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Chair

Mr. Art Hanger

Standing Committee on Justice and Human Rights

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● (1535)

[*English*]

The Chair (Mr. Art Hanger (Calgary Northeast, CPC)): I'd like to call to order the meeting of the Standing Committee on Justice and Human Rights, December 11.

As one matter that's before us on the agenda, we are still finalizing our discussion on Bill C-252, an act to amend the Divorce Act for access for a spouse who is terminally ill or in critical condition.

One of my Conservative colleagues, Mr. Rick Casson, will be presenting, as this is a private member's bill. I would ask that Mr. Casson begin his statement.

Mr. Rick Casson (Lethbridge, CPC): Thank you very much, Mr. Chairman.

I have a brief statement to make and then I can answer questions, if necessary.

It's an honour for me to be here today speaking to you about my private member's Bill C-252, an act to amend the Divorce Act. I know how busy this committee has been with the volume of legislation, and I appreciate your taking the time to examine this important bill.

Since it was first read on May 4 of this year, this bill has been a work in progress. Bill C-252 received rigorous and constructive debate in the House of Commons during second reading, and I appreciate the thoughtful debate provided by members of all parties during the first and second hours of debate at second reading.

That input from all sides allowed this bill to proceed to this committee today with unanimous support from the House. From the Liberal Party, we heard from Mr. Shawn Murphy, Mr. Lee, Mr. Szabo; from the Bloc, Ms. Freeman and Mr. Ménard; from the NDP, Mr. Comartin and Mr. Siksay; and from the government, we heard from Mr. Goodyear, Mr. Shipley, Rob Moore, Lynne Yelich, and Mr. Van Kesteren. All made contributions. I really consider it to be a bill that has been shaped and moulded with the cooperation of my colleagues in the House of Commons.

I would like to say at the outset that this bill is and always has been about families. We all know divorce is an unfortunate yet common reality in our society today. This bill recognizes the importance of familial bonds in all families, especially those families where a divorce has occurred. Although families may be fractured by a divorce, the bonds and relationships between children and their parents continue to exist and deserve the support this bill seeks to establish.

I first considered undertaking a private member's bill to address this issue earlier this year after hearing about a very unfortunate situation in my riding involving a young family that had been split by divorce, and one of the parents had become terminally ill. As is the case with most divorces, there are two sides to the story. I did not undertake this bill because one person was right or one person was wrong. That was not and is not a decision for me to make. However, I did recognize that something was wrong, so I was faced not with the question of who is right, but rather of what is right.

I believe it is right that children be ensured a chance to say goodbye to a parent who is terminally ill or in critical condition, unless such contact between parent and child is not in the best interest of the child.

As you know, this bill seeks to establish that the terminal illness or critical condition of a divorced parent represents a change of circumstance of that child of the marriage, and that this change of circumstances ought to allow the child and parent to visit as long as it is consistent, as I said, with the best interests of the child.

As legislators, we need to produce and provide, where we can, ample and timely access between children and their divorced parents. Ample access is a principle provided for in subsection 16.(10) of the Divorce Act, which states that “the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child”.

Subsection 17.(9) reiterates the same support for ample access in the consideration of variation orders.

I have undertaken this bill because I believe it is necessary to take the Divorce Act a step ahead to provide not only ample access, but also timely access. Timely access is especially important for circumstances where a divorced parent is terminally ill or in critical condition and the child may not have the opportunity to say a last goodbye to his or her parent.

This is what I mean when I say “timely access”. The Divorce Act currently provides for maximum access, and this bill seeks to establish, or at least open the door for, timely access by affirming that a child who is on the verge of losing a parent is indeed a child in unusual circumstances, a child needing a chance to say goodbye.

Visitation rights in Canada are about the rights of the children, and this bill respects those very rights, while also seeking to expand them. During second reading debate, honourable colleagues voiced concern in relation to the rights and the best interests of children.

The original text of this bill stated that any access or custody order must be made subject to subsection 16.(8) of the Divorce Act, which clearly states that such orders must be made according to the best interests of the child.

During the second hour of debate at second reading, the bill was amended by all-party support so that the proposed subsection clearly states that such access to a child be granted only as long as it is consistent with the best interests of that child. This was an important amendment, because it provided the bill with its own provision upholding the best interests of the child.

Another important aspect of this amendment is that it preserves judicial discretion by maintaining that it is the courts who decide what embodies the best interests of the child. This bill does not dilute the ability of the courts to exercise their discretion when assessing the interests of a child and preserves the role of the courts in doing so.

This bill is meant to provide an important criterion to assist the judge's consideration, not to harness it. Terminal illness or a critical condition of a parent ought to be one factor amongst other factors that are collectively subject to the key issue, the best interests of the child. Likewise, I do not believe that terminal illness or critical condition is cause for automatic custody.

In short, although the terminal illness or critical condition of a parent is a significant factor that demands consideration, it is not the determining factor, and it cannot trump the biggest factor, which is the best interests of the child.

Another significant aspect of the amendment applied to this bill at second reading is that the bill now seeks to amend section 17 of the Divorce Act rather than section 16. This amendment is significant and appropriate because section 16 deals with custody orders, while section 17 deals with variation, rescission, or a suspension of orders. The condition of a parent who is terminally ill or in critical condition would be taken into consideration by a judge assessing the circumstances surrounding an initial custody order. This bill is aimed at situations in which the circumstances have changed due to the condition of a parent, and in which the consideration of custody or access needs to be revisited.

Mr. Chairman and members of the committee, in summary I would like to say I believe this bill is balanced as it seeks to support both familial bonds and the best interests of children. Any and every child faced with the possible loss of a parent deserves a chance to say that last goodbye unless it is decided by the court that such visitation is not in the child's best interests. This bill also respects the judicial discretion of our courts by allowing them to exercise that discretion in determining what decision ought to be rendered in the best interests of the child. This bill does not seek automatic custody for divorced parents who are terminally ill or in critical condition; rather, it seeks to establish the terminal illness or critical condition of a parent as one factor amid other factors that need to be considered when the courts are adjudicating such questions of custody.

I believe we have a responsibility to identify how we can create and fine-tune the laws to help our fellow Canadians and support them in both good and bad times. That is why I am here today speaking to you about Bill C-252. Mr. Chairman, thank you for this opportunity, and I look forward to your questions and input.

● (1540)

The Chair: Thank you very much, Mr. Casson. That was very well put.

Now I'll go to questions.

Mr. Bagnell.

Hon. Larry Bagnell (Yukon, Lib.): Thank you, Mr. Chairman.

That was an excellent presentation. I'm not that familiar with this, but could you explain the technicality of what would be different from the situation now if this bill were implemented? You gave a good rationale for the philosophy of it, but I'm looking for the technical difference.

Mr. Rick Casson: I will if I may, Mr. Chairman.

Thanks, Mr. Bagnell, for that. Section 17 of the Divorce Act deals with the variation or suspension of orders, anything that changes in a custody order that the court should consider when looking at any change. What we want to do is just add a section after section 5 that states what the bill says: "A former spouse's terminal illness or critical condition shall be considered a change of circumstances". We just want to make sure that's in the bill, and that it is one of the considerations that the judge would face when looking at changing a custody order. Right now it's not there. It may be overlooked. So this is just an opportunity to have them look at one more situation that could exist in the life of a child.

Hon. Larry Bagnell: So it's when they have an original custody order and then they come back for a change? This just adds one of the conditions that the judge would look at in making that determination?

Mr. Rick Casson: That's what I believe, yes.

Hon. Larry Bagnell: The critical or terminal illness would be determined by a doctor, I assume?

Mr. Rick Casson: Yes, I believe that is the way it would have to be done. I'm sure that any judge would ask for a doctor's consideration in this, since that is the reason being presented to him to change the custody order. That's an assumption on my part. Maybe the department people can talk more on that.

Hon. Larry Bagnell: Regarding the best interests of the child, who would determine that, again?

Mr. Rick Casson: The courts.

