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Consultation Paper on Modernizing the Child, Family and Community Service Act

Prepared by the Child Protection Project Committee

supported by:
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The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its purposes are to:

- promote the clarification and simplification of the law and its adaptation to modern social needs,
- promote improvement of the administration of justice and respect for the rule of law, and
- promote and carry out scholarly legal research.

This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Attorney General for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.

Child Protection Project Committee

The Child Protection Project Committee was formed in 2019. This volunteer project committee is made up of leaders in the field of child protection in British Columbia. The committee's mandate is to assist BCLI in developing recommendations to reform British Columbia's child protection statute, the *Child, Family and Community Service Act*. These recommendations will be set out in the project's final report, which is planned to be published in 2021.

The members of the committee are:

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Kevin Zakreski (staff lawyer, British Columbia Law Institute) is the project manager.

For more information, visit us on the World Wide Web at:
https://www.bcli.org/project/16649

Call for Responses

We are interested in your response to this consultation paper. It would be helpful if your response directly addressed the tentative recommendations set out in this consultation paper, but it is not necessary. General comments on reform of the *Child, Family and Community Service Act* are also welcome.

A helpful way to submit a response is to use a response booklet. You may obtain a response booklet by contacting the British Columbia Law Institute or by downloading one at **https://www.bcli.org/project/16649**. You do not have to use a response booklet to provide us with your response.

Responses may be sent to us in any one of three ways—

by fax:	(604) 822-0144
by email:	cfcsa@bcli.org
by online survey:	link from https://www.bcli.org/project/16649

If you want your response to be considered by us as we prepare our report on modernizing the *Child, Family and Community Service Act*, then we must receive it by **15 January 2021**.

Privacy

Your response will be used in connection with the Modernizing the *Child, Family and Community Service Act* Project. It may also be used as part of future law-reform work by the British Columbia Law Institute or its internal divisions. All responses will be treated as public documents, unless you expressly state in the body of your response that it is confidential. Respondents may be identified by name, title, and organization in the final report for the project, unless they expressly advise us to keep this information confidential. Any personal information that you send to us as part of your response will be dealt with in accordance with our privacy policy. Copies of our privacy policy may be downloaded from our website at: https://www.bcli.org/privacy.

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An overview of the consultation paper

The *Child, Family and Community Service Act* is the central statute in British Columbia's child protection system. Among its provisions are those that establish and define the best interests of the child as the leading organizational principle of child protection law, set out the grounds under which children in need of protection (due to abuse, abandonment, or neglect) may be removed from their families and taken into the care of a director, and set out the court orders, procedures, and safeguards that govern the process of taking a child into care.

This consultation paper contains 38 tentative recommendations to reform the *Child, Family and Community Service Act*. While these tentative recommendation don't constitute a front-to-back review and overhaul of the Act, they do cover a wide range of important subjects encompassed by the Act. The consultation paper's tentative recommendations address topics ranging from modernizing the Act's terminology, to enhancing several court procedures and orders, to providing clear guidance on incorporating a child's views within a child protection proceeding.

The purpose of the consultation paper is to stimulate public responses on the tentative recommendations for reform. Responses from specialists in child protection law and practice and from the general public are both encouraged, as are responses that agree or disagree with the consultation paper's tentative recommendations. Responses and comments on the tentative recommendations help in the process of reaching decisions on this project's final recommendations. To ensure that a response is considered as final recommendations are being formed, BCLI must receive it by **15 January 2021**.

About the Modernizing the Child, Family and Community Service Act Project

The Modernizing the *Child, Family and Community Service Act* is a major law-reform project. This consultation paper contributes to one of the goals of the project, which is to recommend specific reforms to improve the *Child, Family and Community Service Act*. (The project has a second goal, which is to examine legislation on youth aging into the community. BCLI plans to publish a study paper on this subject in 2021.)

This consultation paper's tentative recommendations to reform the *Child, Family and Community Service Act* are intended to identify outdated provisions and operational incompatibilities and gaps within the statute itself and with legislation and regulations that intersect with this Act. This means that the consultation paper's scope isn't so expansive as to include all aspects of the *Child, Family and Community Service Act* or the broader child protection system. This consultation paper represents a focused review of selected aspects of the Act.

A focused review is appropriate because the *Child, Family and Community Service Act* and the child protection system are undergoing significant change. A stream of recent reports has recommended reforms to the system. The coming into force this year of new federal legislation on child welfare for First Nations, Inuit, and Métis children, youth, and families has highlighted the need to for amendments to the *Child, Family and Community Service Act* to respond to that federal legislation. BCLI does not seek to re-do the work that has been carried out elsewhere. It has carefully crafted the scope of this project to make a distinctive contribution to a multifaceted reform effort.

Our supporters and the project committee

The Modernizing the *Child, Family and Community Service Act* Project has been made possible by project funding from the Law Foundation of British Columbia.

In carrying out the project, BCLI had the assistance of the Child Protection Project Committee. This committee is made up of experts in the child protection field in British Columbia. It includes members of the legal and social-work professions, as well as officials from the Ministry of Children and Family Development for British Columbia, the Office of the Representative for Children and Youth of British Columbia, and the Office of the Public Guardian and Trustee of British Columbia.

Content of the consultation paper

Introduction

The consultation paper begins with a short introductory chapter. This chapter describes the goals of the project, summarizes the *Child, Family and Community Service Act*, discusses other law-reform work, and gives an overview of the seven substantive chapters to follow.

Definitions and terms

A number of key terms in the *Child, Family and Community Service Act* derive from older family-law legislation. With the advent of the British Columbia's *Family Law*

Act (in force 18 March 2013) and significant amendments to the federal *Divorce Act* (projected to come into force on 1 March 2021), this terminology has fallen out of use in major family-law statutes, replaced by newer terms. In some cases, older terms such as custody have taken on negative connotations.

The committee tentatively recommends updating the terminology used in the *Child, Family and Community Service Act* to allow it to keep pace with these developments in family law. In making its tentative recommendations in this chapter, the committee carefully considered the effect of new terminology on child protection law. In some cases, it found that direct adoption of a term from the *Family Law Act* or the *Divorce Act* would have negative effects for child protection law, which outweighed the positive benefits of harmonization. In these cases, the committee has modified the proposed terminology, attempting to strike a balance between the benefits of modernization with the special considerations of child protection law.

Disclosure

The *Child, Family and Community Service Act* has a rudimentary provision on disclosure of information in child protection proceedings. The committee tentatively recommends amendments to the Act to enhance its disclosure requirements. The committee proposes requiring the director to provide reasons when an extension to an order is sought. It also proposes specific amendments to the Act's main disclosure provision, which are intended to incorporate points made in the case law interpreting this provision. In particular, the committee proposes requiring parties to a child protection proceeding to disclose all documents to which the party intends to refer to at trial and setting a requirement for 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.

Independent legal advice

The Act makes a handful of references to independent legal advice. The committee tentatively recommends enhancing this concept by amending the Act in two distinct ways. First, it proposes amendments to 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. Second, it proposes an amendment to provide that a child (if 12 years of age or older) must be offered independent legal advice whenever the child is served with an application for an order under the Act.

Court procedures and orders

The committee makes a series of tentative recommendations intended to fine-tune the Act's system of procedures and safeguards for court orders. It proposes that the Act's provision on consent orders be streamlined by giving the court the power to dispense with the written requirement for a consent order. In a similar vein, it proposes that a court be allowed to make a continuing custody order as an outcome of a hearing under section 54.01. And it proposes clarifying that an order granting guardianship of a child under that section is sole guardianship, ending parental rights.

The committee examined the provisions in the *Family Law Act* dealing with misuse of court process and respecting litigants' conduct. These provisions create an expanded regime in family law for dealing with litigation misconduct, supplementing the *Supreme Court Act*'s provision on vexatious litigants. In the end, the committee decided that these provisions shouldn't be extended to the *Child, Family and Community Service Act*. The stricter vexatious-litigant provisions should continue to set the standard for this Act.

Finally, the committee considered the Act's provision that empowers a court to order that a person be made a party to a child protection proceeding. The committee proposes that this provision be amended by adding new language that deals with when a child (aged 12 years old or older) should be granted party status.

Selected protection issues

The committee tentatively recommends extending the ground for protection relating to emotional harm of a child to embrace the risk of future harm. This proposal would bring that provision into line with the Act's other grounds for protection that deal with harm to a child. The committee also proposes that violence be split off from the ground for protection dealing with emotional harm, to form a new ground for protection in its own right.

The committee tentatively recommends adding a provision to the Act requiring a director to regularly reassess whether a child should remain in care. In particular, this requirement would be triggered prior to any subsequent custody application before the court.

The committee tentatively recommends that the Act be amended to adopt provisions enhancing contact between children and parents, siblings, and other extended family.

Incorporating children's views in child protection proceedings

The committee tentatively recommends that a new enabling provision be added to the Act, listing for the court specific options to be used to incorporate a child's views in a child protection proceeding.

Legal representation for children in child protection proceedings

The committee tentatively recommends amending the Act to adopt an enabling provision for legal representation for a child in a child protection proceeding.

Conclusion

BCLI encourages readers to respond to this consultation paper. Readers' responses assist the committee in crafting the final recommendations for reform for the Modernizing the *Child, Family and Community Service Act* Project. Those final recommendations will be submitted to the provincial government. In considering the committee's recommendations, the provincial government should take into account the need for broader consultations than BCLI is capable of carrying out, bearing in mind (in particular) the provincial government's obligation to consult with Indigenous communities, who are particularly affected by legislation on child welfare.

Chapter 1. Introduction

About the Modernizing the Child, Family and Community Service Act Project

What are the project's goals?

The *Child, Family and Community Service Act*[1] is the statute at the centre of British Columbia's child protection system. Child protection is a complex subject. The child protection system has been the object of intense study in recent years, generating major reports and significant ongoing projects.[2] Child protection is going through a period of profound change, and this transformational process is still unfolding.[3]

The Modernizing the *Child, Family and Community Service Act* Project aims to contribute to this ongoing reform of the child protection system. The system is so large and intricate that a single law-reform project can't hope to address all issues calling out for reform. A law-reform project also shouldn't aim to duplicate past or ongoing work; rather it should build on completed reports and complement ongoing projects.

The Modernizing the *Child, Family and Community Service Act* Project is intended to play this complementary role. The project has two dimensions: (1) a focused review of the *Child, Family and Community Service Act* to identify outdated provisions and

1. RSBC 1996, c 46.

2. See e.g. Edward John & British Columbia, Ministry of Children and Family Development, *Indigenous Resilience, Connectedness and Reunification: From Root Causes to Root Solutions: A Report on Indigenous Child Welfare in British Columbia: Final Report of Special Advisor Grand Chief Ed John* (Victoria: Ministry of Children and Family Development, 2016), online: <fns.bc.ca/wp-content/uploads/2017/01/Final-Report-of-Grand-Chief-Ed-John-re-Indig-Child-Welfare-in-BC-November-2016.pdf> [*Indigenous Resilience*]; E. N. Hughes, *BC Children and Youth Review: An Independent Review of BC's Child Protection System* (Victoria: Ministry of Children and Family Development, 2006), online: <cwrp.ca/sites/default/files/publications/en/BC-HuguesReviewReport.pdf>; Thomas J. Gove, *Report of the Gove Inquiry into Child Protection in British Columbia* (November 1995), online: <www.qp.gov.bc.ca/gove/>. For a good summary of several leading reports see West Coast LEAF, *Pathways in a Forest: Indigenous Guidance on Prevention-Based Child Welfare* (September 2019), online: <www.westcoastleaf.org/wp-content/uploads/2019/09/Pathways-in-a-Forest.pdf> at 11–12 [*Pathways in a Forest*].

