SUBMISSIONS OF THE CANADIAN BAR ASSOCIATION (BRITISH COLUMBIA BRANCH)

TO THE BC MINISTRY OF JUSTICE

REGARDING

GUARDIANSHIP ISSUES

UNDER THE

FAMILY LAW ACT

Issued By:

Canadian Bar Association
British Columbia Branch

Family Law Working Group

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PREFACE

Formed in 1896, the purpose of the Canadian Bar Association (British Columbia Branch) (the “CBABC”) is to:

- Enhance the professional and commercial interests of our members;
- Provide personal and professional development and support for our members;
- Protect the independence of the judiciary and the Bar;
- Promote access to justice;
- Promote fair justice systems and practical and effective law reform; and
- Promote equality in the legal profession and eliminate discrimination.

The CBA nationally represents approximately 36,000 members and the British Columbia Branch itself has over 7,000 members. Our members practice law in many different areas. The CBABC has established 75 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The CBABC has also established standing committees and special committees from time to time.

The CBABC Family Law Working Group (the "CBABC Working Group") is a special committee of the CBABC comprised of members of the CBABC who share an interest in, or who practice, family law. There are 50 members of the CBABC Working Group. The CBABC Working Group's submissions reflect the views of the CBABC Working Group only and, not necessarily the views of the CBABC as a whole.

Stuart Rennie, CBABC Legislation and Law Reform Officer, assisted the CBABC Working Group.

EXECUTIVE SUMMARY

The CBABC Working Group considered the questions in the Ministry of Justice's Discussion Paper: Guardianship Issues under the *Family Law Act*[1] (the "Discussion Paper"). In preparing its response, the CBABC Working Group conducted an online survey (the "Survey"), held or monitored several section meetings, including a CBABC Kamloops Family Law Section meeting, a CBABC Victoria Family Law Section meeting, and a meeting of the CBABC Family Law Section Chairs, and held several email and teleconference discussions among the CBABC Working Group members themselves.

[1] See http://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/fla-guardianship-discussion-paper.pdf and see unofficial version of the *FLA* at: http://bclaws.ca/civix/document/id/complete/statreg/11025_00

Unfortunately, the Discussion Paper was overshadowed by the level of interest in the Ministry's other *Family Law Act* discussion paper on property issues. Nonetheless, the CBABC Working Group had two lively discussions and the input of a few CBABC Family Law Section meetings, as well as a fascinating though curiously self-contradictory Survey results.

An issue we considered, which was not directly raised by the Discussion Paper, was the guardianship affidavit. As with some other issues, the results were inconclusive. For at least one CBABC Family Law Section meeting and one CBABC Working Group discussion, a significant majority favoured eliminating the guardianship affidavit generally, or eliminating it for parents only. By contrast, the Survey favoured retaining it overall (70-30%) and retaining it for parents specifically (54-46%).

While it went largely unexamined, the answer to Question 1 of the Discussion Paper was generally yes. But in one late discussion and a thought by the CBABC Working Group's Chair, we raise the question whether section 39(1) is even necessary, given the dominant concept of regular care.

As for Question 2 of the Discussion Paper, a clear majority of the CBABC Working Group agreed that regular care is a useful basis for parents to become guardians who have not lived with the child, or lived together with the other parent and the child. Nonetheless, three concerns arose: (a) regular care might be the best basis for all parents to become guardians, (b) the *FLA* has to allow a means for parents to become

or be recognized as guardians who intend to exercise regular care but are blocked (the *AAAM*[2] issue discussed in our submissions below) and (c) regular care should be defined in the *FLA*.

The issue identified in (b), above, has two possible solutions: (1) parents can be guardians automatically, though perhaps without full parenting responsibilities; or, (2) parents can be recognized as guardians for a time and be confirmed as guardians if, within that time, they either commence regular care or, if frustrated in that endeavour, make application to court. The CBABC Working Group was split on which solution to choose, or indeed on whether either was appropriate. See the discussion in our submissions under Question 4 of the Discussion Paper.

In answer to Question 3 of the Discussion Paper, the CBABC Working Group all felt the term "regular care" should be defined, and defined by the government rather than by the courts. Unfortunately, the CBABC Working Group did not have time to come to any resolution on what that definition should be. The main conflicts were: (a) whether parenting time alone should be enough (the Survey said yes by a 65-35% majority) and (b) how to capture both the physical and non-physical aspects of "care" that parenting entails.