If I can, Mr. Chairman, to help clarify, under subsection 17(9), it states:

> In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

That gives it both ways.

Hon. Larry Bagnell: If the custody was originally provided to a person who's terminally ill or who became terminally ill, this would also give the judge the ability to change that custody if that person were not able to care for the child, for instance?

● (1545)

Mr. Rick Casson: If the person already had custody of the child? I think you'd better ask the officials that question. You're saying if they already have custody of the child...there'd be no need to....

Hon. Larry Bagnell: I'm just asking if that's one of the objectives of your bill.

Mr. Rick Casson: No, it's not. It's to allow a child who at present does not have access to that parent to have access when that parent is dying.

Hon. Larry Bagnell: But then it would work the other way, if that person couldn't care for the child, and if they had custody—

Mr. Rick Casson: That would be a consideration the courts would have to take, I'm sure.

Hon. Larry Bagnell: Could you just outline the constituent's story that inspired this? Was it that one of the parents was ill and they were denied custody?

Mr. Rick Casson: As I said, I'm not going to really get into that. As all divorces are, it was a somewhat messy situation. When this was first brought to my attention, that there wasn't anything in the law that would facilitate a judge to make this decision, I thought, well, regardless of what the personal or individual situation was, the law needed changing, so we moved forward to do that.

But yes, a mother was dying.

Hon. Larry Bagnell: What kind of feedback have you had from constituents or anyone since this came into debate? Are people pretty happy with it?

Mr. Rick Casson: To tell you the truth, there hasn't been an overwhelming amount of input, because as you know, it's not something that's on the top of mind for a lot of people. But people who have been faced with this issue are very thankful that it's come forward.

What it did do is that I had a lot of contact from people on the Divorce Act generally—not specifically this, but just the Divorce Act. There were a lot of custody issues, a lot of maintenance issues, which we all face, I think, in our offices, but on this there were a few from across the country.

Hon. Larry Bagnell: In the House, in the debate, was there anyone who spoke against the bill?

Mr. Rick Casson: Initially, yes. I must say that I felt the debate was quite remarkable, in that it was very constructive. Concerns were pointed out. Then when we came back for the second hour, there was an amendment created to change it from where it was to put it into this section of the bill, and that passed unanimously. I supported that amendment because I think it made it work better. Then the bill passed unanimously in the House.

I mentioned in my comments that I felt it was pretty collaborative. I think it just showed that in some instances in the House we can cooperate when people see the end result as being something they want.

The Chair: Thank you, Mr. Bagnell.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard (Hochelaga, BQ): Thank you, Mr. Chairman.

Congratulations on your bill. I know it's always an important moment when you get to do your job as a legislator. I have often said to my whip and my leader that there should be two hours a day for private members' business. That's one way for us to do our job well and to represent people in the House of Commons. Unfortunately, the balance between government business and private members' bills has not yet been struck.

We, in the Bloc Québécois, are mostly supportive of your bill, although we are still concerned by the fact that family policy has to remain with the provinces, in our opinion. Quebec, in particular, has a civil law tradition, and we would like divorce to come under Quebec jurisdiction. If legal separation and marriage are part of Quebec civil law, it would be logical for divorce to be too.

That said, the courts currently take into account the rights of the child—that's fundamental—and unless there's any criminal record, history of poor parenting or deprivation of an attribute of parental authority, the courts generally tend to favour giving access to both parents.

Correct me if I'm wrong, but basically, the amendment you're suggesting potentially involves two cases. The first is where a court judgment denies one parent access to the child, and the second is on a review application because the parent is in the terminal stage, in the hope that a special arrangement can be made, for more frequent visits or visits at other times with the father or mother who has a degenerative disease.

Are those the two scenarios that a person unfortunately suffering from a degenerative disease could rely on under amended section 16?

● (1550)

[*English*]

Mr. Rick Casson: Yes, one issue is that we feel that if one of the parents becomes terminally ill, this changes the circumstances. So that should offer the opportunity to go back to the courts and say that things have changed, that this parent has a very short period of time to live so they'd like to have access if none is granted, or, as you say, maybe even give more.

On the other issue, if for some reason that access has been denied, if for some reason the court felt strongly enough to say that one parent should not see this child, that has to be considered. This doesn't outweigh anything. This is just part of the total package. I am comfortable with that. If for some reason, whatever it was—we can speculate—if there was abuse or whatever, there is no way a court could force that child to go to see that parent. I don't think they would. But this is just another consideration for them to have when they're dealing with this.

[*Translation*]

Mr. Réal Ménard: That's fine. A little later, we'll be hearing from the departmental officials, but if I understand correctly, the government supports your bill, because the bill is apparently going to pass unanimously. If the government supports it, I guess there were guarantees that there were no problems with jurisdiction, the Constitution or the best interests of the child. Have you had the opportunity to discuss your bill with the friendly Minister of Justice?

[*English*]

Mr. Rick Casson: Yes, I have. I've talked to the minister's office and to him personally and really received some help.

When the idea first comes up for a private member's bill, you seek support from the legislative people in the House of Commons. You talk to your colleagues. The suggestion for the amendment came forward from various places. The wording and where it should go in the bill was offered in a friendly manner by many people.

The issue of jurisdiction I will not go into today. That will be something you will have to discuss with others.

The Chair: Thank you, Mr. Ménard.

We'll go to Mr. Comartin.

Mr. Joe Comartin (Windsor—Tecumseh, NDP): Thank you, Mr. Chair.

Thank you, Mr. Casson, for being here.

I have to admit that I didn't catch this until very recently, and I had it confirmed again today. I don't know if you appreciate this, but there are several different types of scenarios where this issue could arise in terms of a terminal illness. Let me quickly go through those.

One is a scenario where the parties have separated, the parents have separated, and there's no court order. One of the individuals who doesn't have physical custody of the children becomes terminally ill and applies to the court. Section 16 of the act would apply, not section 17. The test or the criteria in section 17 would not be something the court would have to take into account.

The second scenario, which also applies to section 16, would be where you have an application for custody or even a disputed application for custody by both the parents, but there's no order yet. You have de facto custody residing with one of the parents, and again the non-custodial parent becomes terminally ill and wants to have access. Section 16 would apply there, and this criterion would again not apply.

This criterion only applies in the third scenario, where a court order has already been made and you're moving to vary it.

I'm raising this with you, and I'm apologizing to some degree, because when you talked about the amendment, I didn't appreciate that it was only going to apply to the third scenario. It doesn't apply to the first two. It only applies to the variation.

I have to say to you that from my experience in family law, which is quite extensive, the third scenario is going to be the most common one, where you'd actually have a court order and custody would be granted to one parent or access would be denied or left blank. The most common situation is where the parent has perhaps dropped out of the child's life but is now terminally ill and wants to have access before death.

You're probably going to catch most of the cases or the majority of the cases, but I think there are a significant number that you're not going to catch. I have no idea what the percentage is, but I would think it's less than half. There are a number of cases that you're not going to catch through this amendment.

I'm only raising this so you can appreciate it. We may want to hear more when we hear from the officials, but it's a problem.

Let me finish my question, after all of this.

I'm assuming you wanted to catch all three of those scenarios, where a person faced with a terminal illness or a very serious illness would want the opportunity to say to the court this is really important and take it into account, which is what your amendment does in the third scenario.

● (1555)

Mr. Rick Casson: Maybe you can help me, through your experience, Mr. Comartin.

For the first two scenarios you talked about, where there is no court order or there's one in development and something happens, does section 16 not allow that consideration to come before the judge?

Mr. Joe Comartin: No, it would not.

Mr. Rick Casson: Would it not be considered at all, as far as the terminally ill person?

Mr. Joe Comartin: I'm sorry. It would, inasmuch as it would be under existing law, but they would not look to section 17. They would only look to section 16, which has some criteria in there. As you've already set out, the primary one is the best interests of the child.