3. There have been recent amendments to the *Child, Family and Community Service Act*. See *Child, Family and Community Service Amendment Act, 2018*, SBC 2018, c 27 [in force 1 April 2019]. New legislation on Indigenous child welfare has recently been enacted at the federal level. See *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 [Federal Act].

operational incompatibilities and gaps within the statute itself and with legislation and regulations that intersect with this Act; (2) comparative legal research into legislative models that support policy and practice related to youth aging into the community.

This consultation paper is a major step in reaching the goals associated with the first dimension of this project.[4]

The Child Protection Project Committee

In carrying out this project, BCLI has had the benefit of assistance from the Child Protection Project Committee. This project committee is made up of leaders in the child protection field. Its ranks are drawn from lawyers, social workers, public officials and overseers, as well as others.[5]

The project's supporter

The Modernizing the *Child, Family and Community Service Act* Project has been made possible by project funding from the Law Foundation of British Columbia.

About the Public Consultation

The centrepiece of this consultation paper is the committee's set of 38 tentative recommendations for reform. The bulk of these tentative recommendations are proposals to amend the *Child, Family and Community Service Act*, either by changing existing provisions or by adding new ones.

Tentative recommendations are meant to be highly specific statements of policy. In many cases, they propose detailed changes in wording to a provision. They are intended to give readers the clearest and fullest picture of potential reforms.

The committee invites all members of the public to comment on the tentative recommendations for reform in this consultation paper. Responses agreeing and disagreeing with tentative recommendations are equally valued, as the committee wishes to hear from all perspectives on its proposed reforms. In addition to comments on

4. Regarding the second dimension, BCLI plans to publish a study paper setting out its comparative legal research into legislative models that support policy and practice related to youth aging into the community. Work on this study paper is ongoing, with a target for publication by spring 2021.

5. See, below, appendix B at 157–161 (for list of committee members with short biographies).

specific tentative recommendations, the committee will also accept general comments on reform of the *Child, Family and Community Service Act*.

Responses must be in writing and may be sent to BCLI by a variety of means.[6] If you want your response to be considered as the committee develops the final recommendations for this project, then BCLI must receive it by **15 January 2021**.

After the public consultation closes, the committee will review its tentative recommendations in light of the responses it has received and form its final recommendations for reform. Those final recommendations will be submitted to the provincial government. The government will ultimately be responsible for deciding whether or not the committee's recommendations should be implemented by introducing legislation in the legislative assembly. In considering the committee's recommendations, the government should take into account the need for broader consultations than BCLI is capable of carrying out, bearing in mind (in particular) the government's obligation to consult with Indigenous communities, who are particularly affected by legislation on child welfare.

About the Child, Family and Community Service Act

The *Child, Family and Community Service Act* came into force on 29 January 1996. When the bill that ultimately became this Act was introduced in the legislative assembly for second reading, the minister said that its goals were "to replace outdated legislation with new laws and a new system that will ensure the safety and well-being of children, and provide support for families who are experiencing significant levels of stress or conflict."[7]

6. See, above, at the unnumbered fourth page of this consultation paper, headed "Call for Responses," for more detail on how to respond to this consultation paper.

7. British Columbia, Legislative Assembly, *Hansard*, 35-3, vol 16, no 4 (7 June 1994) at 11529 (Hon Joy MacPhail). The minister's speech also provided the following social context for the new legislation: "At present, the province's role in providing child welfare services is governed by the Family and Child Service Act. That legislation was passed in 1980 and came into force in 1981. We have seen many changes in the intervening years. Two recessions and the economic shifts that accompanied them have permanently changed the lives of families and communities across this province. New social trends have emerged. Women are entering the workforce in ever-greater numbers. We are seeing more and more single-parent families. Child poverty is a tragic reality that most people today witness in their own communities. We now know more about the frequency of child abuse in our communities and understand more about its long-term effect on victims. I am sure that every member of this House is troubled by the growing number of children living on our streets and the increasing number involved in prostitution. First nations are demanding the right to reassume responsibilities for the protection of their own children and of strong cultural identities within their own communities. The public is demanding greater accountability from all government ministries and agencies, the Social Services ministry included.

In simple and straightforward terms, "[t]he primary aim of the legislation is the protection of children."[8] Even though it may be possible to set out the Act's "primary aim" in a simple, declarative statement, the *Child, Family and Community Act* itself is a lengthy and detailed statute. It is made up of 10 parts. A brief overview of these parts shows how they touch on a wide and diverse range of subjects.

Part 1 contains a long list of defined terms for the Act and a series of statements of broad principles. Guiding principles explain how the Act "must be interpreted and administered."[9] Service-delivery principles apply to "the provision of services under this Act."[10] Finally, the part sets out an inclusive list of factors that apply to the interpretation of the best interests of the child, the paramount consideration of the Act.[11]

Part 2 sets out voluntary services or support for families, including a series of agreements that may be made between a director (who is defined as "a person designated by the minister under section 91" and who has the administrative powers that are assigned to directors throughout the Act)[12] and a parent, child, or other party.[13] Part 2.1 deals with youth and adult support services and agreements.

Part 3 is entitled "child protection" and, as that title suggests, is the substantive heart of the Act. Part 3 comprises eight divisions, which, among other things, set out the scope and procedure for the Act's major court applications and orders.[14]

Part 4 lists the rights of children in the care of a director.

Our child welfare legislation has not kept pace with these changes or with society's increased understanding of the unique support needed by families and children living in traumatic circumstances." (*Ibid*.)

8. *Ibid*.

9. *Supra* note 1, s 2.

10. *Ibid*, s 3.

11. See *ibid*, s 4.

12. *Ibid*, s 1 (1) "director."

13. See *ibid*, ss 6 (voluntary care agreements), 7 (special needs agreements), 8 (agreements with child's kin and others). See, below, at 68–71 (for tentative recommendations on voluntary care agreements, special needs agreements, and agreements with child's kin and others).

14. As will be seen, the bulk of the committee's tentative recommendations relate to provisions located in part 3 or new additions to part 3.

Part 5 addresses the relation of the Act to the *Freedom of Information and Protection of Privacy Act*.[15]

Part 6 deals with appeals and reviews. In British Columbia, child protection proceedings are mainly held in the provincial court. Part 6 sets out procedures for appeals to the Supreme Court of British Columbia and the Court of Appeal for British Columbia.

Part 7 deals with administrative matters. Part 8 contains miscellaneous provisions. Part 9 sets out the rules that govern transition of cases begun under the old Act to the *Child, Family and Community Service Act*.[16]

The *Child, Family and Community Service Act* is supported by subordinate legislation in the form of a regulation[17] and court rules.[18]

These components of the *Child, Family and Community Service Act* justify comments in the legal commentary to the effect that the Act is "a lengthy and complex statute,"[19] which is noteworthy for "includ[ing] far more significant procedural safeguards (including limits on the duration of various orders) for parents than the previous legislation had offered."[20]

15. RSBC 1996, c 165.

16. Readers who are interested in pursuing the *Child, Family and Community Service Act* and child protection law in greater depth than this brief overview of the Act can provide should consider the following textbooks: Continuing Legal Education Society of British Columbia, eds, *British Columbia Family Practice Manual*, 4th ed, vol 1 (Vancouver: Continuing Legal Education Society of British Columbia, 2006) (loose-leaf 2019 update) at ch 19 [*Family Practice Manual*]; Canadian Bar Association, British Columbia Branch, Family Law Section & Continuing Legal Education Society of British Columbia, eds, *Family Law Sourcebook for British Columbia: A Project of the Vancouver Family Law Section, British Columbia Branch, Canadian Bar Association*, 3rd ed (Vancouver: Continuing Legal Education Society of British Columbia, 2003) (loose-leaf 2018 update).

17. See *Child, Family and Community Service Regulation*, BC Reg 527/95.

18. See British Columbia, *Provincial Court (Child, Family and Community Service Act) Rules*, BC Reg 533/95.

19. Judith Mosoff et al, "Intersecting Challenges: Mothers and Child Protection Law in BC" (2017) 50:2 UBC L Rev 435 at 441 [Mosoff et al].

20. *Ibid* at 443. As readers will see, examining and, in some cases, enhancing these procedural safeguards is a major theme of this consultation paper.

The Child Protection System and Other Reform Projects

Even though the *Child, Family and Community Service Act* can be fairly described as being "lengthy and complex," the Act is also in other respects merely the tip of the iceberg formed by a larger child protection system. In addition to legislation, this system comprises a vast range of ministerial policies, government programs, and standards of practice applicable to child protection workers (who are members of the social-work profession, practising in the area of child protection).[21]

This point has implications for a law-reform project. It could be argued that a law-reform project must address both child protection legislation and the broader child protection system. To take a recent example drawn from a project carried out in another province, "legislative reform" was characterized as only one of four "essentials for reform."[22] Does the committee's focus on legislative reform in this consultation paper hamstring this project, limiting its effectiveness?

This question may be answered *no*, for two reasons. First, even though the bulk of the committee's tentative recommendations are aimed at amending the *Child, Family and Community Service Act*, the committee didn't ignore the broader child protection system in forming these tentative recommendations. The committee considered the implications of each tentative recommendation for legislative reform for that broader system. And, even though the committee largely confined itself to making tentative recommendations that addressed the Act, in the handful of cases where a legislative reform would clearly call for changes to some aspect of the broader system, the committee has made tentative recommendations addressing changes.

Second, there have been a number of recent law-reform reports that have examined the non-legislative aspects of the child protection system in extensive detail. While

21. See Margaret Hall, "A Ministry for Children: Abandoning the Interventionist Debate in British Columbia" (1998) 12:2 Intl JL Pol'y & Fam 121 at 123 ("The protection of children is a problem for the modern liberal state because it brings two important values, or 'mores' into direct and irreconcilable conflict: the 'basic mores' on which modern liberal society is founded (individual freedom of thought and act, and respect for the private family as the inner sanctum of the free individual) and the 'humanitarian mores' of public compassion—the desire to alleviate suffering. This moral conflict makes the form of child protection legislation problematic as it requires an attempt by the State to accommodate both competing values yet, ironically, this conflict necessitates the existence of child protection legislation and a state 'system.' " [citation omitted]).

22. Manitoba, *Transforming Child Welfare in Manitoba: Reform. Renew. Results.* (Winnipeg: Government of Manitoba, 2018), online: <cwrp.ca/sites/default/files/publications/child_welfare_reform_mb.pdf>.

the committee didn't engage in evaluating them, these reports did figure into the backdrop of the committee's consideration of selected issues for reform. Particularly noteworthy in this respect are two recent reports: Grand Chief Ed John's *Indigenous Resilience* report[23] and Westcoast LEAF's *Pathways in a Forest* report.[24]

When it determined the scope of this project's mandate, BCLI acted primarily for pragmatic reasons. BCLI knew that it didn't have the resources or the mandate to undertake a full-scale study of the child protection system. It also knew that its expertise existed in another area: the close examination of legislative provisions for reform. But it was sustained by the existence of these other reports that do delve so deeply into other aspects of the child protection system. BCLI saw no need to re-do their work. Instead, they allowed BCLI to focus on legislative reform, which (even if it might not be sufficient in and of itself to reform the entire child protection system) is a necessary component of a package of reforms developed in recent years by individuals and organizations pursuing distinctive projects.

A Federal Act on Child Welfare

On 1 January 2020, *An Act respecting child welfare for First Nations, Inuit, and Métis children, youth, and families* came into force. The Federal Act has three declared purposes:

> (a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;

23. See *Indigenous Resilience*, *supra* note 2 at 8–9 (report of special advisor "with a three-part mandate to do the following: Focus on improving permanency options and rates for Indigenous children in care, particularly those in care through continuing custody orders (in care until reaching the age of majority); Work to identify next steps for BC following the release of the Council of the Federation's July 2015 report, *Aboriginal Children in Care—Report to Canada's Premiers*; and Assist the Minister of Children and Family Development in developing advice to Cabinet on these matters as necessary.").

