determinations in nearly half the cases that come before them.

Violence Against Women Within the Family¹³:

Violence against women and children within the family remains a deeply entrenched reality of Canadian life even as its pervasiveness continues to be denied in almost all recent law reform efforts in this country.

According to a 2000 Statistics Canada report women were 5 times more likely than men to have been injured during an assault and to require medical attention, 5 times more likely to fear for their lives, 5 times more likely to have been choked and 3 times more likely to require time off from work because of partner-perpetrated violence or abuse.

Even a cursory glance at the findings of this report indicates that the violence experienced by women and men is neither similar nor equivalent. Further, women are more likely to be victims of stalking and sexual assault, and to experience substantial psychological impacts from whatever forms of violence they experience.¹⁴

Gendered differences are clearly apparent in cases of homicide. The 2007 General Social Survey reported that perpetrators of spousal homicide or attempted homicide were overwhelmingly male (82% compared with 18% who were female).

Recent efforts to claim that violence within families is gender-neutral, bi-directional, mutual, or occurring at similar levels for women and men does not reflect the substantive research done in this area and is misleading. This move to gender-neutral or bi-directional language reflects an intense political struggle to change the understanding of violence against intimate partners. It has serious practical implications because it promotes certain responses to violence and abuse and precludes others. It affects research, policy, legislation and public understanding of violence.

¹² *Women in Canada 2006* p 40

¹³ Adapted from *Transforming our Communities: A Report from the Domestic Violence Advisory Council*, Ontario Women's Directorate 2009, at pp. 21 - 24

¹⁴ Holly Johnson, *Measuring Violence Against Women Statistical Trends, 2006* Statistics Canada p. 7

Violence Against Women After Separation:

Violence experienced by women in their intimate relationships does not end the day the relationship ends. There is an ongoing legacy that can last for many years. The violence takes on new forms such as stalking, criminal harassment and legal bullying as the abuser attempts to maintain his power and control over his former partner; ideally, to have her return to him.

Custody and access is the most common arena in which this post-separation abuse plays itself out, with children the weapon in the hands of the abuser.

Most family law legislation in Canada, including the *Divorce Act*, does not address the issue of violence against women adequately. Too often, the legislation itself and/or the court's interpretation of it continue to perpetuate myths and stereotypes when making custody and access decisions that require ongoing and intense contact and even collaboration between a woman and her abuser.

Family law legislation needs to offer protections to women and their children by

- eliminating joint custody arrangements in cases of violence against women
- requiring that violence and abuse against the mother be an important factor in the best interests of the child test
- eliminating maximum contact provisions that do not take into account the safety of women
- supporting access regimes that protect women from ongoing, unsupervised contact with their abuser at exchanges of the children
- implementing measures to prevent abusers from using the family law and the family court process to continue to harass and abuse their former partner

Unfortunately, Bill C-422 does just the opposite.

Bill C-422 Analysis:

Note: This analysis focuses on only those aspects of Bill C-422 that relate to custody and access and should not be read as a complete analysis of the entire Bill.

What the Bill says:

1. The Bill repeals all use of the language of custody and access and replaces it with such terms and words as parenting, parenting time, equal parenting responsibility and parenting orders.
2. It sets out as one of its principles the right of children to know and be cared for by both parents.

3. It establishes a presumption in favour of equal parenting:

“ . . . in making a parenting order, . . . the court shall

- (a) apply the presumption that allocating parenting time equally between the spouses is in the best interests of a child of the marriage; and
- (b) apply the presumption that equal parenting responsibility is in the best interests of a child of the marriage.”

4. The presumption can be rebutted if “it is established that the best interests of the child would be substantially enhanced by allocating parenting time or parental responsibility other than equally.”

5. However, even if the presumption is rebutted, the court is mandated to “nevertheless give effect to the principle that a child of the marriage should have the maximum practicable contact with each spouse that is compatible with the best interests of the child.”

5. The Bill sets out the considerations to be taken into account when determining the best interests of the child by providing a list of “primary” considerations followed by a list of “additional” considerations.

6. The “primary” list includes, among other factors, “the benefit to the child of having a meaningful relationship and as much contact as is practicable with each of his or her parent” as well as the willingness of each spouse to encourage and support the child’s relationship with the other parent and the “protection of the child from physical and psychological harm through abuse, neglect or alienation of parental affection.”

7. The “additional” list includes, among other factors, “family violence committed in the presence of the child.”

8. In the event a court makes a decision that does not provide for equal parenting time or responsibility, it is required to provide detailed reasons for its decision.