Having as much contact with a parent is another section, but the specific proposed subsection that you're putting into section 17 would not be taken into account. Our courts assume that we know what we're doing here, but it's sometimes a false assumption. They're assuming that if we only put it into section 17, we mean for it to be used only in section 17.

Mr. Rick Casson: Well, I look forward to the response from the officials on that as well. I appreciate your pointing it out.

I thought that if we put it into section 17 to deal with present orders, then anything else would be dealt with in section 16, but you're saying that's not the case.

Mr. Joe Comartin: It's not my understanding.

That's all, Mr. Chair. Thank you.

The Chair: Thank you, Mr. Comartin.

Monsieur Petit.

[*Translation*]

Mr. Daniel Petit (Charlesbourg—Haute-Saint-Charles, CPC): Thank you.

Good afternoon, Mr. Casson.

First, I'd like to congratulate you. Your amendment, which would amend the Divorce Act, is a really good one. The act was proclaimed in 1968, under Trudeau and the Liberals. For nearly 40 years, this act has been causing us problems, in families and in society. As you say, we have to try to protect children with this legislation so that their interests take precedence. At least that's the way I see it.

In Quebec, there tends to be an imbalance in terms of custody orders. In many cases, the woman gets custody of children under five.

Very often, what happens is what's called an alienation of affection, that is to say, the custodial parent has so much control over the mind of the child that the child ends up rejecting the other parent. This type of behaviour is of course not allowed, but it's very hard to prove or even deal with legally.

In Quebec, under the Legal Aid Act, young children, though minors, can apply for legal aid given their lack of financial means. They can ask to see their father or mother in the terminal stage. That's great. That didn't use to be an option.

I think this is a very significant step forward, and it's to your credit. Take, for example, a 7-, 8-, 9- or 10-year-old child who has had an alienation of affection and stopped seeing their father five or six years ago. Let's just assume it's a father. At some point, the child learns from uncles and aunts that the father is not doing very well. The mother, who has alienated the child, wants to keep the child to herself. I'm not faulting her; she's only human. In that case, the child could go to legal aid and ask, through a lawyer, to see the father. In other cases, it could be the mother. It's a delicate situation. The child is going against the wishes of the custodial parent.

This bill would enable a parent in ill health, who might be unable to go to court in the terminal stage, to see the child if the child has requested it.

Do you see it the same way I do, as a new opportunity for children, an opportunity to visit a parent with the help of legal aid, as is done in Quebec?

● (1600)

[*English*]

Mr. Rick Casson: To tell you the truth, I wasn't aware that the situation existed in your province. Certainly, as I relate to the situation I'm familiar with and which stirred me to move on this private member's bill, the one parent was very, very ill and the family got involved as well. So there are all kinds of aspects, as you say, of aunts and uncles. If the child isn't aware the other parent is ill, then there are ways to make that happen.

I would think it would be a tool that would help in most situations to deal with terminally ill parents to put this into Bill C-17—and I'd be interested to see what the officials say about section 16 as well—to just make it part of the criteria the judge looks at when he makes these decisions.

Thanks for your comments. I appreciate them.

The Chair: Thank you, Mr. Petit.

Mr. Lee.

Mr. Derek Lee (Scarborough—Rouge River, Lib.): Mr. Casson, there's probably nothing worse for a member of Parliament than to be thrown with his or her bill before a committee, many of whom are lawyers, who will nitpick until the cows come home. So I don't doubt for a moment the good intentions behind this legislation, which has been adopted by the House at second reading. And I think we can see its intention from the wording. But I do have a few questions just to rough out some concerns. They probably aren't major concerns. Mr. Comartin has addressed one of them.

Another one that I have is that the wording in the statute appears to place a burden on a judge. It says that a judge “shall...ensure”. Was it your intent in drafting this that the burden actually be on a judge, that irrespective of the positions of either of the parties or any of the applicants, a judge on his or her own initiative would have to take the steps to either impose or ensure access?

Mr. Rick Casson: No, Mr. Lee, not really. I think that word might possibly be something to be considered, if the committee wishes to have a little further look at that, as to what onus it puts on different parties, particularly the judge. I think there has been some talk about that particular word, “ensure”.

Mr. Derek Lee: Yes, and because of that word “ensure” and the relatively robust wording, you could have an access scenario created in a revision order, which neither of the parties wanted and the child didn't want, and where a medical doctor had said that there's no way this person who is dying is going to have the ability to encounter what could be a 10-year-old child. That may seem odd to you, but the wording does seem to push for and create access without reference to what either of the parties would want—although it comes in the context of a revision in the statute.

Have you thought about this medical issue at all in this, since it does involve a critically ill or terminally ill patient?

● (1605)

Mr. Rick Casson: A medical issue in what way?

Mr. Derek Lee: Incapacity.

Mr. Rick Casson: So if the parent is so ill that they can't...? But then what would stop the judge from making that decision for the child to go to visit?

Mr. Derek Lee: Okay, I suppose you've covered it off with the amendment, where the best interests of the child are. But you wouldn't want to have a scenario where the adults and the judge said okay, little one, go and watch your father die. I realize that's not what you envisaged.

I'm nitpicking the wording here and trying to figure out what the Department of Justice will have to say about this wording as it would be applied to thousands or hundreds of cases across the country over a period of time. I wonder if other medical conditions would not.... You have referred to terminally ill or “critical”, but there are actually a number of other conditions pertaining to people who are in hospital, who might be pretty badly off, but who wouldn't be terminally or critically ill. I can think of the term “guarded”; I've seen that used. I don't know whether it has a medical application or not.

Here I'm inviting your comment—

Mr. Rick Casson: No, I understand.

Mr. Derek Lee: —about the possibility of altering the wording for the medical conditions to provide a broader spectrum of what would be very poor condition.

Mr. Rick Casson: Our intent is that it is a terminal illness or a terminal condition. I guess it would be the doctor's role to decide if that were indeed the case. Once that is established, I don't know where these other medical things would come in. You could be terminally ill from a lot of things, but if that is the determination of the doctor, then that would be what the judge would have to base his ruling on, I would suppose.

Mr. Derek Lee: So at the end of the day, it is your intention that it would be a last clear chance, before the possibility of death, for the parent to see the child and the child to see the parent.

Mr. Rick Casson: Can you repeat that?

Mr. Derek Lee: Your intention is to provide a window of opportunity for either the child to see the parent or the parent to see the child, in the terminal situation.

Mr. Rick Casson: That's the gist of it. Exactly.

Mr. Derek Lee: Thank you, Mr. Chairman.

The Chair: Thank you, Mr. Lee.

Mr. Moore.

Mr. Rob Moore (Fundy Royal, CPC): Thank you, Mr. Chair.

Thank you, Mr. Casson, for bringing this forward and for walking us through some of the debate. I know there was a lot of good debate that surrounded this bill and also some amendments.

I know we can get bogged down sometimes in all the details. I appreciate that we have some witnesses who are going to present on some of the finer legal points, but I want to give you a chance to talk about the typical scenario that this bill would encompass—without speaking specifically on any case—simply to hear your intention with the bill.

Mr. Rick Casson: Mr. Comartin pointed out a couple of instances where there are no custody orders or where they are being developed. I agree that section 17 doesn't deal with that.

When I started this, I saw a parent who was denied access to their children at a time when there was very little time left. I thought, how could this happen in this country? If there's no other reason for the judge to stop it—for instance, from a previous order that saw some issue of abuse or whatever and the parent had no right to see those children, then certainly. But with all of that absent, my goodness, shouldn't we allow that child to see that parent or that parent to see the child?

That was the driving force, and that was what I was thinking. There was a situation where the courts had decided that the child would be in the custody of the other parent—the one who wasn't ill—and the one who was ill needed access. That's what we're trying to work toward here.

Mr. Lee's comments are pretty important. He made some of these issues during the debate as well. From a lawyer's point of view, on any statement or any law, if you just drill into one word or one aspect of it, you could pretty much find an argument against almost everything.