24. See *Pathways in a Forest*, *supra* note 2 at 6 ("Our intentions in coming to this project were to assess whether the Ministry of Child[ren] and Family Development (MCFD) is meeting its obligations under section 2(c) of the *Child, Family and Community Service Act* (CFCSA) in providing the necessary supports to families to ensure that parents are able to exercise their right to parent and that children's best interests are met." [footnote omitted]), 6–7 ("However, this original intention has broadened as a result of the community engagement that we have undertaken. Through speaking with Indigenous leaders, families, Elders, and child welfare advocates, we have broadened our understanding of what it means to transform and re-envision the current child welfare system from one rooted in colonial interventionist practices to one that can effectively support Indigenous families and communities. Accordingly, our aim in writing this report is to uplift and amplify the wisdom and expertise of those who contributed to this project and the many others who have been doing this challenging work.").

(b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and

(c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.[25]

In pursuing these purposes, the Federal Act sets out minimum standards that must be met by provincial child protection legislation.[26]

The Federal Act has clear implications for legislative reform and the *Child, Family and Community Service Act*. This Act must be reviewed and, where necessary, amended to ensure that it meets the Federal Act's minimum standards.

Such a review of the Act isn't within the scope of this project. It is work of a scale as to require a separate law-reform project in its own right. The committee understands that the Ministry of Children and Family Development for British Columbia is completing its own analysis of the implications of the Federal Act.

The committee was able to take the Federal Act into account in forming tentative recommendations for those issues for reform in which a provision of the Federal Act was a relevant consideration.

An Overview of this Consultation Paper

At the outset of this project the committee held two meetings, in which it reviewed the *Child, Family and Community Service Act* and identified the issues for reform that it determined as coming within its mandate to identify outdated provisions and operational incompatibilities and gaps within the statute itself, and other ones with legislation and regulations that intersect with this Act. As a result of these meetings, the committee decided that there were seven areas within the Act that would form the main focus of its work.

This consultation paper consists of nine chapters. Apart from this introductory chapter and a brief conclusion, chapters that correspond to the seven areas identified by the committee are the backbone of this consultation paper. The subjects of these chapters, with a short summary of the issues for reform they address, are as follows.

- **Definitions and terms.** Should terms such as custody and domestic violence that are used in the *Child, Family and Community Service Act* be re-

25. Federal Act, *supra* note 3, s 8.

26. See *ibid*, s 4.

placed with terms used in the *Family Law Act*? What accommodations are necessary to ensure that new terminology introduced into the *Child, Family and Community Service Act* respects the special features of child protection law?

- **Disclosure.** Should a director be required to disclose reasons for seeking an extension to certain orders? Should the Act's dedicated provision on disclosure be enhanced to incorporate ideas that have grown up in the case law interpreting this provision?
- **Independent legal advice.** Should requirements to advise parties of their right to independent legal advice be expanded to embrace agreements under sections 6–8 of the Act? Should the Act provide that a child (if 12 years of age or older) must be offered independent legal advice whenever the child is served with an application for an order under the Act?
- **Court procedures and orders.** Should the court be given a power to dispense with the written requirement for a consent order under section 60? Should a court be able to make a continuing custody order after an application under section 54.01? Should the Act be amended to clarify the effect of an order under section 54.01 on parental rights? Should the Act be amended to incorporate provisions modelled on those in the *Family Law Act* regarding misuse of court process and orders respecting conduct? Should the Act's section on when a court may order that a person be made a party to a child protection proceeding be amended to incorporate a provision that expressly addresses making a child (if 12 years of age or older) a party to a child protection proceeding?
- **Selected protection issues.** Should the ground for protection relating to emotional harm embrace the risk of future emotional harm? Should a separate ground for protection be developed for family violence? Should the Act require regular reassessments before decisions are made on whether a child remains in protective care? Should the Act adopt new provisions promoting contact between children and their parents, siblings, and other extended-family members?
- **Incorporating children's views in child protection proceedings.** Should the Act be amended to incorporate an enabling provision listing the options available to a court for incorporating a child's views into a child protection proceeding?
- **Legal representation for children in child protection proceedings.** Should the Act be amended to adopt an enabling provision for legal representation for a child in a child protection proceeding?

Chapter 2. Definitions and Terms

Overview and Scope of this Chapter

The *Child, Family and Community Service Act*[27] has historically shared a common vocabulary with other major family-law statutes. But in recent years this bond at the level of language has been broken. With the advent of the *Family Law Act* (which came into force in 2013)[28] and amendments to the *Divorce Act* (which are slated to come into force later this year),[29] two major family-law statutes have adopted new and updated terminology. The *Child, Family and Community Service Act*, meanwhile, has retained terms that are out of step with current trends in family law and that are increasingly seen in a negative light. This has led to calls for reform, to bring the *Child, Family and Community Service Act* into line with the *Family Law Act* and the *Divorce Act*.[30]

This chapter is concerned with how reforms to selected legislative definitions and terms used in the *Child, Family and Community Service Act* should be carried out. Its overriding question is how to achieve the benefits of harmonization while recognizing when distinctive aspects of child protection law may call for a different approach. The chapter's attention is focused on three sets of terms:

- custody and access;
- parent and the parent apparently entitled to custody of the child; and
- domestic violence.

27. *Supra* note 1.

28. SBC 2011, c 25.

29. *Divorce Act*, RSC 1985, c 3 (2nd Supp), as am by *An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act*, SC 2019, c 16 [Bill C-78; not in force]. See also SI/2019-82, (2019) C Gaz II, 6062 [setting 1 July 2020 as the date Bill C-78 comes into force]; Department of Justice Canada, News Release, 2020-06, "Government delays *Divorce Act* amendments coming into force in response to requests from justice partners due to COVID-19 pandemic" (5 June 2020), online <www.canada.ca/en/department-justice/news/2020/06/government-delays-divorce-act-amendments-coming-in-to-force-in-response-to-requests-from-justice-partners-due-to-covid-19-pandemic.html> [announcing that coming-into-force date has been deferred to 1 March 2021].

30. See *Indigenous Resilience*, *supra* note 2 at 178, recommendation (72).

Issues for Reform—Custody and Access

Custody and access in the Child, Family and Community Service Act

Custody and access are terms that were developed in family-law legislation to describe the relationships that separated spouses had with their children. Putting it simply, a parent with the primary guardianship and caregiving responsibilities was said to have custody of the child, while the other parent had access to the child. From their initial use in the federal *Divorce Act*, these terms spread across Canada to all corners of family-law legislation.[31] One of the Acts to which they spread was British Columbia's leading child protection statute, the *Child, Family and Community Service Act*.[32] Custody and access appear hundreds of times in this Act.[33]

Unsurprisingly, given the number of times custody and access crop up in the Act, they aren't used in a consistent manner to refer to a parent-child relationship. Instead, the meaning of the word can shift with the context of the provision in which it appears. It's possible to arrange these provisions into a series of groups, which is done in these two tables.

Table 1: Use of "custody" in Child, Family and Community Service Act

Group	Provisions
definition	**example:** "includes care and guardianship of a child"—s 1 (1) "custody"
	list of provisions: s 1 (1) "custody"
child-focused	**examples:** "the court must consider the child's need for finality in determining custody"—s 42.2 (7); "decisions affecting their custody or care"—s 70 (1) (k)
	list of provisions: ss 1 (1) "child in care"; 42.2 (7); 53 (1) (e); 57.01 (5); 57.1 (5); 70 (1) (k)
child-parent relationship	**examples:** "a parent who has custody of a child"—s 6 (1); "parent apparently entitled to custody of the child"—s 16 (3) (a)

31. See Nicholas Bala, "Bringing Canada's *Divorce Act* into the New Millennium: Enacting a Child-Focused Parenting Law" (2015) 40:2 Queen's LJ 425 at 454 ("[t]he concepts of custody and access are central to the *Divorce Act*'s parenting regime, and, as a result, they are widely used in Canada") [Bala, "New Millennium"].

32. *Supra* note 1.

33. A search of the online version of the *Child, Family and Community Service Act* results in custody appearing 279 times in the Act (with 231 of these appearances coming in the substantive provisions of the Act and 48 in the Act's table of contents and headings) and access appearing 73 times (55 times in the substantive provisions; 18 times in the table of contents and headings).

Group	Provisions
	list of provisions: ss 6 (1); 7 (1); 16 (3) (a); 32 (3); 33 (1); 33.01 (1) (a); 33.01 (1) (b); 33.1 (4) (b); 34 (3) (c); 35 (2) (b); 35 (2) (c); 36 (2.1) (d); 38 (1) (d) (ii); 41 (1) (a); 41 (2) (b); 42.1 (3) (c); 42.1 (6) (b) (i); 42.2 (3) (a); 42.2 (4) (a) (i); 46 (1); 48 (1); 48 (1.1); 48 (1.1) (b); 49 (7) (a); 49 (8); 49 (10) (b); 55 (1); 55 (4); 55 (5); 59 (2) (b)
director's relationship to child	**examples:** "an interim order that the child be in the custody of the director"—s 35 (2) (a); "child remain or be placed in the custody of the director"—s 41 (1) (c); "director who has custody of a child"—s 47 (1)
	list of provisions: ss 35 (2) (a); 36 (3) (b) (ii); 41 (1) (c); 41 (1) (d); 41 (2); 42.1 (6); 42.2 (4) (b); 42.2 (4) (d); 42.2 (7) (c); 47 (1); 49 (10) (a); 50 (1); 50.01; 50.1 (1) (a); 52; 54.01 (9) (c); 54.1 (1); 61 (1), 61 (1) (a); 61 (2); 63 (1); 63 (1) (a); 63 (1) (b); 79 (h.2) (i); 92.1 (2) (a) (v)
other person's relationship to child	**examples:** "an interim order that the child be placed in the custody of a person other than a parent"—s 35 (2) (d); "child be placed in the custody of a person other than the parent or a director"—s 39 (3)
	list of provisions: ss 35 (2) (d); 39 (3); 42.2 (3) (a); 42.2 (4) (a) (i); 42.2 (4) (c); 42.2 (6); 44 (4); 44.1 (1) (a); 44.1 (2) (c); 46 (2) (c); 47 (2); 49 (2) (d.2); 49.2 (8); 54.01 (1); 54.01 (3) (a); 54.01 (5) (b); 54.01 (9) (a); 54.2 (1) (a); 54.01 (2.1) (a); 60 (1) (d); 63 (1); 63 (1) (a); 63 (1) (b); 68 (1); 97 (1) (b); 98 (1) (a) (ii); 98 (3) (b)
names of orders and hearings	**examples:** "continuing custody order," "temporary custody order," "subject of an order for custody under this Act"—s 12.3 (1) (b); "continuing custody hearing"—s 44 (1) (a)
	list of provisions: ss 1 (1) "continuing custody order"; 1 (1) "temporary custody order"; 12.3 (1) (b); 33.01 (3); 38 (1) (d.2); 39 (1) (e); 43; 44 (1) (a), 44 (1) (b), 44 (2) (d), 44 (3); 44.1 (1); 44.1 (1) (a); 44.1 (2) (c); 44.1 (3); 45 (1); 45 (2); 46 (1); 46 (2) (c); 46 (2) (d); 47 (1); 47 (2); 47 (3); 48 (4); 49 (1); 49 (7); 50 (4); 50.1 (2) (a); 50.1 (2) (b); 50.1 (2) (c); 53 (1); 53 (1) (d); 53 (2); 54 (1); 54 (2); 54 (2) (e); 54 (3); 54 (4); 54.01 (1) (b); 54.01 (5) (c); 54.01 (9); 54.01 (9) (b); 54.1 (1); 54 (1.1) (a); 54 (1.1) (b); 54 (1.1) (c); 54.2 (1); 54.2 (2); 54.2 (4) 55 (1); 55 (2); 56 (1); 56 (2) (c); 57 (1) (b); 57 (2) (c); 57 (2) (d) (iii); 58 (1); 58 (3); 58 (3) (a); 60 (1); 60 (7) (a); 60 (7) (b); 60 (7) (c); 93 (1) (g) (ii); 97 (1) (a); 97 (1) (b); 97 (2); 98 (1) (a) (ii); 98 (3) (b); 107 (6)
transfer, return, continue, resume	**examples:** "transfer custody of the child to the person other than the parent"—s 44 (1) (b); "the child be returned to the custody of the parent"—s 54.01 (9) (a)
	list of provisions: ss 44 (1) (b); 45 (1); 49 (3); 49 (4); 49 (4) (b); 49 (5); 49 (6); 49 (7) (b); 49 (7) (c); 49 (9); 53 (1) (e); 54.01 (1); 54.01 (3) (h); 54.01 (5); 54.01 (5) (b) (i); 54.01 (5) (b) (ii); 54.01 (6); 54.01 (7) (c); 54.01 (9) (a); 54.1 (1); 54.1 (2) (a); 54.1 (3); 54.1 (3) (a); 54.1 (4) (c); 54.2 (1); 54.2 (4); 57 (5); 57.01 (1); 57.02 (2) (c); 57.1 (1); 57.1 (2) (c); 60 (1); 60 (1.1); 60 (6); 60 (7); 61 (1); 62 (1); 62 (2)