In answer to Question 4 of the Discussion Paper, the CBABC Working Group was completely divided, though the divisions themselves suggest an answer. Option B for

[2] See *A.A.A.M. v. British Columbia (Children and Family Development),* 2015 BCCA 220 (CanLII).

both Guardianship and Parenting Responsibilities represents a compromise between the all-parents-should-be-guardians folks and those who prefer that parents earn guardianship.

SUBMISSIONS

The CBABC Working Group is pleased to respond to the request for submissions from the Ministry of Justice regarding the Discussion Paper.

Discussion Paper: The Guardianship Issues Under The *Family Law Act*

The Discussion Paper asks 4 questions:

Concerns Related to Section 39 of the *FLA*:

1. Should the *FLA* be clarified with respect to guardianship in situations where the parents never lived together, or lived together but separated before the child was born?

Regular Care:

2. Is regular care a useful basis for establishing the guardianship status of a parent that has never lived with their child?

3. If it is a useful basis, does regular care need to be more clearly defined within the *FLA*?

Alternative Proposed Options For Default Guardianship:

The Ministry is considering these alternative options or models for default guardianship:

A. A biological parent is their child's guardian, unless there is an order or agreement otherwise.

B. A biological parent acquires guardianship status for a specified period of time (e.g. 12 months) after the child is born or they learn of the child's birth.

C. Unless there is an order or agreement otherwise, a biological parent is only a guardian if they have either resided with or regularly cared for their child.

If the default guardianship model is changed such that a parent acquires guardianship status by virtue of their biological relationship with the child, should full parental responsibilities continue to flow from that status? Or, should the exercise of full parental responsibilities be linked to living with or regularly caring for a child, with a limited set of responsibilities (e.g. receiving information and notices and making day to day decisions while the child is in their care) flowing to parents who do not live with or regularly care for the child?

4. Does one of these options represent a clearer, more effective way to understand and apply guardianship in the absence of an agreement or order?

CBABC Working Group Meeting September 8, 2016

On September 8, 2016, the CBABC Working Group held a meeting to consider the questions in the Discussion Paper. The discussion centered on whether biological parents should automatically start as guardians or should earn the right to be guardians. As to the latter, the Group discussed parenting track records, evidence of a clear intent to parent, an application to court for guardianship or a combination of these.

There was a discussion regarding the definition of guardianship. One member pointed out there was no definition. The CBABC Working Group considered that this was intentional; that what was new under the *FLA* was that guardianship acquired meaning primarily through the parenting responsibilities a guardian exercised.

Custody wasn't defined under the previous act, either. Case law gave it two broad meanings: "When used in its wider sense, custody is akin to the concept of guardianship and encompasses the full bundle of parental rights. In its narrower sense, the term refers only to the right to physical custody or day to day care and control of the child"[3] The first is now section 41(a) of the *FLA*. The second is now just the starting point for all guardians; namely, they start off with full parenting responsibilities, but those can be adjusted either by agreement of the parties or by court order.

This was rare under previous law. If you were a custodial parent but did not have the "full bundle of parental rights", you were usually a guardian instead, with specified rights or responsibilities. Now, both would be guardians – which may be one of the reasons

[3] *Young v. Young*, [1993] 4 SCR 3, 1993 CanLII 34 (SCC).

that the public and the courts both have come to conceive of guardianship as equivalent to parenting to a degree that may now be stronger than was the case when we used the term custody:

> … only a guardian can challenge an application to relocate. This is not an insignificant right. In addition if a child's guardian dies and the surviving parent is not a guardian, they do not automatically become a guardian but must apply for an appointment. Also, s. 49 of the *FLA* allows a guardian to apply to a court for directions respecting an issue affecting a child. Only a guardian can make such an application. A parent who is not a guardian, but with contact, has no legal right to challenge the other parent's actions in court. As a result I conclude that even without parental responsibilities, guardianship still has a meaningful legal status. Additionally, as noted earlier, it has a symbolic status: a guardian is seen as playing a "parental" role in a child's life, even when not exercising parental responsibilities.[4]

Given the importance of guardianship, the CBABC Working Group attending the meeting agreed that the *FLA* should be amended to clarify when a parent is automatically a guardian and when and how he or she should apply to court.