I think the overall encompassing reason for doing what we're doing is just that. I'm not trying to read anything into this that doesn't exist. I'm not trying to force children to see a parent they don't want to see. That's all covered off elsewhere in the legislation.

● (1610)

Mr. Rob Moore: I appreciate, too, that the underlying principle of your bill, when it comes to custody, has been for some time, and should remain in the future, the best interests of the child. Your bill fully recognizes that. I know some of that flowed from the debate that took place. I think the amendndment is now well placed in the bill.

Do you want to comment a bit on that factor—the best interests of the child—and how you see your bill respecting that fundamental principle in custody law?

Mr. Rick Casson: Well, it has to be. That's what everything is based on here—the children. We have adults who have chosen to disagree and go different ways in their lives, but we have young people who are caught up in that. The courts have come into play to deal with this as the tug-of-war gets started.

To make tools available that are better suited to deal with all the situations that exist goes one step further. Certainly this doesn't answer all the questions.

If a judge, for any reason, doesn't think it's in the best interests of the child, then he will rule as such. All the facts would have to be placed in front of him by anybody who is seeking to change an existing order.

Mr. Rob Moore: Thanks.

The Chair: Thank you, Mr. Moore.

Mr. Temelkovski.

Mr. Lui Temelkovski (Oak Ridges—Markham, Lib.): Thank you very much, Mr. Chair.

Mr. Casson, thank you for bringing this issue to us.

Prior to being elected I was with an insurance company, and we dealt with critical and terminal illnesses. There are so many definitions of critical illness and terminal illness, especially terminal illness. A major consideration was the timeframe one was faced with. It was not whether one was terminal—terminal is easily defined—but within what timeframe was that person not going to be with us any more. Some terminal illnesses may provide a person a life expectancy of ten years after they're diagnosed. In other areas, when we're talking about a critical illness, there are to my knowledge as many as 38 different definitions of critical illness, anything from cancer, to skin cancer, to heart attack, and so on.

I don't see here where you're defining that. Maybe you could give us a little more information on the definitions of these, because if the bill is intended to have children visit a terminally or critically ill parent, it can happen with even the least amount of consequences there, unless defined appropriately.

Mr. Rick Casson: Again, I'm not an expert on the 38 definitions. Are you saying the medical profession has 38 definitions?

● (1615)

Mr. Lui Temelkovski: I have seen as many as 38 different critical illnesses covered under critical illness.

Mr. Rick Casson: Whatever that number is, I suppose it's up to the medical profession to establish whether it's a critical illness or a terminal illness and report that to the courts. Then it's for the judge to decide if there are one, two, or thirty-some, as you indicate. I think that would have to be taken into consideration.

I'm trying to get my head around your suggestion that there may be too many definitions of critically ill to allow this to work. I don't think that would matter. If the doctor has indicated this is the case, that's the way it would be, regardless of what the illness was.

Mr. Lui Temelkovski: I think the point I was trying to make is that one could use this critical illness to their advantage to bring their kids to them inappropriately, or even when it is a terminal illness, when there's ample time in the statute as it stands to provide a parent access to their children. The termination might be prolonged or take maybe ten years to happen, as opposed to something urgent, when we're thinking of terminal.

Personally, I think of terminal as something under a year or two, but within the insurance industry I have seen it be as long as ten years.

Mr. Rick Casson: I guess it would be better for the child to have visitation rights for ten years rather than a week to see a critically ill parent. I don't know if we could include a definition of timeline. In the best scenario, somebody who was classed as being critically ill would recover at some point through some new medication or treatment. But I'm not going to argue about a timeframe. I don't know how you'd administer that. If it's a doctor's decision or observation that this person is terminally ill, and he states that, then I think that's the criterion the judge would have to go on.

The Chair: Thank you, Mr. Temelkovski.

Mr. Szabo has a question.

Mr. Paul Szabo (Mississauga South, Lib.): Yes.

The Chair: Mr. Thompson has a question too.

Mr. Paul Szabo: Thank you, Mr. Chairman.

I had the opportunity to speak on this. It was one bill that I really wanted to speak on at second reading because I do very much support the intent. The member has taken a case.

What concerned me was I wasn't sure whether the member was aware of who drafted the amendment. Where did it come from?

Mr. Rick Casson: I believe it came from the officials out of the.... I got help from the parliamentary secretary to the minister, I believe.

Mr. Paul Szabo: Is it from the justice department officials?

Mr. Rick Casson: As for who drafted it, I'm not certain. I don't know the person's name.

Mr. Paul Szabo: While they're checking, Mr. Chair, my intent was to establish whether or not the member was consulted about his intent being reflected in what was being redrafted. I'm a little concerned that we're getting into some grey areas where there may be some problems with it. I'd hate to see it lose for....

Mr. Rick Casson: I apologize; I'm just trying to confirm where it came from.

Mr. Paul Szabo: There are justice witnesses to come yet. We could ask the question there.

● (1620)

The Chair: Yes.

Mr. Rick Casson: It's probably one of them.

Mr. Paul Szabo: Some time ago there was a standing joint Commons and Senate committee on custody and access, and I participated in that substantially. They did a report, *For the Sake of the Children*, and this issue came up marginally in the discussion of a concept called parental alienation syndrome, in which one parent pitted the child against the other parent, and there was an acrimonious split. This concerned me, and I'm here today because I know that when you have an acrimonious split, there are things that can happen through the judicial system that could frustrate the intent of the law, because people have rights on both sides.

If, for instance, death is imminent, and there is a terminally ill parent who does not have custody but would like to see the child, the other parent, who may in fact be still harbouring acrimony, may in fact be able to petition the court to deny and to delay it long enough so that this would be frustrated. My concern is that the amendment be drafted in such a way to include that consideration and that there somehow be a special case in which it would be granted, unless reasons could be given, within a certain period of time. The whole bill could be frustrated if someone could simply challenge the request, challenge the order for a variation.

I think in your case, death was imminent, and a decision had to be made quickly. Is that your wish for this bill?

Mr. Rick Casson: It would have to be, in some cases, absolutely. Of course, due course of the law and all the appeals and things, as Mr. Lee indicated, can make things get pretty nitpicking and what not.

Mr. Paul Szabo: Absolutely.

Mr. Rick Casson: Can you put a timeline on a judge's decision in a court case? I'm not sure. I guess that would be a question for the officials.

Mr. Paul Szabo: I think that maybe now that the officials have the questions, we're going to hear the answers.

Mr. Rick Casson: Do I have to prepare them?

Mr. Paul Szabo: You have raised the issue of a terminal illness, or a critical condition. A critical condition is a different situation, and, having seen the motion, I'm not sure whether or not it helps the bill. Someone can be in critical condition and be in hospital, but their death may not be imminent. All of a sudden the situation becomes a matter of judgment. It's kind of a wait-and-see thing.

Would you also envisage covering a situation in which someone was maybe in a terrible accident and was very disfigured or whatever? Would this be something you would accept a judge determining would not be in the best interests of the child to see? The psychological impact on the child may not be under the purview or under the definition of best interests of the child.

Mr. Rick Casson: I think all aspects of the best interests would have to be taken into consideration, particularly whether it's psychological or not, I suppose. You certainly wouldn't want to be traumatizing the children. How a judge would get that information, whether through pictures or whatever, might be something one of the parties would want to present to the court.

Mr. Paul Szabo: I'm not sure whether "critical condition" helps your bill. Maybe the officials....

Finally, I don't have a lot of expertise on the criteria for best interests of the child. What about the situation where a terminally ill parent would like to have access for one last visit, for one last time, even though it was against the order, and a child was under 18, but still of the age of reason, and didn't want to? This implies the court shall ensure that the former spouse is granted access. Now we have the rights of the other party here, being the child. Is this a problem? Again, maybe this is for the officials, but children have rights as well.

Mr. Rick Casson: Certainly they do, and I think it has to be covered under the best interests of the child.

What is the age of reason to you, Paul? Is it a legal number?

