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MODERNIZING THE CHILD, FAMILY AND COMMUNITY SERVICE ACT

Backgrounder

Legislative Fact Sheet:

Report on Modernizing the Child, Family and Community Service Act

Date: 25 May 2021

Introduction

BCLI's Child Protection Project Committee has published a report that makes recommendations to reform BC's child protection statute. This backgrounder summarizes the report's recommendations that call for the Legislative Assembly of British Columbia to make changes to the *Child, Family and Community Service Act*.

Definitions and terms

What is the current law?

- The CFCSA uses terms developed from older family law legislation, such as *custody*, *access*, and *domestic violence*.

What reforms does the report recommend?

- These older terms should be replaced with terms used in the *Family Law Act* and the *Divorce Act*, such as *guardianship*, *parenting time or contact*, and *family violence*.

Why should the legislature enact these reforms?

- Courts often have to deal with child protection and family law disputes side by side. Differing terminology can complicate the resolution of these disputes.
- Older terms such as *custody* have taken on negative connotations, implying that children can be seen as property. Employing modern terminology will allay this concern.

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Disclosure

What is the current law?

- The CFCSA has a rudimentary provision on disclosure in child protection proceedings. If a party to a proceeding requests it, another party must disclose the orders the party intends to request, the reasons for requesting these orders, and the party's intended evidence.

What reforms does the report recommend?

- The CFCSA's disclosure provision should be enhanced by: (1) eliminating the requirement to request disclosure; (2) requiring parties to disclose all documents to which the party intends to refer to at trial; (3) requiring the director to disclose to the other parties all documents that are or have been in the director's possession or control and that could be used by any party at trial to prove or disprove a material fact; (4) clearly stating that there is an onus on the director to disclose all documents within the scope of the provision (except for those covered by solicitor-client privilege), or to prove that a given document may not be disclosed.

Why should the legislature enact these reforms?

- These reforms will remedy deficiencies in the CFCSA and incorporate points made in the case on law on disclosure.
- Enhancements to the CFCSA's disclosure provision will clarify the law and help to streamline child protection proceedings in court.

Independent legal advice

What is the current law?

- The CFCSA contains a handful of references to independent legal advice in connection with consenting to the transfer of guardianship of a child.

What reforms does the report recommend?

- The CFCSA should also provide that parents and children (if 12 years of age or older)—and, in some cases, other parties to an agreement—must be advised of the right to independent legal advice before entering into a voluntary care agreement, a special needs agreement, or an agreement with the child's kin or others.
- A child (if 12 years of age or older) should be offered independent legal advice whenever the child is served with an application for an order under the CFCSA.

Why should the legislature enact these reforms?

- Voluntary care agreements, special needs agreements, and agreements with the child's kin or others—each of which may function as an alternative to removing a

child—have significant impacts on a person’s legal rights, so it is important that the CFCSA require parents, children, and other parties to be advised of the right to independent legal advice.

- Providing children with legal advice whenever they are served with an application for an order under the CFCSA will support children’s rights and enhance the conduct of child protection proceedings.

Court procedures and orders

What is the current law?

- The CFCSA contains a detailed framework governing the procedures for obtaining court orders.

What reforms does the report recommend?

- The CFCSA’s legal framework should be enhanced by new provisions: (1) giving the court the power to dispense with the written requirement for a consent order; (2) requiring the director to provide reasons when an extension to an order is sought; (3) allowing the court to make a continuing guardianship order as an outcome of a hearing under section 54.01; (4) clarifying that an order granting guardianship of a child under that section is sole guardianship, ending parental rights; (5) dealing with when a child (aged 12 years old or older) should be granted party status.

Why should the legislature enact these reforms?

- These reforms to the CFCSA will fill gaps in the legislation, remove frustrating practices that have taken hold, and enhance and streamline court proceedings.
- Directly addressing when a child should be granted party status will support children’s rights, while creating a thoughtful, deliberative process that ensures children aren’t granted party status in cases in which it may harm their interests or well-being.

Selected protection issues

What is the current law?

- The CFCSA sets out the grounds upon which a child may need protection. It combines in a single ground for protection (1) situations in which a child may be emotionally harmed and (2) cases in which a child is living in a situation where there is domestic violence by or towards a person with whom the child resides.

What reforms does the report recommend?

- The CFCSA should contain separate grounds for protection for emotional harm and family violence.

- The CFCSA should provide guidance to courts in interpreting the grounds for protection, declaring that whether dealing with past harm or likelihood of future harm, the same test on a balance of probabilities applies.
- The CFCSA should require a director to regularly reassess whether a child should remain in care. In particular, this requirement would be triggered prior to any subsequent guardianship application before the court.
- The CFCSA should adopt provisions enhancing contact between children and parents, siblings, and other extended family members.

Why should the legislature enact these reforms?

- Emotional harm and exposure to violence are distinct situations that call for different approaches to whether a child should be taken into protection. Separating them into two grounds for protection allows for the law to be applied in a more sensitive manner.
- A new interpretive provision for the grounds for protection would arrest a disturbing trend in some recent court cases that have said that the degree of certainty may differ depending on whether the court is considering past harm or risk of future harm, a conclusion that is doctrinally confusing and at odds with a decision on point from the Supreme Court of Canada.
- Requiring regular reassessments will support the goal of ensuring that children aren't in the care of the ministry unless it's clearly necessary and in the child's best interests.
- Promoting contact with parents, siblings, and extended family members will benefit children and support their rights, and the proposed reform will fill in gaps in the CFCSA.

Incorporating children's views into child protection proceedings

What is the current law?

- The CFCSA doesn't address how to incorporate children's views into child protection proceedings. Courts have partially filled this gap, providing various methods for incorporating a child's views into a proceeding.

What reforms does the report recommend?

- The CFCSA should contain a provision listing for the court specific options to be used to incorporate a child's views in a child protection proceeding.

Why should the legislature enact this reform?

- It would encourage and support the trend toward incorporating the child's views in decision-making that affects the child.
- It would clarify the law, ensuring that options for incorporating the child's views aren't overlooked.

Legal representation for children in child protection proceedings

What is the current law?

- The CFCSA doesn't address legal representation for children in child protection proceedings. Ministerial policy and the court's inherent jurisdiction to control proceedings provide a basis for ordering legal representation in some cases.

What reforms does the report recommend?

- The CFCSA should contain an enabling provision for legal representation for a child in a child protection proceeding.

Why should the legislature enact this reform?

- A legislative provision would make the law clearer and more consistent.
- Legal representation for children is an important component of ensuring that children's views are respected and taken into account when decisions are made that affect children.
- Nearly all of the other provinces and territories have legislation providing for legal representation for children in child protection proceedings, so amending the CFCSA would bring it into line with a country-wide consensus.