CBABC Kamloops Family Law Section Meeting September 14, 2016

On September 14, 2016, the CBABC Kamloops Family Law Section held a meeting to consider the questions in the Discussion Paper. As for guardianship, there was a strong majority for either eliminating the requirement for the affidavit altogether or at least eliminating it for parents. In practice, the affidavit has proven to be an irritant almost across the board, without anyone recalling a case whether it raised an issue that had

[4] *G.W. v. S.H.,* 2016 BCPC 266 (CanLII), at para. 22, Judge Keyes quoting Mister Justice Punnett in *J.W.K. v. E.K.,* 2014 BCSC 1635 (CanLII).

not already been raised by the parties, or just turned out not to be an issue worth pursuing.

There was consensus to make all parents guardians but with limited parenting responsibilities.

There was consensus that “regular care” needs to be defined in the *FLA,* but no consensus on what the definition would be as we ran out of time.

CBABC Family Law Section Chairs’ Meeting At The CBABC Provincial Council September 17, 2016

On September 17, 2016, the CBABC Family Law Section Chairs met at the CBABC Provincial Council Meeting. Unfortunately, discussion of the property issues took almost all of our time. There was a consensus of those attending this meeting that “regular care” needs to be defined.

CBABC Victoria Family Law Section Meeting September 28, 2016

On September 28, 2016, the CBABC Victoria Family Law Section held a meeting to consider the questions in the Discussion Paper.

A majority favoured Option B where a biological parent acquires guardianship status for a specified period of time (e.g. 12 months) after the child is born or they learn of the child’s birth. Concern was expressed to ensure that there is a reasonable time limit

(maybe less than 12 months) so that parties don't have to rush to court right when a child is born. It was noted that Option B imposes unnecessary burden on single parents where there is no involvement of the other parent.

CBABC Working Group Survey

In making its submissions, the CBABC Working Group engaged an online survey of CBABC members and the public based on the Discussion Paper's 4 questions. The Survey was conducted from September 13 to 30, 2016. The Survey had 28 responses. The Survey had 10 questions.

Question 1 asked: "Should biological parents automatically be recognized as guardians?"

- 60.71% said yes;
- 39.29% said no.

Question 2 asked: "Should biological parents earn guardianship?"

- 57.14% said yes; and
- 42.86% said no.

Question 3 asked: "If biological parents should earn guardianship, how?"

There were 14 responses to this question.

These comments are, in no particular order of importance or preference, as follows:

a) There is absolutely no reason a parent should not be automatically a guardian. As pointed out, the only reason that one would want to be a guardian is to exercise parental responsibilities; the only time a guardian can exercise parental responsibilities is during parenting time. In my opinion the *FLA*'s provisions around parenting time and the exercise of parental responsibilities are sensible. In no way would I think that someone being appointed a guardian pre-emptively grants them parenting time - the gradual re-introduction of parenting time, and the circumscription of parental responsibilities ought to be the protection of the child from estranged parents who are now being re-introduced, not a holdback of guardianship. The "regular care" test is good, but the practical utility of this is unclear to me when the primary parent can simply deny regular parenting time. The real focus should be on keeping parties out of court, and I do not see the sense in forcing parties that regularly care for the child to attend court to be "officially" declared to be guardians; this may be unavoidable in the case of other parties, but this is especially the case when those parties are biological parents;

b) I agree with the manner suggested in the Discussion Paper where the parent lives with the child or regularly cares for the child and the suggested expanded definition of “regular care” includes the parent’s intention to care for the child;

c) Showing an intention to care for the child, provided there are no protection/restraining orders in place, and by paying child support;

d) They need to be considered in the mix. But not automatically endowed with rights. There should be flexibility for all adults who have an interest in a child;

e) Regular care with definitions or intention to regularly care with definitions similar to the Alberta statute;

f) Through regular care of the child;

g) Demonstrating that they have an active interest in co-parenting the child. Very often a parent will have no involvement with a child for years, and the parent raising the child will ask for child support and suddenly the parent who has no interest in parenting wants the child 40% of the time (to avoid paying child support). As such there needs to be demonstrated commitment to the child through their contact with the child to show that a bond has developed and that they are not just doing this out of revenge or to minimize obligation;

h) Submitting a guardianship application forms as is in currently in use;

i) By caring for the child (or attempting to care for the child if being blocked by the other parent);

j) By making intentions clear, even by making an application;

k) By showing care and concern and involvement with the child;

l) Time or attempts to spend time with the child;

m) Lived with child or regular care of the child;

n) Develop a relationship with the child from birth, pay child support per Guidelines or provide other financial assistance, even if not directly in cash, demonstrate honest effort to develop relationship if spurned or denied by other birth parent.