Mr. Paul Szabo: The courts would determine that. There are some people who are 18 years of age who are not lucid or coherent. I spent a couple of years on a hospital ethics committee, and I can tell you that a "No CPR" order is a really complicated sucker too, because you're talking about competence and an ability to reason or make decisions. Again, those are things that will have to be dealt with in the general case.

I'm a little concerned that what has been suggested as the amendment has maybe narrowed this or tried to carve out a very specific set of circumstances and assumptions when it may in fact inadvertently or otherwise affect other circumstances. I'm hoping the bill gets some help from the committee, if needed.

I think, Mr. Chairman, it would probably be the officials who may be able to answer some of these questions.

● (1625)

The Chair: I'm going to cut you off, Mr. Szabo.

I'm going to turn to Mr. Thompson. He may have a point to raise.

Mr. Myron Thompson (Wild Rose, CPC): It's really not a point, it's just a comment and then a question.

I want to thank you, Rick, for bringing this forward. It's a great bill as far as I'm concerned.

You're right when you say it's all about families. I never had any problem with the intent of this bill right from the very beginning. I think the intent was quite clear. It seems to me one piece of our vocabulary that gets lost nowadays is common sense. The bond between a child and a parent is always there. No matter what happens, there is a bond. I think that's what we need to remember. I've had an experience in my own family, and I can tell you it is extremely important. The possibility of children being able to visit with the one who is going to expire is so important.

It's nothing against lawyers, but it seems to me every time something comes up this nitpicking seems to be way bigger than it ought to be. It looks to me like the important thing here is that the intent is loud and clear, and I think everybody would say yes, it's good common sense to acknowledge this. We all know the provinces and the territories are the ones responsible for implementing the laws that we pass in this place.

When do you think this bill will be raised with the provincial and territorial authorities? I think their way of administering it is going to be the real key to the success of this bill.

Mr. Rick Casson: Thank you, Myron, for the comments. I appreciate that.

How that moves forward into the provinces and territories I suppose would depend on how it proceeds here and how it proceeds further in getting into legislation.

I want to comment on the common sense issue. I think maybe one of my problems is that I'm a little too black and white, and the grey area confuses me. It's necessary, and I understand that. People have to think of all these different scenarios, but I hope we never get to the point in this country where we legislate the end of common sense. I think we still need it at some points in our lives.

The Chair: Thank you, Mr. Casson.

Mr. Ouellet, you have time for one quick question.

[*Translation*]

Mr. Christian Ouellet (Brome—Missisquoi, BQ): Congratulations, Mr. Casson, on the sensitivity you've shown to children through this bill. However, I have a question about one particular point.

As you know, these days there are a lot of family breakdowns. Often, the grandparents are responsible for raising young children for quite a long time. It even happens, in many cases, that one of the two parents comes back, takes the children living with the grandparents back and denies the grandparents access. And yet the grandparents were a source of emotional security for the young children.

Do you think that with this bill, grandparents might also be allowed to see the children again before dying, like parents?

[*English*]

Mr. Rick Casson: Well, I'm not dealing with that aspect of it here. What we're trying to say is that it is a terminally ill parent. Now, if the grandparents are involved in the raising of the children, that's an issue of its own. Certainly I'm in that situation, personally. My son and his wife are divorced and we're helping them raise our grandkids. Mostly it's a little moral support, but it's the other kind of support as well, at times. But that's my duty in life.

Was it a terminally ill grandparent, is that what you're suggesting? I think the courts would have to be pretty careful on that. If one set of grandparents has access and another doesn't, then you're really getting into an area. For the purposes of what I'm trying to do, I'm looking here at parents. If we can deal with that at this point in time, I think that would be one big step.

● (1630)

[*Translation*]

Mr. Christian Ouellet: Mr. Chairman, can I just make a very brief comment before concluding?

[*English*]

The Chair: Go very quickly, Mr. Ouellet.

[*Translation*]

Mr. Christian Ouellet: I was very sensitive to my Liberal colleague's question about people who are ill for a long time, for two years, for example.

Would it be possible in the bill to specify a period of time in which the child could visit the parent, without it necessarily being just before death or fully in the terminal stage? Provision could be made, for example, in the case of a parent with cancer, for the child to visit the parent over a period of two months. That would simplify things, for example, in the case of a person who, as was mentioned earlier, might have MS for the last 10 years of their life.

[*English*]

The Chair: Mr. Casson, do you have a comment on that?

Mr. Rick Casson: No, not really. I think all the comments we've heard here.... The ones that are in the real legal realm, hopefully, we'll get some answers to from the next folks. I'm not a lawyer. I hope we can come to some consensus so we can make this all work within the intent of the bill.

If that's the end of my time, Mr. Chairman, I appreciate very much this opportunity, as I did the discussion in the House. It was very helpful. I think all the issues raised are important, and I just hope we can move ahead in some way to address this specific aspect.

The Chair: Thank you, Mr. Casson. Well done. We appreciate your presentation, and certainly there will be some discussion, first with the departmental officials, then among ourselves here to see where we can take your bill. Thank you.

Could I ask the departmental officials to step to the table?

Mr. Bagnell.

Hon. Larry Bagnell: Mr. Chair, while they're stepping to the table, could you explain the procedure from here on in on this bill?

The Chair: Well, there is going to be a vote on whether we accept it, or whatever the situation is, and then it will go to clause-by-clause and on and on and on, depending on what the committee decides here.

Hon. Larry Bagnell: After the officials, will we get to discuss the bill?

The Chair: We could, depending on how long that discussion is. If it doesn't take place today, it will take place on Wednesday.

Go ahead, Monsieur Ménard.

[*Translation*]

Mr. Réal Ménard: I just want to make sure we're going to have enough time to discuss the report on solicitation.

I don't know whether my colleagues would agree to doing just one round, with a limit of one speaker per party. Then we could begin considering the report. Otherwise, I'm afraid we'll run out of time.

Given that there appears to be consensus on the bill, we could unanimously agree to do just one five-minute round, just this once.

[*English*]

The Chair: I might ask colleagues to consider extending for a few minutes if we have to.

Let's get to the departmental officials. We'll do what we can to conclude a little bit early and go from there.

Ms. Farid, please.

Mrs. Claire Farid (Counsel, Family Law Policy, Department of Justice): Members of the committee, we're pleased that you have invited us to participate in these committee hearings.

My name is Claire Farid. I'm counsel with the family law policy unit of the family, children, and youth section. With me is Lise Lafrenière-Henrie, senior counsel and coordinator of the family law policy unit.

We will provide you today with information about the technical aspects of the Divorce Act and Bill C-252. However, before turning to the specifics of the bill, we would like to discuss the general scheme of the Divorce Act with respect to custody and access issues.

As you're aware, the federal government is responsible for the Divorce Act and the custody and access issues that arise in that context. The provinces and territories are responsible for custody and access issues that arise in the non-divorce context—for example, for common-law couples.

Section 16 of the Divorce Act is the section that provides that a court may make an order for the custody of and/or access to a child. Subsection 16(8) provides that only the best interests of the child shall be considered by the court in making an order for custody or access. The child's best interests are to be determined in light of the condition, means, needs, and other circumstances of the child.

● (1635)

[*Translation*]

Therefore, when a court makes an order for custody of or access to a child, it is required to look at all of the circumstances of the child and make the order that is best for that particular child.

Some of the types of issues that a court will generally examine are: factors related to the child, such as his or her age and views and preferences about the custody and access arrangement, the relationship that the child has with each parent and other significant people in his or her life, and plans that the parents have for the upbringing of the child.

It is relevant to note subsection 16(10) of the Divorce Act, which provides that in making an order for custody or access, the court must give effect to the principle that a child should have as much contact with each spouse as is consistent with the best interests of the child, and must take into consideration the willingness of the person who is applying for custody to facilitate contact with the other spouse.