Group	Provisions
agreements, authorizations, and other transactions already referring to guardianship	**example:** "with respect to the care, custody or guardianship of a child placed with the caregiver"—s 94
	list of provisions: ss 93 (2) (b); 94; 94.1; 95.1 (1) (a)
records and information	**example:** "with respect to a record, the director who has custody or control"—s 74 (2) (a)
	list of provisions: ss 65 (1) (b); 73; 74 (2) (a); 74 (2) (b); 96 (1) (a); 96 (2)
transitional provision	**example:** "custody of a child"—s 107 (2)
	list of provisions: s 107 (2)
miscellaneous	**example:** "a correctional centre, youth custody centre or other lawful place of confinement"—s 1 (1) "place of confinement"
	list of provisions: s 1 (1) "place of confinement"

Table 2: Use of "access" in Child, Family and Community Service Act

Group	Provisions
child-focused	**example:** "access to the child is necessary to determine if the child needs protection"—s 17 (1) (c)
	list of provisions: ss 17 (1) (c); 55 (4); 55 (5); 56 (3); 57.01 (1) (a); 57.01 (3) (a); 70 (2)
child-parent relationship	**example:** "parent who had custody when the child was removed may apply to the court for access to the child"—s 55 (1); 55 (4)
	list of provisions: ss 55 (1); 55 (4); 56 (1); 56 (3)
director's relationship to child	**example:** "give a director access to the child"—s 17 (1) (b) (i)
	list of provisions: ss 17 (1) (b) (i); 21 (2) (c)
other person's relationship to child	**example:** "a person denies the police officer access to the child or no one is available to provide access"—s 27 (2) (b)
	list of provisions: ss 27 (2) (b); 30 (2) (b); 50 (2); 54.01 (2); 54.1 (2) (g); 54.2 (2.1) (a); 55 (2); 55 (5); 56 (1); 56 (3)
names of orders	**examples:** "an order under section 57.01 permitting access to the child"—s 54.2 (2.1); "the court may attach to an access order under this section"—s 55 (6)
	list of provisions: ss 54.2 (2.1); 54.2 (2.1) (a); 54.2 (2.1) (b); 54.2 (3); 54.2 (3) (a); 54.2 (3) (b); 55 (6); 57 (1) (c); 57 (2) (d) (i); 57.01 (1) (b); 57.01 (2) (d); 57.01 (3) (b) (i); 57.01 (3) (b) (ii); 57.01 (3) (b) (iii); 57.01 (4); 57.1 (1); 57.1 (2); 57.1 (2) (d); 57.1 (3) (a); 57.1 (3) (b); 57.1 (3) (c); 57.1 (4); 57.1 (5); 102 (1) (b)
records and information	**example:** "to be given access to information about the child in a record"—s 76 (1) (a)
	list of provisions: ss 76 (1) (a); 76 (2) (a); 77 (1); 77 (2)
transitional pro-	**example:** "access to a child"—s 107 (2)

Group	Provisions
vision	**list of provisions:** s 107 (2)

Modernized terminology in the Family Law Act

Replacing custody and access in the Family Law Act

In 2010, British Columbia's government published a white paper[34] setting out the policy for new legislation to replace what was then the province's main family-law statute, the *Family Relations Act*.[35] One of the "key themes in the proposed new act" discussed in the *Family Law Act White Paper* was changing the drafting of the old *Family Relations Act* to incorporate more "non-adversarial language."[36]

Custody and access were singled out for criticism here, as the *Family Law Act White Paper* noted that "many find words like 'custody' and 'access' unhelpful and suggest the words characterize nonresidential parents as visitors and children as property."[37] Another concern was that "the terms promote a feeling of winning and losing and tend to divide separating parents rather than uniting their attention on their common responsibility for their children's upbringing."[38]

The *Family Law Act White Paper* proposed "eliminat[ing]" custody and access, replacing them with terms that were intended to "emphasize a relationship of responsibility towards a child": *guardianship*, *parenting time*, and *contact*.[39] As the white paper explained, *guardianship* "will describe responsibility for children."[40] A *guardian* "will have 'parental responsibilities' ": "[t]he time that a child spends with a guardian will be 'parenting time' and a child's time with a nonguardian will be 'contact.' "[41]

34. British Columbia, Ministry of Attorney General, Justice Services Branch, Civil Policy and Legislation Office, *White Paper on Family Relations Act Reform: Proposals for a new Family Law Act* (July 2010) [*Family Law Act White Paper*].

35. RSBC 1996, c 128 [repealed]. See also *supra* note 34 at 1 ("The British Columbia *Family Relations Act* is the statute that deals with matters arising out of separation and divorce, including the division of family property, guardianship, custody of and access to children, and support.").

36. *Family Law Act White Paper*, *supra* note 34 at 4–6.

37. *Ibid* at 6.

38. *Ibid*.

39. *Ibid* at 50.

40. *Ibid*.

41. *Ibid* at 51.

The *Family Law Act* has implemented the *Family Law Act White Paper*'s policies: in place of the words custody and access, the Act uses the terms guardian, parental responsibilities, parenting time, and contact. The definitions of guardian, parental responsibilities, and parenting time are rather complex, in that they point readers to substantive provisions in the *Family Law Act*.[42] In considering the issues for reform that follow, it is not necessary to grasp all the intricacies of these terms and the case law that has grown up around them, however it is important to bear in mind an outline of them because they represent the means by which the *Family Law Act* moved beyond terms like custody.

Guardians under the Family Law Act

Case law[43] and commentary[44] often refer to the *Family Law Act* as creating presumptions of guardianship, even though the relevant provision (section 39) never uses the word *presumption*. The section makes a series of declarations about who is considered to be a guardian in various situations:

- **prior to separation:** "[w]hile a child's parents are living together . . . each parent of the child is the child's guardian";[45]
- **after separation:** "after the child's parents separate, each parent of the child is the child's guardian,"[46] *subject to* "an agreement or order made after separation or when the parents are about to separate [which] may provide that a parent is not the child's guardian";[47]

42. See *supra* note 28, s 1 "guardian" ("means a guardian under section 39 *[parents are generally guardians]* and Division 3 *[Guardianship]* of Part 4" [bracketed text in original]), "parental responsibilities" ("means one or more of the parental responsibilities listed in section 41"), "parenting time" ("means parenting time as described in section 42").

43. See e.g. *Jafari v Moradi*, 2016 BCSC 1331 at para 113, Fitzpatrick J ("Section 39 of the *FLA* has a similar presumption that 'each parent of the child is the child's guardian.' " *T.C. v S.C.*, 2013 BCPC 217 at para 41, Dhillon Prov Ct J ("A plain reading of s. 39 indicates that a parent who resided with the child at the time of parental separation is a guardian under the Act by operation of law. Here, the father and mother lived together with the child at the time of their separation. Each is presumptively a guardian unless other provisions of the Act apply.")

44. See e.g. *Family Law Sourcebook*, *supra* note 16 at § 2.11 ("Section 39 of the *Family Law Act* sets out the presumptive guardianship provisions.").

45. *Supra* note 28, s 39 (1).

46. *Ibid*, s 39 (1).

47. *Ibid*, s 39 (2).

- **parent who has never resided with child:** in this case, "[a] parent who has never resided with his or her child is not the child's guardian,"[48] subject to any one of the following applying:
  - the parent is a parent under an arrangement involving assisted reproduction that isn't a surrogacy arrangement;[49]
  - "the parent and all of the child's guardians make an agreement providing that the parent is also a guardian";[50]
  - "the parent regularly cares for the child."[51]

Finally, marrying or entering into a marriage-like relationship with a child's guardian doesn't, in and of itself, convert a person who isn't a child's guardian into a child's guardian.[52]

The *Family Law Act* provides that "[o]nly a guardian may have parental responsibilities and parenting time with respect to a child."[53] Parental responsibilities and parenting time are defined by reference to substantive provisions of the Act.[54]

Parental responsibilities may be allocated differently before or after separation of guardian parents. Before separation, "each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances."[55] After separation, "[p]arental responsibilities may be allocated under an agreement or order such that they may be exercised by (a) one or more guardians only, or (b) each guardian acting separately or all guardians acting together."[56] As a

48. *Ibid*, s 39 (3).

49. See *ibid*, s 39 (3) (a) ("section 30 *[parentage if other arrangement]* applies and the person is a parent under that section" [bracketed text in original]).

50. *Ibid*, s 39 (3) (b).

51. *Ibid*, s 39 (3) (c).

52. See *ibid*, s 39 (4) ("If a child's guardian and a person who is not the child's guardian marry or enter into a marriage-like relationship, the person does not become a guardian of that child by reason only of the marriage or marriage-like relationship.").

53. *Ibid*, s 40 (1).

54. See *ibid*, ss 41 (parental responsibilities), 42 (parenting time).

55. *Ibid*, s 40 (2).

56. *Ibid*, s 40 (3). See also *Family Law Sourcebook*, *supra* note 16 at § 2.13 ("Agreements on parenting arrangements are effective only if the guardians have separated or are about to separate and the agreement is effective on separation. The court cannot make an order on parenting ar-

judge once put it, in these circumstances, "only a guardian may have parental responsibilities but not every guardian has all parental responsibilities."[57]

Parenting time "is the time that a child is with a guardian, as allocated under an agreement or order."[58] The Act describes the time that a non-guardian parent spends with a child not as access but rather as contact. The Act defines the expressions *contact with a child* and *contact with the child* to mean "contact between a child and a person, other than the child's guardian, the terms of which are set out in an agreement or order."[59]

Replacing custody and access in the Divorce Act

A similar process of eliminating the terms custody and access has unfolded for the *Divorce Act*, with amendments passed in 2019 and scheduled to come into force in March 2021.[60]

The reasons for making this change were similar to those discussed earlier in relation to the *Family Law Act*. Custody and access were seen to "fan conflict and undermine collaboration"[61] and, further, "they are widely considered to have negative connotations."[62] Among these negative connotations were the "clear proprietary and penal undertones" found in the word *custody*, the "limited role" implied by access, and the overall sense that "the words connote *winners* and *losers*, with the winner being awarded custody and the loser being awarded access."[63]

rangements if the guardians are the child's parents and they are living together." [citations omitted]).

57. *Re Director and L.*, 2014 BCPC 284 at para 8, Frame Prov Ct J.

58. *Family Law Act*, *supra* note 28, s 42 (1).

59. *Ibid*, s 1 "contact with a child" or "contact with the child."

60. See *supra* note 29.

61. Canada, Library of Parliament, *Legislative Summary for Bill C-78*, by Karine Azoulay, Alexandra Smith, & Nicole Sweeney, Publication No. 42-1-C78-E (Ottawa: Library of Parliament, 2019) at 6 [endnote omitted].

62. *Ibid*.