Question 4 asked: “Even guardians can have different parenting responsibilities. Should guardians’ degree of parenting responsibilities depend on the level of parenting they exercise?”

- 57.14% said yes;
- 42.86% said no.

Question 5 asked: “If a parent is recognized as a guardian, should that parent start with all the parenting responsibilities, or just the limited set of parenting responsibilities proposed by government?”

- 60.71% favoured all parenting responsibilities;
- 39.29% favoured the limited set of parenting responsibilities proposed by government.

Question 6 asked: “If the parent starts with a limited set of parenting responsibilities, do you think the government got those parenting responsibilities right?”

- 54.55% said yes;
- 45.45% said no.

Question 7 asked: “If government did not get the limited set of parenting responsibilities right, what would you propose?”

There were 8 responses to this question.

These comments are, in no particular order of importance or preference, as follows:

a) I would say the limited set should be section 41(a) and 41(j); and any other parental responsibilities listed in section 41, as authorized by the primary parent, or to the extent that they do not prejudice the primary parent's ability to care for the child in the way that the primary parent believes is in the child's best interests (e.g. the secondary parent couldn't countermand a decision the primary parent had made, or unreasonably make a decision that conflicts with the primary parent's plans, such as enrolling the child in an activity without checking-in with the primary parent first;

b) Leave it to the parents;

c) Section 41(j) requesting and receiving from third parties health, education or other information respecting the child;

d) Flexibility should be the key. The cookie cutter approach to date is not necessarily in the best interests of a child or parent;

e) The list of parenting responsibilities in section 41 of the *FLA* should not be specifically extended but a clause indicating that they are "not limited to" should be added;

f) Parenting responsibilities should be equally shared and if necessary courses and training provided to ensure that the best interests of the child are being met;

g) I would not set out responsibilities. To do so would be arrogant and infringe on the rights of parents to parent their children;

h) All biological parents should start equally; if one or other fails to act responsibly or fails to exercise parenting responsibilities, an application for restrictions or removal of parenting responsibilities can be made to a court. If one parent blocks parenting by the other, there should be 3 strikes rule: do it 3 times with no believable evidence to back up denial of parenting, the other parent should be given the opportunity to be primary caregiver.

Question 8 asked: “If the parent starts with a limited set of parenting responsibilities, how should that parent earn more parenting responsibilities?”

There were 12 responses to this question.

These comments are, in no particular order of importance or preference, as follows:

a. A parenting coordinator, justice counsellor, or provincial court should be involved. Perhaps these parties should be able to authorize an evaluative or non-evaluative section 211 report which can be carried out by a justice counsellor;

b. Agreement or court order, there should be a presumption in favour of sharing as between guardians. The dynamic of control between the primary decision making parent and other parent usually is not in child's best interest unless there is real reason why significant decisions should not be based on agreement;

c. It would have to be by agreement, arbitrator's order or court order;

d. Earning is a strong word. The utilization of parental responsibilities should be granted to those who have interests in a child. It should be a flexible, adaptable framework;

e. Through responsible parenting and regular care;

f. It should be based on the best interests of the child. If guardians can cooperate, there will be no issue. In situations where there is conflict and the parties cannot find agreement, it really ought to be assessed based on the individual child's needs with all factors being fully canvassed;

g. Best interests of the child should be the paramount criterion;

h. Courses, workshops and more supervised access to teach parenting skills; realistically have the courses available outside of regular work hours;

i. By exercising parenting time;

j. Time or attempts to spend time with the child;

k. Demonstrate willingness and ability to exercise greater parenting responsibilities;

l. By diligently exercising the parenting responsibilities allowed; if there is a denial of parenting time by the other, that should not be counted against the blocked parent but should count against the non-compliant one.