[*English*]

The Divorce Act therefore emphasizes the importance of the child's relationship with both parents. The particular access arrangement that is ordered must, of course, always be in the best interests of the child. Section 16 deals with original orders, and therefore looks at the circumstances of the child at a particular point in time. Those circumstances sometimes change, however, in a way that makes this original order inappropriate; thus, there is a need to return to court for a variation of that order. It is subsection 17(5) of the act that currently sets out the conditions for the variation of an order for custody or access.

There are two aspects of the inquiry under subsection 17(5). First, before the court can make a variation order, it must be satisfied that there has been a change in the condition, means, needs, or other circumstances of the child since the making of the last order. While subsection 17(5) of the Divorce Act simply refers to a change in the circumstances of the child, the Supreme Court of Canada has clarified that it is not any change in the circumstances of the child that will be sufficient for a court to consider the merits of a variation application. There must be a material change in the situation of the child. This requirement that there be a material change is to prevent parties from indirectly attempting to appeal or re-try the case by pointing to some minimal or insignificant change in the situation of the child.

In order to be a material change, the change must have altered the child's needs or the ability of the parents to meet those needs in some fundamental way. The change must be such that the previous order may have been different had the new circumstances existed at the time the original order was made. It's significant to note here that an important change in the life of a parent that is relevant to the child could be considered a material change in the circumstances of the child.

For example, in the 2002 case of Kazdan v. Kazdan, a mother was terminally ill and she sought to vary a Divorce Act custody and access order to dispense with her former husband's consent for her to travel to Israel with the children. The court found that the former wife's terminal illness and her resulting emotional need to travel with the children to Israel to see her family was a change in the circumstances of the child within the meaning of subsection 17(5) of the Divorce Act. The order was varied to allow her to travel, since it was found to be in the best interests of the children.

So the first aspect of the analysis under subsection 17(5) is to establish that there has been a material change in circumstances, which would then allow the court to consider the merits of the situation. Once this threshold has been met, the court must then embark on the second aspect of the analysis, which is to determine what order would now be in the best interests of the child. In determining what is in the best interests of the child, like under section 16, the court must seriously consider the importance of the child's relationship with each former spouse. Because both subsections 16(8) and 17(5) require that original orders and variation orders related to custody and access be based on the best interests of the child, the court must look at all aspects of the child's life to determine what order would be appropriate. The court therefore has broad discretion to fashion an order to ensure that the child's best interests are met.

Bill C-252 would add proposed subsection 17(5.1) to the Divorce Act to assist with interpretation of subsection 17(5) in circumstances where a former spouse has a terminal illness or is in critical condition. There are two elements to proposed subsection 17(5.1).

First, proposed subsection 17(5.1) would provide that for the purposes of subsection 17(5), a former spouse's terminal illness or critical condition shall be considered a change in circumstances of the child of the marriage. This aspect of the provision would have the result of deeming the terminal illness or critical condition of a former spouse to be a material change in circumstances. As a result, in cases where a former spouse has such a terminal illness or is in critical condition, the threshold requirement of subsection 17(5) will have been met, and the focus would be on the issue of whether a variation of the original order is appropriate.

● (1640)

The second element of proposed subsection 17(5.1) is that it provides some direction for the court with respect to the potential variation of the order. The bill states that the court “shall...ensure that the former spouse is granted access to the child as long as it is consistent with the best interests of that child”. Therefore, access between the former spouse and the child is to be ordered, as long as it is in the best interests of the child.

Since the best interests of the child are a prerequisite for making a variation order for access, the court would be required to consider all the circumstances of the child to determine whether such an order would be appropriate. In the context of this analysis, the court would also consider what type of access arrangement would be appropriate—for example, in terms of the frequency and length of visits, and who would be present at these visits.

We hope this information is helpful to the committee, and we would be pleased to take any questions.

Thank you.

The Chair: Thank you very much. I appreciate that.

Mr. Bagnell.

Hon. Larry Bagnell: Thank you, Mr. Chair.

At the outset, I would say that although Mr. Ménard is the friendliest *député*, I can't agree with him. I think every member should have a chance to speak. We have up to 5:30 on the agenda for this item, and I know both my colleagues have questions they'd like to ask.

You spoke about material changes in the situation of the child. Regarding the types of elements this bill addresses, are those material changes in the case of a child, or because there are material changes in the parents, former parents, or spouses?

Mrs. Lise Lafrenière-Henrie (Senior Counsel, Family Law Policy, Department of Justice): The bill addresses what would be a material change in the circumstances of the family to determine whether a variation order can be made. If a custody order is in existence, the only way to vary it is to prove that there is a material change. This bill would facilitate that variation in cases where a parent is terminally ill, because the threshold of meeting the material change would be more clearly set out.

Hon. Larry Bagnell: Okay. I was just asking because she had said specifically in the situation of the child.

I think you can tell that the committee is very supportive of this bill, and so is the House of Commons, so that's not an issue. There were a number of technical questions; it went on for an hour, actually. I'm wondering if you remember some of those and could answer the ones that you remember.

Mrs. Claire Farid: Do you want me to start with a specific one? There were so many.

Hon. Larry Bagnell: The ones the committee members were interested in. I know you were writing down some of them. So if there were some you remember that had obvious answers....

● (1645)

Mrs. Claire Farid: The first question that you had asked was what would be different technically with the addition of this provision to the Divorce Act. I guess the difference this particular provision would make is that currently under subsection 17(5), when you have someone applying for a variation of a custody order, they have to prove that there has been a material change in the circumstances of the child, and that's a fairly onerous task.

What this provision would do would be to say that if an individual has a terminal illness or is in critical condition, it has been proven that there's a material change in circumstances. In that sense, it would facilitate the application, so that the analysis by the court would be focused on whether a new order would be in the best interests of the child. So from a technical perspective, that's the change this provision would make.

Hon. Larry Bagnell: So that would get past one of the two hurdles.

Mrs. Claire Farid: It would facilitate. There are two parts of the analysis. You would move directly to the second aspect, which is a new order in the best interests of the child.

Hon. Larry Bagnell: Mr. Szabo had a number of technical questions that he said you would answer.

While you're looking for that, can I ask if you have any problems with the bill?

Mrs. Claire Farid: The one technical point I think we might bring to your attention is the word “ensure” that's used in the bill. I think that the word “ensure” is a little different from the type of wording that is currently used under the Divorce Act. For example, the Divorce Act now uses wording such as the court “may” make an order, or the court shall take something into consideration, whereas the word “ensure” gives the impression that the court would somehow be guaranteeing that the access would take place. So that might be an issue the committee wants to examine, in terms of looking at that wording.

The Chair: Thank you, Mr. Bagnell.

Mr. Ménard.

[*Translation*]

Mr. Réal Ménard: As was mentioned, I think the committee is pretty much in favour of the bill. There may have to be some amendments, and I don't know if you yourselves are going to suggest wording we could use for that amendment.

Do you have a system for checking roughly how many people might be in the same situation as Mr. Casson's constituent? In other words, usually, when a bill is passed, there's a reason for it. If we make a change, it's to meet a need; in this case, it's the need of people in the terminal stage who are denied access to their children.

Are there any branches in your department that have a handle on the scope of this phenomenon?

Mrs. Lise Lafrenière-Henrie: We have a research branch at the Department of Justice that might be able to find the information, perhaps through Health Canada, on how many people are in the terminal stage. But as for the number of parents in that situation, that could be very difficult, as there may be no way of getting that data. I don't know if that would be available. If you want us to look into that and get back to you, we might be able to find out how many people in Canada are in that kind of situation.

Mr. Réal Ménard: I'd like to come back to the question of the previous speaker, Mr. Bagnell. Let's assume a bill is a bit like a pregnancy; one hopes the child is wanted. In terms of the desirability of this bill, I take it the Department of Justice feels free in recommending its passage to us, perhaps with an amendment. Feel free to make a suggestion. I think it could be helpful to everyone. If I understand correctly, Justice Canada does want to see this bill make it through.

Mrs. Lise Lafrenière-Henrie: As you know, the department takes no position. We make recommendations to the minister.