63. Bala, "New Millennium," *supra* note 31 at 454 ("The word *custody* has clear proprietary and penal undertones that might suggest that the child is confined to the care and control of one parent. *Access* suggests that a parent has a limited role and relationship with his or her child, again with proprietary implications. . . . For parents and children familiar with the terms, the words connote *winners* and *losers*, with the winner being awarded custody and the loser being awarded access." [emphasis in original]).

In place of custody and access,[64] the *Divorce Act* will use the following terms:

- decision-making responsibility;[65]
- parenting time;[66]
- parenting order;[67] and
- contact order.[68]

Should the Child, Family and Community Service Act be amended to eliminate the use of "custody"?

Brief description of the issue

Major family-law statutes such as the *Family Law Act* and the *Divorce Act* have recently been amended to eliminate the word *custody*, in view of concerns about the proprietary and adversarial implications of the term. Should the *Child, Family and Community Service Act* be amended to follow suit, or are their reasons specific to child protection law that justify the continued use of *custody* in the *Child, Family and Community Service Act*?

Discussion of options for reform

This issue raises two starkly opposed options: amending the Act to do away with the term custody versus retaining the status quo.

The reasons for eliminating the term custody from the *Child, Family and Community Service Act* are similar in many respects to those cited above in connection with doing away with that term in the *Family Law Act* and the *Divorce Act*. Custody has negative connotations when it is applied to children. It implies that children can be possessed in some way that is similar to the way a person possesses property. Such

64. See Bill-C-78, *supra* note 29, s 1 (1) ("The definitions *custody* and *custody order* in subsection 2(1) of the *Divorce Act* are repealed.").

65. See *ibid*, s 1 (7) ("decision-making responsibility means the responsibility for making significant decisions about a child's well-being, including in respect of (a) health; (b) education; (c) culture, language, religion and spirituality; and (d) significant extra-curricular activities").

66. See *ibid*, s 1 (7) ("parenting time means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time").

67. See *ibid*, s 1 (7) ("parenting order means an order made under subsection 16.1(1)").

68. See *ibid*, s 1 (7) ("contact order means an order made under subsection 16.5(1)").

connotations are inappropriate for an Act that is dedicated to protecting children and enhancing their wellbeing.

The mere fact that the *Family Law Act* and the *Divorce Act* have been amended provides another reason to rethink the use of custody in the *Child, Family and Community Service Act*. The term's use in family law arose to describe the relationship between children and their parents when those parents had separated or divorced. From there, it was taken up in other areas of the law involving children, such as child protection legislation. A change in the legislation that initially deployed this term creates a disjunction in family law. Since court proceedings involving children can raise both family-law and child protection issues, there is a distinct practical disadvantage to the legislation deploying different terms. Harmonizing the vocabulary of family-law statutes can be a way to forestall gaps and confusion in the application of legislative provisions.

On the other hand, it could be argued that there are significant differences between the *Family Law Act* and the *Divorce Act*, on one side, and the *Child, Family and Community Service Act*, on the other, that justify the use of different terminology. For instance, the *Child, Family and Community Service Act* needs to address a wider range of parent-child relationships. While the *Family Law Act* and the *Divorce Act* are concerned with defining the rights and responsibilities of separated and divorced spouses, the *Child, Family and Community Service Act*—in addressing the protection of all children—must address children whose parents have seen their spousal relationship break apart, children whose parents remain in a spousal relationship, and children of a parent who was never in a spousal relationship.

The committee's tentative recommendation for reform

In the committee's view, it is desirable to promote consistency between family-law and child protection legislation.

The committee tentatively recommends:

1. The Child, Family and Community Service Act should be amended by repealing the definition of "custody."

What term should be used in the Child, Family and Community Service Act to replace "custody"?

Brief description of the issue

This issue for reform is linked with the previous one. If the word custody is eliminated from the *Child, Family and Community Service Act*, then what word should replace it?

Discussion of options for reform

There are potentially many options that could be considered for this issue. The leading option is to use the word guardianship, which is the preferred term of the *Family Law Act*. Adopting this term for the *Child, Family and Community Service Act* would ensure a measure of consistency between two major British Columbia statutes dealing with children.

Other options would be other terms that describe the parent-child relationship. It may be possible to conceive of such a term that results in a better fit for the *Child, Family and Community Service Act*. But such a term would carry the disadvantage of doing less to promote consistency with the *Family Law Act*.

The committee's tentative recommendation for reform

The committee favoured promoting some consistency with the *Family Law Act* by using the term guardianship. The committee also noted that this tentative recommendation shouldn't be implemented by simply replacing custody with guardianship wherever it appears in the *Child, Family and Community Service Act*. Although this Act currently has a legislative definition of custody, it uses the term in a number of senses, some of which don't relate to children. For example, the Act contains six references to custody of a record.[69] These references shouldn't be changed. In other places, a provision in the Act uses the expression "custody or guardianship."[70] In these cases, the tentative recommendation is to remove the words *custody or*.

The committee tentatively recommends:

2. The Child, Family and Community Service Act should be amended to strike out "custody" and replace it with "guardianship," wherever "custody" is used in connection with

69. See *supra* note 1, ss 65 (1) (b), 73, 74 (2) (a), 74 (2) (b), 96 (1) (a), 96 (2).

70. See e.g. *ibid*, s 1 (1) "child in care" ("means a child who is in the custody, care or guardianship of a director or a director of adoption").

a child, that child's relationship to a parent, a director, or another person who may act as a guardian to the child, or the name of an order or proceeding under the Act.

Should the definition of "guardianship" in the Child, Family and Community Service Act be amended?

Brief description of the issue

The *Child, Family and Community Service Act* defines *guardianship* to "[include] all the rights, duties and responsibilities of a parent."[71] This definition differs in wording and approach from how the *Family Law Act* defines an equivalent term, *guardian*.[72] In light of the committee's earlier tentative recommendation to replace the bulk of the *Child, Family and Community Service Act*'s references to custody with references to guardianship, does this Act's definition of guardianship require amendment?

Discussion of options for reform

The options for this issue consist of retaining the current definition of guardianship found in the *Child, Family and Community Service Act* or amending that definition to harmonize it with what is found in the *Family Law Act*.

Bringing the *Child, Family and Community Service Act*'s definition of guardianship strictly into line with how a guardian is defined in the *Family Law Act* would have the benefit of promoting consistency between the two Acts. A major reason for modernizing the terminology of the *Child, Family and Community Service Act* is to promote this consistency. This goal would be undermined, to a degree, if the two Acts used the same words but defined them in somewhat different ways.

But there may be reasons to retain the *Child, Family and Community Service Act*'s definition of guardianship. The *Family Law Act*'s definition of the equivalent term guardian relies on a detailed set of substantive provisions in that Act. These substantive provisions are geared to one of the main purposes of that Act, which is defining the rights and responsibilities of separated parents. Simply incorporating these provisions by reference into the *Child, Family and Community Service Act* could create problems for an Act that is designed to meet a different set of objectives.

71. See *ibid*, s 1 (1) "guardianship."

72. See *supra* note 28, s 1 "guardian" ("means a guardian under section 39 *[parents are generally guardians]* and Division 3 *[Guardianship]* of Part 4" [bracketed text in original]). See also, above, at 16–18 (further discussion of the *Family Law Act*'s approach to guardianship).

The committee's tentative recommendation for reform

While the committee gave consideration to amending the definition of guardianship in the *Child, Family and Community Service Act*, in the end it decided to propose retaining the current definition. The committee was concerned about the practical effect of incorporating the *Family Law Act*'s provisions on guardianship into the child protection system. The committee noted that this system must address situations that aren't addressed within the *Family Law Act*. For example, there still are instances of a child being taken directly from the hospital shortly after birth into care. In these cases, the *Family Law Act*'s conception of a guardian could cast some doubt on whether the child's father is a guardian. These doubts could complicate any future plan to return the child to the father's care.

The committee also noted the broad scope of the *Child, Family and Community Service Act*'s definition of guardianship. Within this broad scope, it is hard to find any fundamental conflicts between the two definitions.

The committee tentatively recommends:

3. The Child, Family and Community Service Act should retain its current definition of "guardianship."

Should the Child, Family and Community Service Act be amended to eliminate the use of "access"?

Brief description of the issue

Major family-law statutes, such as the *Family Law Act* and the *Divorce Act*, have recently been amended to eliminate the word *access*. In its place, words such as *contact* and *parenting time* have been put into service. Should the *Child, Family and Community Service Act* be amended to adopt this terminology?

Discussion of options for reform

The advantages of amending the *Child, Family and Community Service Act* to eliminate the use of the word access are similar to those noted earlier in relation to eliminating the word custody. In brief, these are that the word access has come to be seen in a negative light in family law. As a result, major family-law statutes have been amended to eliminate the use of the word. Continuing to use the word in the *Child, Family and Community Service Act* opens the door to misunderstandings and confusion that could impair how the Act's provisions are administered in practice.

But there are reasons to consider retaining the word access in the *Child, Family and Community Service Act*. The proprietary overtones of the word custody are stronger than they are for the word access. This point suggests that access might not have as strong a negative quality as has attached to custody. Further, custody had a ready replacement (guardianship) that was already somewhat established within the *Child, Family and Community Service Act*. The replacement terms for access (contact and, to a certain degree, parenting time) are much less familiar within the child protection system.

The committee's tentative recommendation for reform

The committee wrestled with this issue, deciding to propose retaining the word access. This decision was driven, in part, over concerns about the limited reach of the likely replacement term for access, which is the word contact. The committee considered supplementing this term with the concept of parenting time from the *Family Law Act*. But it became apparent that a phrase like *contact or parenting time* would be difficult to deploy seamlessly within the *Child, Family and Community Service Act*. Its use could lead to disputes over whether contact or parenting time should prevail in a given case. Further, the committee believed that the word access loses a good deal of its sting when it isn't paired with custody, which has a clearer and more direct link to property. Over time, it's possible that access could come to be seen as a neutral term.

The committee tentatively recommends:

4. The Child, Family and Community Service Act should retain all its references to "access."

Issues for Reform—Parent and the Parent Apparently Entitled to Custody of the Child

How "parent" is defined in the Child, Family and Community Service Act

The *Child, Family and Community Service Act* uses an open-ended, inclusive definition of *parent*. In effect, this approach means that the Act's focus is less on defining the core meaning of the term and more on confirming that certain, specific cases are included within the meaning of the term.[73] These cases are the following:

73. As a result of this approach, any questions about the core meaning of parent for the Act would be resolved by reference to the ordinary meaning of the word and not by applying a specialized legal meaning included in the Act by its drafters.

(a) a person to whom guardianship or custody of a child has been granted by a court of competent jurisdiction or by an agreement, and

(b) a person with whom a child resides and who stands in place of the child's parent or guardian.[74]

The Act's legislative definition then goes on to exclude specific persons. In this case it confirms that a parent "does not include a caregiver, prospective adoptive parent or director."[75]

A search reveals that parent appears 117 times in the *Child, Family and Community Service Act*. The word is mentioned twice in the Act's table of contents and twice in headings, leaving 113 appearances in the substantive provisions of the Act.

Given the size of this number, it's no surprise that parent crops up in all sections of the Act. The word features prominently in connection with the following topics:

- agreements—sections 7 and 8;
- grounds for protection—section 13;
- family conferences and plans for care—sections 20 and 21;
- child in danger—sections 28 and 29;
- notice of removal of child—section 31;
- child protection hearings and orders—sections 33.1 to 48;
- continuing custody hearings and orders—section 49;
- permanent transfers of custody—sections 54.01 to 54.2;
- related orders—sections 55 to 60;
- agreements and orders for child support—section 97.

How the Family Law Act defines "parent"

The statute to look toward for a modernized definition of parent is the *Family Law Act*.[76]

74. *Supra* note 1, s 1 (1) "parent." See also *ibid*, s 1 (1) "custody" ("includes care and guardianship of a child"), "guardianship" ("includes all the rights, duties and responsibilities of a parent").

