

## Ontario Bar welcomes Family Law Overhaul

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Ontario has unveiled a package of reforms that family law practitioners say should cut clients' costs and improve fairness in the areas of child support, pensions and matrimonial property division.

Bill 133, tabled Nov. 24 by Attorney General Chris Bentley, would also make substantial changes to other aspects of family law, including estates, child custody, restraining orders, and changing children's surnames.

Many of the proposed amendments were the product of province-wide consultation with family law practitioners, Bentley told *The Lawyers Weekly*. "They have a broad consensus within the Bar and they will make a measurable difference in making, for example, the family law more affordable [and] faster – and I would point to the pension law changes and others."

The proposed measures were welcomed by the organized Bar, who described them as "a welcome first step" in updating a provincial family law regime that has not seen major reform since 1986.

"It is the County and District Law Presidents' Association's position that additional changes are required, and we believe a comprehensive review is needed in the whole area of family law, along with more judicial resources to ensure better access to justice in Ontario," said the co-chair of CDLPA's family law committee, Romuald Kwolek of Orazietti Kwolek in Sault Ste Marie, Ont.

"I think it's great — it's going to have a huge impact in a lot of areas where we practise," enthused the chair of the Ontario Bar Association's (OBA) family law section, Thomas Dart of Burgar Rowe in Barrie, Ont.

"The pension changes will be the biggest changes for most people," added Dart. "It's going to significantly reduce costs for clients who have to deal with pension issues."

Several practitioners told *The Lawyers Weekly* they support the government's plan to amend the *Family Law Act* (FLA) to oblige parents who pay child support to make annual financial disclosure to the other parent. (Some recipients will also have to disclose to payers). Details will be worked out in regulation once the bill is passed, but it will remain up to recipients to enforce the disclosure obligation, if need be by going to court.

Lawyers therefore questioned whether children will benefit much from the change since the government opted not to automatically re-calculate child support, based on payers' updated financial information — as is now done in Manitoba and some other provinces.

"I am definitely disappointed because I think [a disclosure obligation and automatic recalculation] should go hand in hand," commented Judith Huddart of Toronto's Dranoff Huddart.

Bill 133 gives the provincial cabinet regulatory authority to implement automatic recalculations and to enforce production of the required financial information, but the government did not announce an intention to do either, possibly because of budgetary constraints.

Asked whether his government has the appetite to create a recalculation service, Bentley said the issue lies in the bailiwick of the Minister of Community and Social Services, who oversees the Family Responsibility Office. Huddart said leaving the onus on recipient parents to go to court to force recalcitrant payers to disclose their



**Ont. A.G. Chris Bentley announces planned reforms Nov. 24, 2008, in Toronto that he says will protect women and children from violence and make family law litigation cheaper, fairer and speedier. (Photo courtesy of Jason George)**

income is an unaffordable option for most recipients. "Without a recalculation agency are mothers going to be any better off? We could have made this a lot easier by putting teeth in disclosure."

But she did suggest that the Bill's removal of the current legal burden on recipients to ask payers for updated income information could make it easier to obtain substantial retroactive child support payments in court, since payers would no longer be able to argue that recipients failed to ask for timely disclosure.

"I really am hoping that the judges are going to get the message that they can make retroactive orders, [and that]... the government will use this as an opportunity to educate more people about what has to be disclosed," said Huddart.

CDLPA and the OBA praised the government for heeding lawyers' pleas to bring some certainty to the vexed issues of spousal pension valuation and divisions. Bill 133 aims to reduce, if not eliminate, the phenomenon of dueling actuaries and litigation that frequently occurs when defined benefit pensions, or hybrid defined benefit/defined contribution plans, are valued.

Again, the bill leaves important details to be worked out by regulation. However, the proposed law calls for the non-member spouse to be paid at the time of separation the present value of his or her share of the plan on the valuation date — usually to be placed in a locked-in RSP — except where the pension is already being paid out at the time of separation.

Pensions would be valued by pension plan administrators according to a formula that is to be prescribed by regulation. The new law would apply prospectively to pension divisions that are not already determined under an agreement or court order at the time of proclamation. The projected age of retirement will be determined after consultation with the Bar, in order to make valuations as fair as possible.

There are four changes to the evidence that must be filed with a court in child custody cases. All parents and non-parents applying for custody or access will be required to submit a sworn or affirmed form containing a parenting-type plan, information about the applicant's previous or current involvement in family or criminal proceedings, and any other known information relevant to determining the child's best interests.

The specific questions to be addressed will be developed by the Family Law Rules Committee.

Non-parents (*i.e.* those who are not biological or adoptive parents or who do not have a declaration of parentage) who seek custody (not access) will be required to submit a recent police records check, as well as a form from children's aid societies specifying whether the person has, or has had, a file with the CAS; whether that file is open or closed; and the dates between which the file was open. A custody applicant who has moved around within the province will apparently have to obtain information from every CAS in the areas they have lived. This and other implementation issues — for example, whether the disclosure obligation applies to CAS involvement only when the applicant was an adult — will be specified by regulation.

Bill 133 will permit breaches of restraining orders to be prosecuted as criminal offences. CDLPA called this "a constructive step forward," but practitioners suggested the move should cause judges to revisit their common practice of making spousal restraining orders mutual in those cases where the behaviour of only one spouse is problematic.

In another change called for by the Bar, Bill 133 will permit debts on the marriage date that were "directly related to the acquisition or significant improvement" of the matrimonial home to be excluded from the debtor spouse's net family property.

Family law lawyers said it is most unfortunate that the government chose not to implement the Bar's request to fix an unfair anomaly in the FLA's definition of "matrimonial home" which financially penalizes spouses who bring their residences into the marriage if they and their partners happen to still be living in that residence when they separate. Whether the homeowner spouse has to share the marriage-date value of the property with the other spouse shouldn't depend on whether they are still living in the property at the time of separation, they said.

"It's just wrong," remarked Harold Niman of Toronto's Niman Zemans Gelgoot. "It doesn't make any sense."

The bill would permit a parent who is left off a birth certificate to apply to have their surname added to their child's surname.