As for the wording, perhaps that could take the form of a legal opinion from us. We might have to speak to our minister to see what he would like us to propose as an option.

● (1650)

Mr. Réal Ménard: Whatever you say to your minister, feel free to say it to us, because he is very friendly toward the committee. You already knew that. I won't ask what kind of recommendations you made to your minister, because you'll tell me that's confidential, but am I correct in assuming you don't recommend passage of the bill as it stands, as it's currently drafted?

Mrs. Lise Lafrenière-Henrie: As my colleague indicated, saying that the court shall ensure that the former spouse is granted access may be problematic because that's very strong language. As for possibly suggesting a different wording, what's difficult is suggesting something that wouldn't change Mr. Casson's intent, which we don't want to interfere with.

Mr. Réal Ménard: With his goal.

Mrs. Lise Lafrenière-Henrie: Exactly. That's where it gets trickier.

Mr. Réal Ménard: But if the committee wanted to suspend passage of the bill following clause-by-clause consideration, do you think someone could suggest different wording? Would you see that as coming within your mandate?

Mrs. Lise Lafrenière-Henrie: Maybe, if it went through the minister's office.

Mr. Réal Ménard: Thank you, Mr. Chairman.

[*English*]

The Chair: Thank you, Mr. Ménard.

Mr. Comartin.

Mr. Joe Comartin: Thank you, Mr. Chair.

Thank you for being here. The point I had raised was that this amendment only covers section 17, so for a variation order, not an original order. Do you agree with that?

Mrs. Claire Farid: It's correct that the provision only amends section 17 of the act. There's a difference between sections 16 and 17 in what they do. Section 16 deals with original orders. It is based on the best interests of the child. So the court, looking at whether an original order should be made, would look at all the circumstances of the child, and one of the circumstances the court would be required to consider would be whether there was a terminal illness, or whether the individual was in critical condition.

Under section 17, one difference is that this two-step analysis is required, so you have to prove a material change in circumstances. That is one distinction between the two sections.

Mr. Joe Comartin: To be clear, and I'm doing this for Mr. Casson's purpose, the court does not have to take into account the ill health of a parent in the sense of it being mandatory to take that into account. We're making it mandatory in section 17. But if it's not in section 16, they could choose to ignore the criteria.

Mrs. Claire Farid: Any time the court is required to consider the best interests of the child, the court would be required to consider all the circumstances in the child's life and the parent's life that have an impact on the child. To the extent that a parent's terminal illness has an impact on the child, the court would be required to consider that factor in an analysis under section 16.

Mr. Joe Comartin: It would be the same under section 17, if we didn't have this amendment.

Mrs. Claire Farid: That's right. So because it's the best interests of the child, they would always look at that factor.

Mr. Joe Comartin: I see that Mr. Lee has gone out again. I want to raise this so that it is covered.

One of the other points that was raised by him and by Mr. Temelkovski was the issue of the wording of “critical condition”. Is it going to pose a particular problem for the court in applying that standard to this test?

Mrs. Claire Farid: Neither “terminal illness” nor “critical condition” are defined. What would happen is the court would be required to apply those terms on a case-by-case basis.

Mr. Joe Comartin: They would again be relying on the medical evidence they had coming forward and *Black's Law Dictionary.*

Mrs. Claire Farid: Yes.

Mr. Joe Comartin: Those are all my questions.

The Chair: Thank you, Mr. Comartin.

Mr. Petit.

[*Translation*]

Mr. Daniel Petit: I will ask the same question I asked earlier, but formulated differently. In the Kazdan v. Kazdan case you cited, Ms. Kazdan had to prove before the courts that she was in the final stages of her terminal illness and that she wanted to return to Israel.

The amendment would be such that the lawyer or one of the parties would only have to prove that the person concerned is in the final stages of a terminal illness or is in what is referred to as critical condition. This must be proven first. You broke the clause down into two parts. I want to get back to the term you mentioned earlier. You do not agree with the use of the word "*veille*", the French equivalent of the word "ensure".

I will explain to you how I see these things, because if ever I have to plead such a case before the courts, I want to make sure I will do so properly. If I've understood the clause correctly, once the condition is proven, once the terminal stage is proven, the courts will ensure that I hold the right to see the child, to avoid any possibility of a dispute, as Mr. Casson was saying.

If the courts do not do so and do not exercise their authority, very often, there is an alienation of affection. Let us suppose that both spouses are in conflict, that the child is taken as hostage, and that one of the two parents is in the final stages of a terminal illness. The terminal illness is proven, the mother "loses it" and attacks my client. My client will not be able to see the child and may even die before seeing the child again. So, it is almost as though you are giving the court the power to issue an injunction order, but the court must ensure that a spouse is truly in the final stages of a terminal illness.

Suppose that the person is in the hospital and must appear before the court. The person is terminally ill and wishes to see his or her child. Imagine how difficult this would be. The court would have to go to the hospital, and the lawyer would have to provide medical reports. The person is already under enormous stress, is about to die, and is being asked to appear in court. Imagine this! Even during normal circumstances, this is a very long and difficult process.

This is why I believe in the use of the word "*veille*" or "ensure". Once it is proven that a person is in critical condition, or hospitalized, a judge must ensure that the person may see his or her child. That is how I interpret it.

Why do you disagree with the use of the word "ensure"? If we take out this word, a woman who does not want contact between her child and the ex-spouse will go to the Superior Court of Quebec, and the father will lose the right to see the child and die without ever seeing the child.

To my mind, the word "ensure" contains an element of authority; it is like an injunction. Why are you saying that the word "ensure" should not be used?

● (1655)

Mrs. Lise Lafrenière-Henrie:

Let us take for example how the word ensure is used in the following expression: "shall ensure that the former spouse is granted access". It is even more strongly worded in the English version, which reads:

[*English*]

"shall then ensure that the former spouse is granted access".

[*Translation*]

The impression that is given is that the court will not only issue an order, but will do a follow-up to make sure that the former spouse has the right to access, and that he or she is able to see the child. We're talking about the execution of an order.

The courts cannot execute orders. This is done by the provinces. Therefore, the court does not have this power. This goes above and beyond the court's purview. In the Divorce Act, this type of wording is not used when talking about the courts. Often, there is mention of the courts being able to order something. That is the type of thing we should really be leaning towards.

Mr. Daniel Petit: In the case of custody orders, when a judge wants to make sure that his orders are applied, his decision will also indicate "notwithstanding appeal" to prevent the department from appealing within the 10 days that follow. Therefore, I don't see why the same thing couldn't be done. The judge can say: "I order that..." and at the end of the ruling write "notwithstanding appeal" to make sure that during the 10-day period that follows—and an applicant might well pass away in that 10-dayperiod—an appeal cannot be made and that the ruling must be complied with once handed down. Courts often do this. When the courts do not want the decision to be appealed, they write "notwithstanding appeal" to prevent this. After that, the department must begin an entirely different procedure.

● (1700)

[*English*]

The Chair: Do you have a short answer to that? Would you make it short, please?

Mrs. Lise Lafrenière-Henrie: Yes, it will be very short.

Basically, the court has the right to put any terms or conditions in an order, and they could put in that order a limit on how much time the people have to exercise the access. If it's not done, they can still require that.

The Chair: Thank you, Mr. Petit.

We'll go to Mr. Temelkovski.

Mr. Lui Temelkovski: Thank you very much, Mr. Chair.

I think we've outlined that in section 16 and section 17, the best interests of the child is found in both sections, and it will apply. Right? Okay.

How does the current act deal with such situations of terminal illness and critical illness if either parent is...?

Mrs. Claire Farid: How does the current act deal with that?

Mr. Lui Temelkovski: Yes.

Mrs. Claire Farid: When an individual provides evidence that there is a terminal illness or a critical condition, and that factor is brought before the court, that would be a factor the court would have to consider in determining what is in the best interests of the child.