75. *Ibid*, s 1 (1) "parent."

76. See *supra* note 28. The *Divorce Act*, *supra* note 29, isn't relevant to discussions of the definition of

The *Family Law Act*'s definition of parent was intended to be a departure from how that word was defined in previous legislation.[77] Instead of a traditional legislative definition, the *Family Law Act*'s definition simply points readers to a group of substantive provisions later in the Act (part 3).[78]

Part 3 of the *Family Law Act* was designed to be "a comprehensive framework for determining who is a legal parent for all purposes of the law."[79] An "important law reform goal" of part 3 was "to modernize the law in light of changes in social values and medical technology."[80] In particular, the goal was to address "[a]dvances in reproductive technology," which were seen to "have overtaken the parentage provisions in the *Law and Equity Act* and the *Family Relations Act*."[81] The idea was to cre-

parent because, as a matter of constitutional law (see *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92 (13), reprinted in RSC 1985, Appendix II, No 5), "the primary responsibility for parental status rests with the provincial governments under the *Constitution Act, 1867*, s. 92 (13), 'property and civil rights' " (Berend Hovius, Mary-Jo Maur, & Nicholas Bala, *Family Law: Text, Cases, Materials & Notes*, 9th ed (Toronto: Thomson Reuters Canada, 2017) at 622). Any power for the federal parliament to enact legislation respecting parental status would derive from its "criminal law jurisdiction under s. 91 (27)" and would relate to incidental matters rather than the core definition of parental status (*ibid*; see also *Assisted Human Reproduction Act*, SC 2004, c 2; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61).

77. See *Family Relations Act*, *supra* note 35, s 1 (1) "parent" ("includes (a) a guardian or guardian of the person of a child, or (b) a stepparent of a child if (i) the stepparent contributed to the support and maintenance of the child for at least one year, and (ii) the proceeding under this Act by or against the stepparent is commenced within one year after the date the stepparent last contributed to the support and maintenance of the child") [repealed].

78. See *supra* note 28, s 1 "parent" ("means a parent under Part 3").

79. British Columbia, Ministry of Attorney General, "The Family Law Act Explained" (last visited 21 March 2019), online (pdf): Government of British Columbia <www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/fla/notes-binder.pdf> [perma.cc/86CD-RSWD] [*Family Law Act Transition Guide*] at s 1 "parent." In contrast, "[t]he definition in the Family Relations Act did not define who had legal parentage. Rather, the definition provided for an expanded meaning of parent for the purposes of that Act to include guardians of the person and stepparents. This expanded definition does not mean that these people become legal parents, but rather that under the Act they will be treated in the same way as a parent; wherever the Act talks about a 'parent' it also means a 'guardian' or a 'step-parent.' These expansions are carried forward in the Family Law Act, but are located in the relevant part of the Act: Part 7—Child and Spousal Support, section 146 *[Definitions]* and 147 *[Duty to provide support for child]*." [bracketed text in original] (*Ibid*.)

80. *Family Law Act White Paper*, *supra* note 34 at 31.

81. *Ibid*. The reference to the *Law and Equity Act* relates to a provision—in force at the time of publication of the *Family Law Act White Paper*, now overtaken by section 23 of the *Family Law Act*, *supra* note 28—which held that "subject to the *Adoption Act* and the *Family Relations Act* . . . a person is the child of his or her natural parents." See *Law and Equity Act*, RSBC 1996, c 253,

ate "a comprehensive scheme for determining who a child's legal parents are that takes into account the potential use of assisted conception."[82]

Part 3 is lengthy and complex, but at its core, it addresses parentage in three distinct situations:[83]

- parentage by means of unassisted reproduction (i.e., sexual intercourse)—in this case, "the child's parents are the birth mother and the child's biological father,"[84] with the legislation setting out presumptions of biological fatherhood;[85]
- parentage by means of assisted reproduction—in this case, "the child's birth mother is the child's parent,"[86] as is the birth mother's spouse at the time of conception, unless that spouse didn't consent or withdrew consent to be the child's parent;[87]

s 61 (1) (a) [repealed effective 18 March 2013].

82. *Family Law Act White Paper*, *supra* note 34 at 31.

83. See *Family Law Sourcebook*, *supra* note 16 at §§ 2.36–2.38.

84. *Family Law Act*, *supra* note 28, s 26 (1).

85. See *ibid*, s 26 ("(2) For the purposes of this section, a male person is presumed, unless the contrary is proved or subsection (3) applies, to be a child's biological father in any of the following circumstances: (a) he was married to the child's birth mother on the day of the child's birth; (b) he was married to the child's birth mother and, within 300 days before the child's birth, the marriage was ended (i) by his death, (ii) by a judgment of divorce, or (iii) as referred to in section 21 *[void and voidable marriages]*; (c) he married the child's birth mother after the child's birth and acknowledges that he is the father; (d) he was living with the child's birth mother in a marriage-like relationship within 300 days before, or on the day of, the child's birth; (e) he, along with the child's birth mother, has acknowledged that he is the child's father by having signed a statement under section 3 of the *Vital Statistics Act*; (f) he has acknowledged that he is the child's father by having signed an agreement under section 20 of the *Child Paternity and Support Act*, R.S.B.C. 1979, c. 49. (3) If more than one person may be presumed to be a child's biological father, no presumption of paternity may be made." [bracketed text in original]).

86. *Supra* note 28, s 27 (2).

87. *Ibid*, s 27 (3) ("a person who was married to, or in a marriage-like relationship with, the child's birth mother when the child was conceived is also the child's parent unless there is proof that, before the child was conceived, the person (a) did not consent to be the child's parent, or (b) withdrew the consent to be the child's parent"). See also *ibid*, ss 24 (1) ("If a child is born as a result of assisted reproduction, a donor who provided human reproductive material or an embryo for the assisted reproduction of the child (a) is not, by reason only of the donation, the child's parent, (b) may not be declared by a court, by reason only of the donation, to be the child's parent, and (c) is the child's parent only if determined, under this Part, to be the child's parent."), 28 ("(1) This section applies if (a) a child is conceived through assisted reproduction, (b) the person who provided the human reproductive material or embryo used in the child's

- parentage by means of surrogacy—in this case a *surrogate* "means a birth mother who is a party to an agreement,"[88] which is spelled out in the legislation.[89] The "intended parent"[90] under the agreement is the child's parent, if (a) before conception, no party withdraws from the agreement and (b) after the child's birth, the surrogate "gives written consent to surrender the child to an intended parent" and the intended parent takes the child into his or her care.[91]

Part 3 also provides "if there is a dispute or any uncertainty as to whether a person is or is not a parent," then the court "may make an order declaring whether a person is a child's parent."[92]

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conception (i) did so for that person's own reproductive use, and (ii) died before the child's conception, and (c) there is proof that the person (i) gave written consent to the use of the human reproductive material or embryo, after that person's death, by a person who was married to, or in a marriage-like relationship with, the deceased person when that person died, (ii) gave written consent to be the parent of a child conceived after the person's death, and (iii) did not withdraw the consent referred to in subparagraph (i) or (ii) before the person's death. (2) On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (1), the child's parents are (a) the deceased person, and (b) regardless of whether he or she also provided human reproductive material or the embryo used for the assisted reproduction, the person who was married to, or in a marriage-like relationship with, the deceased person when that person died.").

88. See *ibid*, s 29 (1).

89. See *ibid*, s 29 (2) ("This section applies if, (a) before a child is conceived through assisted reproduction, a written agreement is made between a potential surrogate and an intended parent or the intended parents, and (b) the agreement provides that the potential surrogate will be the birth mother of a child conceived through assisted reproduction and that, on the child's birth, (i) the surrogate will not be a parent of the child, (ii) the surrogate will surrender the child to the intended parent or intended parents, and (iii) the intended parent or intended parents will be the child's parent or parents.").

90. See *ibid*, s 20 (1) "intended parent" or "intended parents" ("means a person who intends, or 2 persons who are married or in a marriage-like relationship who intend, to be a parent of a child and, for that purpose, the person makes or the 2 persons make an agreement with another person before the child is conceived that (a) the other person will be the birth mother of a child conceived through assisted reproduction, and (b) the person, or the 2 persons, will be the child's parent or parents on the child's birth, regardless of whether that person's or those persons' human reproductive material was used in the child's conception.").

91. See *ibid*, s 29 (3) ("On the birth of a child born as a result of assisted reproduction in the circumstances described in subsection (2), a person who is an intended parent under the agreement is the child's parent if all of the following conditions are met: (a) before the child is conceived, no party to the agreement withdraws from the agreement; (b) after the child's birth, (i) the surrogate gives written consent to surrender the child to an intended parent or the intended parents, and (ii) an intended parent or the intended parents take the child into his or her, or their, care.").

92. *Ibid*, s 29 (1) ("if there is a dispute or any uncertainty as to whether a person is or is not a parent

Finally, "[i]t is important not to confuse parental status and parenting roles and responsibilities."[93] Part 3 only deals with parental status. Other provisions in the *Family Law Act*—as well as provisions in other statutes—address parenting roles and responsibilities. For these provisions, it's often necessary to supplement the *Family Law Act*'s definition of parent.[94]

How other British Columbia statutes define "parent"

Acts that incorporate the Family Law Act's definition of "parent"

Even though part 3 expressly provides that parentage is to be determined under that part "[f]or all purposes of the law of British Columbia,"[95] there are some British Columbia statutes that incorporate the *Family Law Act*'s definition of parent within their provisions. For example, the definitions section for the *Vital Statistics Act* contains a definition of parent that is essentially identical to the *Family Law Act*'s definition.[96] Another example is found in the *Wills, Estates and Succession Act*, which repeats the *Family Law Act*'s definition of parent within one of its substantive provisions.[97]

Acts that don't incorporate the Family Law Act definition of "parent"

There are Acts that don't incorporate the *Family Law Act*'s definition of parent. These other Acts tend to address subjects that require a definition of parent that isn't strictly tied to the status of legal parentage. The major example of such an Act is

under this Part, either of the following, on application, may make an order declaring whether a person is a child's parent: (a) the Supreme Court; (b) if such an order is necessary to determine another family law dispute over which the Provincial Court has jurisdiction, the Provincial Court.).

93. *Family Law Act Transition Guide*, *supra* note 79 at part 3.

94. See *ibid* ("Other British Columbia acts and other Parts of the Family Law Act, for example, Part 4—Care of and Time with Children and Part 7—Child and Spousal Support, recognize that people who are not parents may take on a parenting role and responsibilities in relation to a child, despite not being legal parents. Defining, other non-parents as 'parents' for a particular purpose under a law does not grant legal parentage. It simply means that they will be treated in a similar way as a parent for a particular purpose.").

95. *Supra* note 28, s 23 (1).

96. See RSBC 1996, c 479, s 1 "parent" ("means a parent under Part 3 of the *Family Law Act*"). See also *Name Act*, RSBC 1996, c 328, s 1 "parent" ("means a parent under Part 3 of the *Family Law Act*").

97. See SBC 2009, c 13, s 8.1 (c) ("the deceased person is the descendant's parent under Part 3 of the *Family Law Act*").

the *Adoption Act*.[98] While the *Adoption Act* doesn't contain a definition of parent, part 3 of the *Family Law Act* has carve outs for that Act and for adoption generally.[99] Another example is the *School Act*, which defines parent to mean, "in respect of a student or of a child registered under section 13, (a) a parent or other person who has guardianship or custody of the student or child, other than a parent or person who, under an agreement or order made under the *Family Law Act* that allocates parental responsibilities, does not have parental responsibilities in relation to the student's or child's education, or (b) a person who usually has the care and control of the student or child."[100]

One Act that takes a hybrid approach to defining "parent"

Finally, there one Act that uses a hybrid of these two approaches.