Question 9 asked: “S. 39 of the *Family Law Act* has 3 tests for parents to qualify as guardians if: (1) they have lived together with the child, (2) they regularly care for the child or (3) all other guardians agree they can be a guardian. Are these s. 39 tests appropriate?”

- 57.14% said yes;
- 42.86% said no.

Question 10 asked: “If you don't think these s. 39 *Family Law Act* tests are appropriate, what would you propose?”

There were 13 responses to this question.

These comments are, in no particular order of importance or preference, as follows:

a. Start with birth and then the court can review if it should continue based on the facts;

b. I think that there must be some consideration of the scope of parental responsibilities granted in each of the sorts of situations discussed in section 39;

c. I like the expanded definition of regular care as suggested by the government;

d. Intention to care for the child, plus child support being paid, with no restraining orders or protection orders in place;

e. A parent should always be considered a guardian. Doesn't mean they exercise "parental rights" but if they exercise an interest in the child, they should be a guardian;

f. That they have lived with the child (instead of lived together with the child) to cover children who may not have ever resided with both parents, for children born to parents who have never co-habitated, including cases of sexual assault. That they regularly care for the child, and that all other guardians agree they can be a guardian;

g. This should apply to grandparents, interested family members, not just to the biological parents. Often children live with extended family members but those people can not be guardians without jumping through ridiculous rules, home studies, health and criminal record checks;

h. There should be a provision for parents who want to care for their biological child but are being prevented from doing so (for example, if the other parent is blocking those efforts);

i. I believe birth fathers should be able to be guardians even if they have not resided with the child or don't regularly care for the child. Sometimes birth fathers and children lose solid parent-child relationships because the birth parents fall out or stop living together before a child is born. I would suggest a birth father who applies to be a guardian would become a guardian unless the birth mother or other guardians can show it is not in the child's best interest that the birth father be a guardian;

j. Attempts as defined by the Court of Appeal;

k. Clarity respecting regular care;

l. If both biological parents want to have contact with the child at birth, they should be presumed guardians;

m. I would add that if a person is a biological parent she or he qualifies, and I would clarify "they regularly care for the child" by adding "whether or not that person is a biological parent".

Question 11 asked: “Should the government delete the requirement for a guardianship affidavit?”

- 29.63% said yes;
- 70.37% said no.

Question 12 asked: “Should the government delete the requirement for a guardianship affidavit just for parents?”

- 46.43% said yes;
- 53.57% said no.

Question 13 asked: “Should guardianship affidavit be required for everyone coming to court, for any reason?”

- 25.93% said yes;
- 74.07% said no.

Question 14 asked: “Should “regular care” be defined in the *Family Law Act* or should the courts define "regular care"?”

- 67.86% said to define "regular care" in the *Family Law Act*;
- 32.14% said to define "regular care" by the courts.

Question 15 asked: “If "regular care" is to be defined in the *Family Law Act*, is contact with the child or parenting time what is meant by "care"?”

- 65.38% said yes;
- 34.62% said no.

Question 16 asked: “If "regular care" is to be defined in the *Family Law Act*, and you do not agree that contact with the child or parenting time as what is meant by "care", then what do you propose is meant by "care"?

There were 11 responses to this question.

These comments are, in no particular order of importance or preference, as follows:

a. Child lives with you like a grandparent caring for a child for a year;

b. I think what makes the most sense would be to have the courts define "regular care" by regulation - this allows the definition to be accessible to the public while being responsive to case law;

c. Expanded definition to include intention to be in the child's life and providing financial support;

d. Contact is part of it. But care is a larger concept;

e. Care must include physical contact and time with the child. Often times there are Skype or phone calls that are contact or parenting time, but the legislation must be clear that care means the physical duties of caregiving. Care must include being responsible for feeding the child, ensuring the child has appropriate hygiene, ensuring the child is adequately dressed and engaging in appropriate

activities. This also includes providing for the child's medical needs (including basic healthcare, and tending to them when they are ill), a parent who refuses to care for a child when they are ill is not providing "care". It also has to include providing for the child's school needs - a parent who refuses to provide care during school days because it is inconvenient, or does not assist or facilitate completion of homework is not providing "care". As such the *FLA* should ensure that care includes ensuring that the child's health and educational needs are being facilitated based on their best interest. Also, a parent who has their child spend 50% or more of their time with the child in the care of another individual (including family or child care) is not providing care;