So under section 16, it would be one of the factors the court would have to consider. Then under section 17, in undertaking its analysis, if the reason the request for a change to the access provisions was being brought forward was a terminal illness, the individual would have to show that the terminal illness constituted a material change in the circumstances of the child. And then the court would consider that terminal illness or critical condition as one of the factors in determining overall what order would be in the best interests of the child.

Mr. Lui Temelkovski: So in terms of it being challenged to give a variance on the original order, there wouldn't be much difference from what we're proposing here. Other than in the second section, which is proposed paragraph 17(5)(a), it would be deemed that there is a terminal illness or a critical illness and that therefore only one, the second factor, would be necessary to deal with.

Mrs. Claire Farid: I think what the bill does, as I said, is deem the terminal illness or critical condition to be a material change, so you would go straight to the second part of the analysis. And then the bill does give some direction. It says, as we have discussed, "the court shall then ensure that the former spouse is granted access", subject to the best interests of the child. So it does give some direction to the courts, but ultimately the test is the best interests of the child.

Mr. Lui Temelkovski: Let's move over to the reality side of this. When situations like this take place, how often or how quickly can a judgment be received if there is an application?

Mrs. Claire Farid: I don't think I'm able to give a specific time as to how long.

Mr. Lui Temelkovski: There must be some current data. For anybody who has a challenge to a court order right now, how long would it take them to have it reviewed and dealt with?

Mrs. Lise Lafrenière-Henrie: That really is an issue that I would say is just province by province. Of course the provinces administer justice, and there are different rules in each province on how long a motion can take before it can get to court. Even within the provinces, there are jurisdictional issues. Things may move more quickly in one city as opposed to another for various reasons, depending on the court caseload. So it's really hard to say how long it could take. There can be urgent motions made, but—

Mr. Lui Temelkovski: What I'm getting to is the urgency of this. We understand that the urgency Mr. Casson has brought forward is rather quick, and that we need something done yesterday in some of these terminally ill or critical illness situations. It could be that we need the child to be present with the parent yesterday. How real is this change to the act? How quickly can the courts react to this amendment? Can you maybe suggest something that we could put in here to trigger something in these specific situations where an urgency factor is placed on this and a judge appears the next day and deals with the situation? These situations are not going to be everlasting. They may get a court case two years after the person passed away, or after they understand that they can see their child, even though they may be there.

● (1705)

Mrs. Claire Farid: It's important to point out that the provinces and territories are responsible for the administration of justice, so that's access to the courts. We can certainly bring to their attention the fact that you have raised this issue of how quickly someone is able to get into court.

The Chair: Thank you, Mr. Temelkovski.

Mr. Moore.

Mr. Rob Moore: Thanks, Mr. Chair.

One of the things I like about this bill is that it may be bringing some clarity to what is evolving case law. I noticed the case that you cited in your submission. It has already been referred to. If we got down the road a couple of years, could the common law in fact evolve to the point where it does exactly what Mr. Casson is proposing in his bill? In this case where a terminally ill mother was granted a variance, if it became a de facto, regular occurrence in different jurisdictions throughout Canada that terminal illness did result in a consideration of a variance—of course, based on the best interests of the children—is Mr. Casson's bill not just a codification or maybe a speeding up of a process or a trajectory that the courts may already be heading in?

Mrs. Claire Farid: If you had a number of cases that established that a terminal illness or critical condition was a material change of circumstances, certainly that body of case law would be something the courts would look to. In that sense, it would be helpful in terms of establishing what the principles of law are.

There's a slight difference in what this bill does, in that it says the terminal illness or critical condition shall be considered a change of circumstances. It establishes a principle of law.

Mr. Rob Moore: My point is that we could be heading in that direction anyway. It's possible if court cases continue to evolve in this way. I wanted to see if there was any difference in how the court handled this case and how it would have been handled under Mr. Casson's law. In fact, in both cases the terminal illness will be found to be a factor that should be looked at. In both cases the best interest of the child is the overriding factor. In this particular case, if this bill had been law, the result may in fact have been the exact same outcome.

Mrs. Claire Farid: Certainly, but it's difficult to say in the abstract, of course, because everything is determined on a case-by-case basis.

Mr. Rob Moore: Every case is different—and correct me if I'm wrong in anything I say—but Mr. Casson's bill continues to carry through that same theme that we have in family law by providing that overriding factor of the best interests of the child. If a judge finds or if a court finds that in spite of that terminal illness, the best interests of the child would not be served by allowing that dying spouse visitation rights, then the child will not have to visit that spouse, under the bill.

Mrs. Claire Farid: That's correct. The best interests of the child is the test.

Mr. Rob Moore: Thank you.

The Chair: Thank you, Mr. Moore.

Mr. Merasty.

Mr. Gary Merasty (Desnethé—Missinippi—Churchill River, Lib.): Thanks.

Those were great presentations from both witnesses.

With respect to the bill itself, thinking a bit about those who are economically or socially marginalized, and looking at the word "ensure" and giving effect to that word, if we were in a situation where, whether it was contested or not by the healthy spouse, if they're a great distance apart—let's say they're in northern Saskatchewan or northern Manitoba, in a fly-in community, and the ill spouse is in Winnipeg or Saskatoon—with no financial means to support, how far do you think a judge would go to "ensure", meaning financial aid at the end of the day? Are there any precedents of that?

● (1710)

Mrs. Lise Lafrenière-Henrie: Just to clarify, do you mean in terms of ordering one of the parents to pay for the costs of the exercise of access?

Mr. Gary Merasty: If one parent is unable financially but it's in the best interests of the child to get to Winnipeg, but they're just on welfare and have no means to travel, would this "ensure" cover that?

Mrs. Lise Lafrenière-Henrie: If the court orders access and there's this issue, again it's more in terms of what evidence is before the court. If the lawyer representing the parent who doesn't have means makes the case for the child to see the parent before the parent passes away, then it's important that provisions be made for the cost of exercising the access. The courts will take that into consideration, and there are cases where courts have ordered the other parent to pay for the access costs. It's very frequent that the costs are borne by the parent who can afford them.

Mr. Gary Merasty: My next question concerns both parents not being able to afford it. Is the province or somebody else able to...? Can a judge step over that line?

Mrs. Lise Lafrenière-Henrie: That may be a question of going beyond our area of jurisdiction. The provinces are responsible for enforcing orders, so I can't see how we could legislate that. Federally, there is a fund that provides money to provinces and territories to offer services to families. It might be that the fund could be used for that purpose. That certainly would be an excellent use of that money.

Mr. Gary Merasty: Again, I'm supportive of the bill, but how about in the potential situation in which a child is in care of the province and you have the Department of Justice potentially on one side and the province's social services department on the other side, arguing over the best interest? Does that potentially set up a conflict? Who, in the end, is going to decide on the best interests? Obviously the judge will, but is there any potential of something lurking in the hallway that may jeopardize that when a child is in care?

Mrs. Lise Lafrenière-Henrie: I'm just trying to see how, in the Divorce Act context, that would work if a child is in care, because that would probably be more under a family relations act or a provincial family law act.

The Chair: Thank you, Mr. Merasty.

That brings to a conclusion this particular discussion on Bill C-252. I would like to thank the departmental officials for coming forward. We will have one other session dealing with this particular....

Mr. Petit has a point of order.

[*Translation*]

Mr. Daniel Petit: One of the two witnesses talked about a federal fund to support parents. Is that what the fund is called? Do you know the exact name of this fund?

Mrs. Lise Lafrenière-Henrie: I hope I have the correct name, which i believe is the Child-centered Family Justice Fund.

Mr. Daniel Petit: The family justice fund—

Mrs. Lise Lafrenière-Henrie: —child-centered.

Mr. Daniel Petit: Thank you.

[*English*]

The Chair: That's not a point of order, Mr. Petit.

If there are going to be any other amendments brought to the bill, they will be done on Wednesday, after which we will do clause-by-clause. It would be good to have them put forward.

I will now suspend for one minute. We will then go into an in camera session on the remaining business as noted on the agenda, that being the subcommittee's solicitation laws report.

[*Proceedings continue in camera*]

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