The definition of parent in the *Parental Liability Act* begins by incorporating the definition found in the *Family Law Act* ("an individual who is a parent of the child under Part 3 of the *Family Law Act*") and then goes on to supplement that definition with a long list of additions and carve outs.[101] The result is a lengthy, complex definition,

98. RSBC 1996, c 5.

99. See *supra* note 28, ss 25 ("If a child is adopted, sections 26 to 30 of this Act do not apply and the child's parents are as set out in the *Adoption Act*."), 31 (5) ("An application [for an order declaring parentage] may not be made respecting a child who has been adopted.").

100. RSBC 1996, c 412, s 1 (1) "parent." See also *Child Care BC Act*, SBC 2001, c 4, s 1 "parent" ("includes a person with whom a child resides and who stands in place of a parent of the child"); *Mental Health Act*, RSBC 1996, c 288, s 1 "parent" ("includes the spouse of a parent of a person with a mental disorder") *Victims of Crime Act*, RSBC 1996, c 478, s 1 "parent" ("includes (a) a stepparent of the victim, (b) a person who has, in law or in fact, the guardianship or custody of the victim or who is responsible for the care or financial support of the victim, and (c) a person who, although not a parent of the victim, is like a parent to the victim").

101. See SBC 2001, c 45, s 1 "parent" ("means, with respect to a child, (a) an individual who is a parent of the child under Part 3 of the *Family Law Act*, (b) an individual who (i) is married to, or lives in a marriage-like relationship with, a parent referred to in paragraph (a), and (ii) contributes to the support, maintenance and care of the child, (c) an individual who has guardianship or custody of the child, and (d) an individual who has contact with the child, but does not include (e) a director, (f) subject to the regulations, an individual who is included in paragraph (c) or (d) solely because he or she is responsible for the care, treatment, custody or supervision of the child under an arrangement with the government of British Columbia, the government of Canada or any other government, or under any of the following: (i) the *Adoption Act*; (ii) the *Child, Family and Community Service Act*; (iii) the *Correction Act*; (iv) the *Criminal Code*; (v) the *Mental Health Act*; (vi) the *Secure Care Act*; (vii) the federal youth legislation; (viii) the provincial youth legislation; (ix) an enactment of British Columbia or of Canada that is prescribed by the Lieutenant Governor in Council, or (g) an individual described in paragraph (a) who does not have guardianship or custody of, or contact with, the child"). NB No regulations have been adopted under this Act.

which was probably needed to meet the special purposes of the *Parental Liability Act*.[102]

Should the definition of "parent" in the Child, Family and Community Service Act be amended to incorporate the definition of "parent" found in the Family Law Act?

Brief description of the issue

The definition of parent in the *Child, Family and Community Service Act* doesn't contain a reference to the definition of the definition of the same term in the *Family Law Act*. The *Family Law Act*'s definition incorporates a sophisticated set of provisions that address important legal issues for parental status. Should the *Child, Family and Community Service Act* be amended to provide a reference to this definition of parent in the *Family Law Act*?

Discussion of options for reform

The three approaches to defining parent in British Columbia statutes provide three options that can be used as a starting point for discussing this issue.

The first option would be to simply incorporate the *Family Law Act*'s definition of parent into the *Child, Family and Community Service Act*. The legislative definition could follow the language used in the *Vital Statistics Act* (" 'parent' means a parent under Part 3 of the *Family Law Act*"). The advantages of this approach are (1) it's clearer than the definition currently found in the *Child, Family and Community Service Act* (which doesn't really define parent so much as make the point that certain people are considered parents for its purposes) and (2) it would give the *Child, Family and Community Service Act* access to the sophisticated framework for determining parentage found in part 3 of the *Family Law Act*. The disadvantages are (1) the strict focus on parental status might not be appropriate for the purposes of the *Child, Family and Community Service Act* and (2) this approach appears to narrow the definition of parent, removing the two classes of people added by para-

102. The purpose of the Act is to amend the law of torts to transfer liability for certain intentional torts from a child to a parent. See *ibid*, s 3 ("Subject to section 6 [limiting the maximum award under the Act to $10 000] and Part 3 [setting out defences available to a parent], if a child intentionally takes, damages or destroys property of another person, a parent of the child is liable for the loss of or damage to the property experienced as a result by an owner and by a person legally entitled to possession of the property.").

graphs (a) and (b) of the current definition,[103] which could cause problems in practice.

The second option would be to avoid incorporating the *Family Law Act*'s definition of parent, and instead have the legislative definition focus on classes of people who are included within the definition. This appears to the be the approach currently taken in the *Child, Family and Community Service Act* and in a handful of other Acts, such as the *School Act*. This option could embrace either the status quo or some modification of the status quo that is consistent with its overall approach. The advantage of this option is its familiarity, but the downside is that it fails to integrate the *Child, Family and Community Service Act* with the advances found in the *Family Law Act*.

The third option would be a hybrid of the first two. This would yield a definition similar in broad outlines to the one found in the *Parental Liability Act*, which both incorporates the *Family Law Act* definition and supplements it to better meet the *Parental Liability Act*'s purposes. The advantage of this option is that it presents a way to incorporate certainty and sophistication of the *Family Law Act*'s definition while preserving some add-ons that may be necessary for the *Child, Family and Community Service Act*'s special purposes. The downside is that it could result in a lengthy, complex legislative definition.

The committee's tentative recommendation for reform

The committee favoured a hybrid approach, based on the third option. It proposes retaining the current, inclusive definition of parent found in the *Child, Family and Community Service Act*, so long as that definition is supplemented by a new paragraph, which would incorporate a reference to the modern definition of parent found in the *Family Law Act*. In the committee's view, the open-ended nature of the current definition was desirable. It allows, potentially, for the application of the definition in the face of new developments. It also provides a useful platform for integrating into the Act the modern developments with respect to parental status that are addressed in the *Family Law Act*.

The committee was concerned that the use of the word *and* to separate paragraphs (a) and (b) of the current definition implied that the items in the definition weren't independent criteria. (The traditional way in legal writing to emphasize that

103. See *Child, Family and Community Service Act*, *supra* note 1, s 1 (1) "parent" ("includes (a) a person to whom guardianship or custody of a child has been granted by a court of competent jurisdiction or by an agreement, and (b) a person with whom a child resides and who stands in place of the child's parent or guardian").

items in a list operate independently of one another is to use the word *or*.) In the committee's view, a person shouldn't have to meet all (of what it proposes to be) three criteria in the definition of parent to be considered a parent under the Act. It should be sufficient for a person to meet only one criterion.

The committee tentatively recommends:

5. The definition of "parent" in the Child, Family and Community Service Act should be amended by adding the following as a new paragraph (c): "a parent as defined in the Family Law Act."

Background information on "the parent apparently entitled to custody of the child"

Use of the expression in the Child, Family and Community Service Act

The *Child, Family and Community Service Act* doesn't contain a legislative definition of the phrase *the parent apparently entitled to custody of the child*. But the expression does crop up repeatedly in the Act.

A search reveals that the expression appears 18 times in the *Child, Family and Community Service Act*.[104] These 18 appearances are spread across the following topics:

- finding out if a child needs protection—section 16;
- returning the child before an order is made at the presentation hearing—section 33;
- withdrawing before an order is made at the presentation hearing if agreement protects—section 33.01;
- duty to attend and inform others of presentation hearing—section 34;
- presentation hearing and orders—section 35;
- if an interim supervision order no longer protects the child—section 36;
- protection hearing—section 40;
- orders made at protection hearing—section 41;
- withdrawing from a proceeding after the presentation hearing—section 48;
- continuing custody hearing and orders—section 49;

104. This count includes both the full expression and a shorter form that is frequently used in place of the full expression (*the parent apparently entitled to custody*).

- permanent transfer of custody before continuing custody order—section 54.01.

The expression is used in connection with reporting requirements,[105] returning a child,[106] and agreements.[107] In each of these cases, it's a director who is doing the reporting or returning, or is entering into the agreement.

Case law has said that the purpose of the expression was to avoid the need to determine complex issues around parental responsibility within the child protection system, since it is more appropriate for those issues to be dealt with under family-law legislation.[108]

105. See e.g. *Child, Family and Community Service Act*, *supra* note 1, s 16 (3) (a) ("[t]he director must make all reasonable efforts to report the result of the assessment under subsection (2) (b.1) or investigation under subsection (2) (c) to (a) the parent apparently entitled to custody of the child"). See also *ibid*, ss 33 (3) (c), 36 (2.1) (d)

106. See e.g. *ibid*, s 33 (1) ("[b]efore a presentation hearing, or before the conclusion of a presentation hearing, relating to the removal of a child under section 30, the director may return the child to the parent apparently entitled to custody"). See also *ibid*, ss 35 (2) (b) and (c), 40 (2) (a), 41 (1) (a), 48 (1), 49 (7) and (10), 54.01 (9).

107. See *ibid*, s 33.01 (1) (b) ("[b]efore a presentation hearing, or before the conclusion of a presentation hearing, relating to the removal of a child under section 30, 36 or 42, the director may withdraw from the hearing if . . . the parent apparently entitled to custody is not a resident of British Columbia and the director makes an agreement, that the director considers adequate to protect the child, with the government or child welfare agency of the jurisdiction where the parent apparently entitled to custody resides"). See also *ibid*, ss 33.01 (1) (a), 48 (1.1) (a) and (b).

108. See *W.N. v C.G.*, 2012 BCCA 149 at para 77 [*W.N.*], Garson JA ("The language of s. 41(1)(a) of the *CFCSA* supports the contention that the schemes can sometimes operate concurrently and without conflict. Section 41(1)(a) contemplates the return of a child to the person 'apparently' entitled to custody. I view this language as a statement that a supervision order is not intended to determine permanent custody rights and that such matters, when necessary, are to be determined through different mechanisms."); *W.I. v L.M.R.*, 2014 BCPC 164 at paras 31–32 [*W.I.*], Smith Prov Ct J ("The child protection legislation allows in the interim a return to the parent apparently entitled to custody or to some other third party, but the child protection legislation does not allow a return to a parent who is not apparently entitled to custody. That is by design. I have researched that extensively in the past. It was intended to be so. The plan was that parents would resolve these issues through the then *Family Relations Act*, now *Family Law Act*, and they did not want, through the child protection legislation, addressing those fundamental *Family Law Act* parent-apparently-entitled-to-custody issues."); *Director v S.*, 2012 BCPC 168 at para 22, Harrison Prov Ct J (" 'Apparently,' as it appears in the phrase 'apparently entitled to custody,' is a common English word. In this context I take it to mean seemingly real or true, *prima facie*, or to be so at first sight. . . . It is important to point out that the return of a child to the person apparently entitled to custody, should that happen, is not intended to be a permanent determination of custody rights. Those rights will, if necessary, be determined by other means, in this case the *Family Relations Act*.").

Concerns about the expression

There are concerns that this expression has caused some confusion in practice. This concern appears in some court cases that have featured extended consideration of the phrase in disputes over returning a child in care to a parent,[109] a foster parent,[110] or a grandparent.[111] A couple of these cases have remarked that the expression isn't defined in the *Child, Family and Community Service Act*,[112] but neither case went so far as to call this lack of a definition a source of confusion in its own right.

Another concern about the parent apparently entitled to custody of the child is that it incorporates the word custody, which is seen as having negative connotations. The use of that word—which is no longer found in family-law legislation—might also be complicating the expression's purpose, which is to provide a way to navigate issues concerning children without having to invoke a decision-making process that is best left to family-law legislation. As one judge put it, "with the new legislation, the word 'custody' never even raises its head anymore. So who is the parent apparently entitled to custody when there is no *FLA* order in that regard?"[113]

Courts have wrestled with translating the language of the parent apparently entitled to custody of the child into the language used by the *Family Law Act*: guardianship, parental responsibilities, parenting time.[114]

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109. See *W.I.*, *supra* note 108 at paras 31–41; *Director v S.*, *supra* note 108 at paras 9–25.