f. A person who provides day to day care whether or not they are the biological parents;

g. Care includes spending time with the child, but also telephone or electronic contact, physical parenting (feeding, clothing, bathing, putting to bed) and emotional parenting (soothing, discussing, mentoring);

h. What the courts define it as in individual cases, just like families are;

i. Meaningful contact, including taking responsibility;

j. Consistent, sincere, voluntary involvement with the child, demonstration of ability to recognize and implement the best interests of child, ability to not allow spousal conflict to interfere with parenting of the child, absence of financial motivations, e.g. "40% rule reducing child support obligations";

k. Any conduct to or with a child which is nurturing, in the sense of providing love and affection, as well as food, shelter, medical and dental care, supplementary funds to enrich the child's life (even if incidentally it benefits others in the family unit).

Question 17 asked: “If "regular care" is to be defined in the *Family Law Act*, what would "regular" mean to you?

There were 19 responses to this question.

These comments are, in no particular order of importance or preference, as follows:

a. Ongoing, constant, dependable;

b. Minimum of 4 days parenting time per month on a ongoing basis;

c. Arranged in or constituting a constant or definite pattern; done or happening frequently. I think the general idea is that the parent has to demonstrate a desire and willingness to take responsibility for and promote the best interests of that

child -- in many cases, this will mean "earning" an escalating scope of parental responsibilities and parenting time;

d. The intention to want to parent should be sufficient;

e. This is problematic because the parent with primary residence can block contact. As soon as there is a definition, I expect parents will provide less time than required to frustrate the other parent becoming a guardian. I suggest that showing a repeated intention to see the child is sufficient;

f. Therein lies a problem. Regular could be once every year. I think if there is interest in a child and time spent with a child, then that is care;

g. Frequent and meaningful;

h. On a fixed schedule; someone who is reliable and shows up when they have agreed to do so;

i. At least one overnight per week;

j. Visits that are consistent, stable and have a frequency that is consistent with the child's age;

k. Providing a stable home environment, health and education;

l. Consistent. Several times a month;

m. Regular should depend on whether it serves the child's needs - bonding, mentoring, physical and emotional nurturing. A young child will need more frequency, an older child less;

n. A minimum of two days a week;

o. Regular to that particular family;

p. More than occasionally-- enough care that the party has a parental role;

q. Ongoing, consistent time with the child that would allow a child to form an attachment to that parent;

r. Consistently repeating basis, taking into account parents' work commitments;

s. Predictable, as opposed to erratic or episodic, at defined times and places. Children benefit from predictability and are harmed by loss of expectations, such as the disappointment that arises when a parent fails to appear for a scheduled pick-up time.

Question 18 asked: “Should “regular care” be replaced with the definition of ”parenting” in the *Family Law Act*?”

- 36% said yes;
- 64% said no.

CBABC Working Group Meeting October 7, 2016

At the CBABC Working Group teleconference meeting on October 7, 2016, most of the discussion focused on how to balance the interests of biological parents who do not know they are parents or are being blocked from parenting versus effectively single parents who have little or no support from the other: who should have to go to court? under what circumstances and what rights and responsibilities should each have in the interim?

There was a strong feeling that under the *FLA* parents who either did not know they had a child or who are being blocked from parenting have too big a task to acquire guardianship and assume parenting responsibilities. The CBABC Working Group also felt this temporary lack of status worked against non-guardian parents in cases of third

party intervention – adoption or child protection proceedings. There is already a sense that parents who did not have the children when they were removed are treated disproportionally under the *Child, Family and Community Service Act*. It is only worse now. If they are not guardians they are not considered parents, either – and certainly not parents "apparently entitled to custody."[5]

The CBABC Working Group supported the idea of such parents being able to confirm their guardianship within a fixed period of time from knowing they were parents, either by establishing a record of regular care or by making application to court. The CBABC Working Group was clear the triggering event should be the later of the date of birth or discovery (proof, in the case of a dispute) of parentage. We were concerned that being informed of the pregnancy should not be a triggering event, nor should the mere possibility of parentage if there is a dispute over the issue. (But if you are told you are a dad and do nothing…)