Definitions:

1. “Equal parenting responsibility” includes joint responsibility for long-term decision-making and responsibility for daily care during allocated parenting time, but does not include major decisions made by one parent during an emergency situation.

2. “Parenting time” means, with respect to a particular spouse and child, the days and times that the spouse is given primary care and responsibility for the daily needs of the child.

What this means for women and children:

1. Legal presumptions in family law are not appropriate. Although the concept of general rules can seem appealing on first glance, in application, they don’t work and they are not fair. The best interests of children are significantly dependent on the unique circumstances of each child and her or his family. Appropriate decisions about custody and access can only be made by a careful examination of the facts in each individual case.

Furthermore, by 2009, we have had the opportunity to see how poorly presumptions in favour of shared parenting have worked in other jurisdictions. England, Australia and some American states have implemented such regimes, and the reports are not positive. Judges, lawyers, women’s advocates and families report that litigation has increased, with families returning to court again and again because of confusion over the language of parental responsibility, parental conflict has increased and women have traded their economic rights to ensure appropriate custody outcomes.

2. Elimination of the terms custody and access is not appropriate. This would fundamentally change the way in which we think about parenting after divorce and would introduce considerable confusion as people and courts struggle to understand the vague concepts of equal parenting responsibility and parenting time. Confusion leads to increased litigation, which is never in the best interests of children.

3. The creation of a two-tiered set of considerations to be applied to the best interests of the child test will not, in fact, ensure the best interests of children. It is notable that the factors listed as the primary considerations – the benefits to the child of having a meaningful relationship with both parents and other relatives, the willingness of each parent to facilitate the relationship of the child with the other and the protection of the child from possible alienation of parental affection – are all forward-looking.

Nowhere in this list of primary considerations is an examination of past parenting or of the status quo for the child. It is well established that maintaining a familiar regime is extremely important for children. It is also well established that one of the best indicators of future behaviour is past behaviour – in other words, it is more useful to look at the role each parent has played in the past than to look at the parent’s promises about what he

intends to do in the future when determining the abilities of each parent to parenting effectively.

It is not in a child's best interest to force parents to share parental responsibilities when they have not done so during the marriage. Continuity of care, primary attachment and stability are of the greatest importance for a child's well-being after a separation or divorce. It is in the children's best interest that separation or divorce agreements on "parenting" reflect the actual patterns that existed when the family was intact so that their lives will not be overly disrupted by their parent's separation, and they will not be constantly disappointed in their expectations.

4. Despite Mr. Vellacott's comments that his Bill would not impose a presumption in favour of equal parenting in cases of family violence, the Bill offers no such protection. One of the "additional" considerations to be applied to the best interests of the child test is "family violence committed in the presence of the child." This statement is highly problematic for at least three reasons.

First, placing it in the secondary list provides an easy out for any judge who does not want to include a consideration of violence in deciding on appropriate "parenting" arrangements.

Second, the lack of any definition of the term "family violence" ensures it will be poorly understood and ineffectively used. In particular, the absence of any gendered analysis of what violence within the family looks like is a serious flaw and will endanger the safety of women and their children.

Third, the scope of this provision is so narrow as to be almost useless. Children do not have to be "present" to be significantly and negatively affected by violence perpetrated by their fathers against their mothers. Child protection legislation and some provincial custody and access legislation reflects an understanding that it is *exposure* to violence and abuse that must be taken into account. This includes being present, but it also includes living in a violent and abusive environment.

Children who live in homes where their fathers abuse their mothers often feel abused themselves. Studies show that these children are at risk of experiencing elevated levels of stress, anxiety and low self-esteem. Their schoolwork and relationships with other children may suffer. Some children may become overly compliant while others act out or become aggressive. Studies also show that if these children's mothers are safe from further abuse and if they are given the support and resources they

need to consistently parent their children, the negative effects of being exposed to abuse are lessened.¹⁵

Children's exposure to violence and its impact must be taken into account in determining who will get custody and access after separation or divorce. Unfortunately, many judges, lawyers and other professionals tend to underestimate the impact of woman abuse on children. For women who are leaving abusive relationships, the extensive contact which collaborative shared parenting requires can be dangerous and life threatening. Many abusive men hold their children as "hostages" in their attempts to get back at their ex-partners for having left the relationship. What shared parenting does is give men more power and control over their children and their children's mother without requiring them to contribute to their children's support or upbringing. This is why mandatory shared parenting and the principle of ensuring "maximum contact" between the children and both their parents are very problematic for women and for children.