As for parenting responsibilities, the CBABC Working Group was not decided between Options B or A plus a Master Joyce order. It was felt either Option B or Option A plus a Master Joyce order could strike a reasonable balance between allowing fathers some basic starting point as a guardian and protecting mothers from having to negotiate with a non-involved father, or seeking a court order to sever the parenting responsibilities of a father who did not care to exercise them. There was a question that under the Master Joyce model, while having the ultimate voice in most parenting decisions, the mother

[5] For a case on how guardianship meshes with "parent apparently entitled to custody", see *Director and L. et al,* 2014 BCPC 284 (CanLII).

would still have to seek court orders for child passports or travel – but that was felt to be a minimal intrusion on parental authority or autonomy, like the necessity of giving notice to and if applicable dealing with objections to relocation.

The CBABC Working Group discussed “regular care” and noted the disparate suggestions coming out of the CBABC Working Group’s Survey. “Care” needs to be a combination of the physical routines and responsibilities necessary for raising a child coupled with the intangible influences parents provide: values, emotional attachment and stability, a sense of identity and so on. “Regular” should be assessed relative to the opportunity of the parent in question. (We did not like the idea of a purely quantitative standard – x days per week – because many involved parents are restricted in the time they can be in town, let alone parent, due to work or other commitments such as deployment in the Armed Forces.)

The CBABC Working group did discuss section 39(1) of the *FLA*. We felt “living together” should be amended, but had some concerns that merely “living with” a child might apply to parents who still live with their own parents, these grandparents end up providing the real or primary care of the child. Should this really qualify biological parents as guardians when in fact it is the grandparents doing the parenting?

Section 39(1) was meant to do away with the bias inherent in section 27 of the former Family *Relations Act* (*FRA*). Under the former *FRA*, non-primary resident parents were excluded, even where they had been co-parents for years prior to the parents’

separation. Under section 39(1) of the *FLA*, the non-primary resident parent would still be a guardian post separation. Our question was whether that consideration has effectively been overtaken by the concept of regular care. Given section 39(3)(c) of the *FLA*, do we really need section 39(1) at all?

CBABC Working Group's Answers To The Discussion Paper's Questions

Question 1: Should the FLA be clarified with respect to guardianship in situations where the parents never lived together, or lived together but separated before the child was born?

Most CBABC Working Group members answered yes, but candidly without much discussion or thought.

The discussion in the last two paragraphs of our submissions above led the CBABC Working Group's Chair to ask the real question: whether section 39(1) of the *FLA* is necessary at all? Indeed, the contrast between section 39(1) and section 39(3)(c) might have the unfortunate result of leading courts to conclude that "living with" a child is a separate ground from providing "regular care".

As Chair of the CBABC Working Group, I recognize the intent was: (a) to recognize the likelihood that parents who have lived together with a child must have some parenting experience and (b) to avoid the situation under section 27 of the former *FRA* that the mere act of separation disenfranchised the non-primary resident parent. But there may be cases of parents, who merely live with their child and who may not in fact parent,

such as a disabled or addicted parent who lives with parents or other family members who do all the actual parenting. And there may be parents who, on separation, disengage with their child. So, if "regular care" is the best way to allow parents who have never lived with the child to become guardians, maybe regular care is also the best way to ensure that separated parents maintain their level of parenting.

Admittedly this is a fresh thought, stimulated by the last discussion of the CBABC Working Group, but not something the CBABC Working Group itself has had an opportunity to discuss or support.

Question 2: Is regular care a useful basis for establishing the guardianship status of a parent that has never lived with their child?

In the CBABC Working Group there is broad support for this concept, subject to the next question.

Question 3: If it is a useful basis, does regular care need to be more clearly defined within the FLA?

The CBABC Working Group clearly favoured defining "regular care", but did not have enough time to establish what that definition should be. It was felt that "care" should include both physical and non-physical care. The Survey responses show the divergence of views. A clear majority responded that contact or parenting time is what is meant by "care" (65-35%). Yet several responded that care had to include physical care, day to day care, and many commented on the more nebulous, qualitative nature of the term:

"…emotional parenting (soothing, discussing, mentoring);"

"Meaningful contact, including taking responsibility";

"Consistent, sincere, voluntary involvement with the child";

"…nurturing, in the sense of providing love and affection…".