5. The Bill would permit the presumption to be rebutted if it can be "established that the best interests of the child would be substantially enhanced" by a different arrangement. However, it provides no factors to assist in establishing this rebuttal and, coupled with the entirely inadequate approach to determining the best interests of the child and the utterly inappropriate understanding of violence within the family set out in the Bill, creates a very problematic vacuum in the legislation. And, the legislation makes it clear that, even if the presumption is able to be rebutted, the court must still "give effect to the principle that a child of the marriage should have the maximum practicable contact with each spouse."

Conclusion:

Bill C-422 is cleverly constructed. Its passing reference to family violence, its delineation of considerations to be made in applying the best interests of the child test, its establishment of children's rights in its opening principles all appear, at least superficially, to address concerns raised by past critics of similar bills.

Appearing as it does at a time of increasing political conservatism and even fundamentalism, at a time when allegations of parental alienation against mothers are at an all-time high in family court and when fewer and fewer women in family court have legal representation, is very troubling, the Bill offers an approach to dealing with post-separation parenting conflict that can appear attractive to politicians, the media, judges, lawyers and the public.

¹⁵ See, generally, the work of child psychologist Peter Jaffe.

Indeed, even within the progressive media, there is considerable support for this approach to post-separation parenting.¹⁶

In principle, the concept that both parents have ongoing responsibilities towards their children is unquestionably a good one. Many women struggle on a daily basis to convince their spouses that they do in fact have parenting responsibilities with respect to their children, both during the marriage and after separation or divorce. Unfortunately, as described earlier in this paper, it is still women who do the majority of housework, provide most of the day to day care for the children, who arrange their work schedules to accommodate their children's needs and who take time off from work to care for sick children.

In fact, post-separation, many women must also ensure that their children have what they need in the way of clothing, books, toys and such when they are in the care of their father.

Most mothers would welcome increased parental involvement from fathers after a divorce, on the condition that it does not threaten their children's well-being or security.

The National Association of Women and the Law and other women's equality-seeking organizations support amendments to the *Divorce Act* that recognize and respond to the diversities and realities of families in this country, including the reality of violence against women and children within the family, as described above. In particular, we support amendments that:

- maintain the language of custody and access
- eliminate the maximum contact provisions contained in section 16
- set out meaningful criteria for the best interests of the child test, including mandatory consideration of:
 - violence and abuse within the family (see Appendix One for the best interests of the child test that appears in Ontario's *Children's Law Reform Act* for a model)
 - the safety and well-being of the child and the child's mother
 - the practical realities of the child's life, including primary care, whether both parents have a relationship with the child, and whether there is a climate of coercion, violence, or fear
 - whether a parent has demonstrated responsible parenting in the past
 - maintaining continuity and stability in the child's care

¹⁶ See rabble.ca for an ongoing discussion about Bill C-422

- the quality of the relationship the child has with a parent and the effects of maintaining that relationship
- the quality of the relationship between the parents, taking into account that conflict between parents diminishes the benefits of contact to children
- the diverse realities and parenting practices of families in Canada, and the child's cultural and racial heritage
- the child's views where it can be clearly ascertained that the child has not been manipulated, threatened, or otherwise coerced

It is also imperative that the federal government address the right of women to high-quality legal representation regardless of their economic status by providing adequate levels of funding to provinces and territories for family law legal aid. Without adequate legal representation in family court, even positive law reform as we are suggesting in this paper will have a minimal impact on women and children.

Amending the *Divorce Act* and improving access to legal aid would help to ensure that when women and children leave abusive, violent situations they are not condemned to continue to live out that abuse and violence through an “equal parenting” regime that places their safety and well-being in jeopardy on a regular basis.

Such amendments would in no way interfere with joint custody with equal parenting time in families where both parents have been actively involved with the children pre-separation and where both parents are committed to making the best interests of their children a priority.

Women and children deserve custody laws that respect their right to live free from violence and the threat of violence. Bill C-422 does not offer this and needs to be defeated.

APPENDIX A

CHILDREN'S LAW REFORM ACT (Ontario)

Best interests of the child test:

24(1) The merits of an application under this Part in respect of custody of or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3) and (4).

- (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;
 - (b) the child's views and preferences if they can be reasonably ascertained;
 - (c) the length of time the child has lived in a stable home environment;
 - (d) the ability and willingness of each person applying for custody of the child to provide the child with guidance and education, the necessities of life and any special needs of the child;
 - (e) any plans proposed for the child's care and upbringing;
 - (f) the permanence and stability of the family unit with which it is proposed that the child will live;
 - (g) the ability of each person applying for custody of or access to the child to act as a parent; and
 - (h) the relationship by blood or through an adoption order between the child and each person who is a party to the application.
- (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.
- (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.
- (5) For the purposes of subsection (4), anything done in self-defence or to protect another person shall not be considered violence or abuse.