There were similar difficulties in defining "regular". Some tried quantitative tests: minimum four days per month; at least one overnight a week, a minimum of two days a week. Others of the CBABC Working Group felt the amount or frequency of care should be relative to the parents' opportunities, or relative to the overall family situation. Yet others felt "regular" should be equivalent to consistent, reliable, or meaningful.

The Survey asked whether "regular care" should be replaced with simply "parenting". A majority of respondents disagreed (64-36%), yet there is no doubt that how the *FLA* or the courts define the term will depend in great degree on how they define and value central aspects of parenting. The CBABC Working Group felt this task was more properly the task of government than the courts. A legislated definition will also obviously save the courts and litigants much time, given how widely views differed even within the CBABC Working Group and the small number of respondents to the Survey.

Question 4: Does one of these options A, B, or C represent a clearer, more effective way to understand and apply guardianship in the absence of an agreement or order?

Guardianship

Option A. A significant portion of the CBABC Working Group takes this view. They are also the ones, likely, who favour all parents having full parental responsibilities. They are not the majority, however.

Actually, ascertaining the majority is a little difficult. The Survey doesn't help, since respondents said a majority favoured all parents being guardians (61-39%) and at the same time a majority felt parents should "earn" guardianship (57-43%). The same percentage of respondents supported guardian parents staring with full parenting responsibilities or earning parenting responsibilities respectively.

In the discussion groups, however, it was clear that most of the CBABC Working Group were not convinced that biology should determine guardianship. Something more should be required, even if the CBABC Working Group had an unclear idea of what that something else should be. We just did not want the result to work unfairly, one way or the other.

Option B. Option B received significant favour and the CBABC Victoria Family Law Section preferred it. Most felt that intending to parent or regularly care for a child should be one route to guardianship, so long as the parent acts on that intention. Giving them a reasonable time to do so and preserving their guardianship status if they do, seems fair. It also has two other benefits. First, it means a person is not being required to

apply to court purely for status reasons: they must have an actual parenting dispute or they would just assume the parenting role they intend. Second, it avoids any Charter argument since the parties to the dispute start with the same status, if the application is brought in time.

Option C. There are nearly as many participants taking Option C as Option A – and they are diametrically in opposition to one another. So, while the CBABC Working Group did not come to any clear consensus, as Chair of the CBABC Working Group, I observe that Option B does seem to represent an obvious compromise.

Parenting Responsibilities

Option A. This was supported by the A crowd in the guardianship models above.

Option B. This may be supported by some of the C crowd; but the C position on guardianship really is that parents must earn parenting responsibilities, period. So this option is really an alternative to guardianship Option B. Rather than preserving a right of guardianship for a limited time, to allow the parent to act, this option allows provisional status and minimal parenting responsibilities whether and whenever that parent chooses to become engaged with his or her child. Either is a middle ground between guardianship Options A and C. The CBABC Working Group did not have a consensus choice.

Question 4 Generally

One clear policy consideration is to reduce the need to resort to the courts to resolve these issues. The CBABC Working Group was very conscious of the concern on the one hand, that biological parents not have unnecessary roadblocks put in the way of establishing their status as guardians and on the other hand, that an effectively single parent not be unduly burdened by having to deal with an uninvolved parent who either refuses to exercise their parenting responsibilities, or worse, uses them in a manner to impede or frustrate the primary resident parent.

Which parent should have to apply to court? The one who wishes to establish his or her status? Or, the one who wishes to curtail the status or authority of the other parent? As commented above, the advantage of Options B under both guardianship and parenting responsibilities is that the person going to court would be a parent who has an actual dispute over something other than his or her status as guardian.

While the CBABC Working Group did not reach a consensus on which of these outcomes to support, the various positions of and conflicts within the CBABC Working Group appear to be best resolved by one of these two middle courses.

CONCLUSION

We would be pleased to discuss our submissions further with the Ministry, either in person or in writing, in order to provide any clarification or additional information that may be of assistance to the Ministry as it undertakes this important review of the presumption of advancement and property division under the *FLA*.

All of which is respectfully submitted.

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