110. See *W.N.*, *supra* note 108.

111. See *Director v L.W.C.*, 2016 BCPC 311 [*L.W.C.*]; *Director v V.D.*, 2012 BCPC 153.

112. See *L.W.C.*, *supra* note 111 at para 30; *Director v S.*, *supra* note 108 at para 9.

113. *W.I.*, *supra* note 108 at para 32.

114. See *Re Director and L.*, *supra* note 57 at paras 7–8 ("Custody is a term that is no longer recognized under the *Family Law Act*. Instead, parents are guardians. A parent who had access but not custody under the *Family Relations Act* is deemed a guardian under the new legislation. Consequently, even if G.M.L. did not have custody of his children under the *Family Relations Act*, he is a deemed guardian now. Under s. 40 of the *Family Law Act*, only a guardian may have parental responsibilities but not every guardian has all parental responsibilities."), 21–22 ("It is difficult to reconcile the rationale behind the distinctions in s. 35 [of the *Child, Family and Community Service Act*]. It makes no sense to interpret this section to exclude a parent who does not have the primary residence of the children, but otherwise has guardianship and all other parenting responsibilities. . . . This is non-sensical, unstable for the child, and traumatizing for all concerned. In my view, it is not enough to say that if it is so clear at the outset the other parent is an appropriate placement, then the Director should place the child with the parent in a restrictive foster placement. This may be an appropriate course where the other parent is not a guardian or where the other parent has no or very limited parental responsibilities. It is not appropriate in a case such as this where a guardian has all the parental responsibilities, even if he does not have primary residence and day-to-day care."). See also, above, at 21 (tentative recommendation to

Should the Child, Family and Community Service Act be amended to replace references to "the parent apparently entitled to custody" with "a parent or guardian"?

Brief description of the issue

The phrase the parent apparently entitled to custody of the child has caused some confusion in practice. And, even when it is applied without confusion, it has the effect of limiting the options available when a child is in care. Should the phrase be replaced with language that permits a child to be returned from care to a parent or guardian?

Discussion of options for reform

The options considered for this issue were to replace the expression with new language that is clearer and broader in scope or to retain the status quo.

The expression the parent apparently entitled to custody of the child was intended as a vehicle to navigate some difficult terrain, where child protection and family-law issues intersect. It could be argued that the phrase has largely accomplished its goal of ensuring that the return of a child in care isn't hampered by the need to engage in a full-scale legal analysis of issues that are better resolved under the *Family Law Act*. The phrase does contain the problematic word custody, but this could be addressed by simply replacing it with guardianship.

But it could be argued that the phrase hasn't achieved its goals. There are remarks in court cases that show it is perceived as being vague. This vagueness may have inhibited the courts in some cases from returning a child to a parent. As well, even in cases in which there is no struggle with the language of the phrase, it does have a limiting effect on the options for a child in care. It places a barrier in the face of returning a child to a parent who may not be apparently entitled to custody. The result would then be a longer period in care for that child.

The committee's tentative recommendation for reform

The committee was concerned about the vagueness of this expression. It was also concerned that the expression the parent apparently entitled to custody places a limitation on children being returned to their family's care from the director's care. Such a limitation is inconsistent with the guiding principles in section 2 of the Act,

replace custody with guardianship).

which place considerable emphasis on children being cared for in their family wherever this is possible.[115] The legislation should encourage children being in the care of their families and shouldn't limit the choices available to the director in returning a child to the family's care. In the committee's view, so long as a parent meets the definition of a guardian and has some parental responsibilities, then it should be possible to return the child to that parent, without the need of a court order under the *Family Law Act*.

The committee tentatively recommends:

6. The Child, Family and Community Service Act should be amended to strike out "the parent apparently entitled to custody" wherever it appears and replace it with "a parent or guardian."

Should section 55 (4) and (5) of the Child, Family and Community Service Act be amended to replace references to "the parent who had custody when the child was removed" with references to "a parent or guardian"?

Brief description of the issue

This issue is linked to the previous one. Section 55 of the Act relates to court orders regarding "access to [a] child in interim or temporary custody of director or other person."[116] In subsections (4) and (5) there are references to "the parent who had custody."[117] This phrase is distinct from the phrase discussed in the previous issue for reform, so it wouldn't be caught by the tentative recommendation made to address that issue. But is similar in nature to the phrase discussed in the previous issue. Should it also be replaced with a reference to a parent or guardian?

115. See especially *supra* note 1, s 2 (b) ("a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents").

116. *Ibid*, s 55 (heading).

117. *Ibid*, s 55 ("(4) If the parent who had custody when the child was removed applies under subsection (1) or (2), the court must order that the parent be given access to the child unless the court is satisfied access is not in the child's best interests. (5) If a person, other than the parent who had custody when the child was removed, applies under subsection (2), the court may order that the person be given access to the child unless the court is satisfied access is not in the child's best interests.").

Discussion of options for reform

The options for this issue are similar to those discussed for the previous issue. The existing phrase contains the word custody, but this word could be replaced with guardianship. Even after that replacement, the expression would still have a narrower range than what was contemplated in the previous issue. This narrower range might be appropriate for the distinct purposes of section 55. But it would be out of step with what the committee tentatively recommended for the previous issue. And it is open to question why the section's provisions regarding applications to the court for access should be made to turn on whether a parent "had custody."

The committee's tentative recommendation for reform

The committee favoured amending section 55, to make its language consistent with its proposal regarding the phrase the parent who apparently had custody of the child.

The committee tentatively recommends:

7. Section 55 of the Child, Family and Community Service Act should be amended

(a) in subsection (4) by striking out "the parent who had custody when the child was removed" and substituting "a parent or guardian" and

(b) in subsection (5) by striking out "the parent who had custody when the child was removed" and substituting "a parent or guardian."

In relation to access, should a reference be added to how existing orders in relation to parenting time, contact, or access are affected by the removal of a child?

Brief description of the issue

This issue grew out of the committee's consideration of the previous issue for reform. It was noted that orders under section 55 of the *Child, Family and Community Service Act* could have the appearance of not being aligned with existing orders regarding parenting time or contact with a child under family-law legislation, such as the *Family Law Act*[118] or the *Divorce Act*.[119] For example, a couple might have existing orders under the *Family Law Act* or the *Divorce Act*. Then the court makes an order under the *Child, Family and Community Service Act* granting both parents access

118. *Supra* note 28.

119. *Supra* note 29.

to the child, under the director's supervision. One of the parents might wonder how the court could do this, when it appears to conflict with the access arrangements worked out in the *Family Law Act* or *Divorce Act* orders. Should the *Child, Family and Community Service Act* be amended to address this situation?

Discussion of options for reform

This issue essentially poses a yes-or-no question on amending the Act.

The advantage of an amendment would be that it clarifies the relationship between orders under section 55 of the Act and existing orders that address similar subject-matter under family-law legislation. It's not uncommon for a family to face both child protection and family-law issues, so ensuring that the two systems of law avoid conflicts is important. Amending the *Child, Family and Community Service Act* to address this issue would help to further that goal.

The committee's tentative recommendation for reform

The committee was in favour of amending the Act, to clarify the law on this point.

The committee tentatively recommends:

8. A new section 55.1 should be added to the Child, Family and Community Service Act, which should provide that, upon the making of an order pursuant to section 55 (4) or (5), any existing orders made pursuant to family-law legislation in relation to parenting time, contact, or access are suspended during the period a child remains in the guardianship of the director, subject only to other orders subsequently made under section 55.

Issue for Reform—Domestic Violence

Use of the expression "domestic violence" in the Child, Family and Community Service Act

The words *domestic violence* appear in three provisions of the *Child, Family and Community Service Act*, which address the following subjects:

- "services to support children who witness domestic violence";[120]

120. *Supra* note 1, s 5 (2) (f).

- "if the child is emotionally harmed by . . . living in a situation where there is domestic violence by or towards a person with whom the child resides";[121]
- "without limiting the circumstances that may increase the likelihood of physical harm to a child, the likelihood of physical harm to a child increases when the child is living in a situation where there is domestic violence by or towards a person with whom the child resides."[122]

There is no definition of domestic violence in the *Child, Family and Community Service Act*. So, in interpreting the expression, the words would be given their ordinary meaning.[123]

Use of the expression "family violence" in the Family Law Act

Development of expression "family violence"

As this chapter has noted earlier, one of the goals of the *Family Law Act* was to modernize the language used in family law. In part, this goal was achieved by moving away from older terms, such as custody, which had developed negative connotations. It was also achieved by the development of some new terminology. The expression *family violence* was developed for this purpose.

Family violence, as it is set out in the *Family Law Act*, is a term with a legislative definition. The purpose of the definition is "to give all family justice participants a clear and common understanding of what family violence is for the purposes of the Family Law Act."[124] This "clear and common understanding" fostered by the definition of family violence is also intended to ensure that the term is given a broad meaning: "[t]he specific inclusion of elements such as psychological abuse is meant to clarify that violence is more than physical blows."[125] As one judge put it, after remarking

121. *Ibid*, s 13 (1) (e) (ii).

122. *Ibid*, s 13 (1.2).

123. But an argument could be made that the *Freedom of Information and Protection of Privacy Act*, *supra* note 15, should apply here, since that Act contains both a definition of domestic violence ("means physical or sexual abuse of (a) an individual, (b) a parent or child of the individual referred to in paragraph (a), or (c) any other individual who is in a prescribed relationship with the individual referred to in paragraph (a) by an intimate partner of the individual referred to in paragraph (a)"—*ibid*, Schedule 1 "domestic violence") and a paramountcy provision ("[i]f a provision of this Act is inconsistent or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, applies despite this Act"—*ibid*, s 79).

124. *Family Law Act Transition Guide*, *supra* note 79 at s 1 "family violence."

125. *Family Law White Paper*, *supra* note 34 at 45.

that "terms 'physical,' 'psychological' and 'emotional' abuse are given broad meaning within the definition of 'family violence,' " "[c]learly, the *FLA* is intended to provide protection to a very broad range of vulnerable people."[126]

Definition of "family violence" in the Family Law Act

The centrepiece of this legislative definition of family violence is a long list of specific items that amount to family violence. To give a sense of the breadth of the *Family Law Act*'s conception of family violence, it's worth quoting this list in full:

> (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
>
> (b) sexual abuse of a family member,
>
> (c) attempts to physically or sexually abuse a family member,
>
> (d) psychological or emotional abuse of a family member, including
>
> (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
>
> (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
>
> (iii) stalking or following of the family member, and
>
> (iv) intentional damage to property, and
>
> (e) in the case of a child, direct or indirect exposure to family violence.[127]

This list is introduced by the word *includes* (i.e., "family violence includes . . ."). In legislation, lists that are introduced by includes are commonly understood to be open-ended. This means that the items on the list aren't an exhaustive recital of all the elements of the defined term. It's open to a court interpreting such a list to determine that other items, similar in nature to those on the list but not expressly spelled out in the list, are embraced within the definition.

There is case law[128] and commentary[129] that catalogues examples illustrating how broad the definition of family violence can be when it is applied in family-law litiga-

126. *C.A.B. v M.S.B.*, 2015 BCPC 12 at para 17 [*C.A.B.*], Marchand Prov Ct J.

127. *Supra* note 28, s 1 "family violence."

128. See *A.G.M. v R.S.M.*, 2018 BCSC 1670 [*A.G.M.*] at paras 46–51, Donegan J (discussing "principles and factors" gleaned from earlier cases); *R.W. v P.C.*, 2017 BCSC 998 at paras 35–41, Gropper J.

129. *Family Law Sourcebook*, *supra* note 16 at § 2.29.

tion. Judges have emphasized that cases are "factually unique"[130] and the "definition is inclusive and not exclusive,"[131] which can make it difficult to narrow the definition down. That said, "[t]he court must distinguish between mere unpleasantness and conduct that amounts to family violence."[132]

Provisions in the Family Law Act in which "family violence" is used

While the expression family violence crops up throughout the *Family Law Act*,[133] it is a particularly important concept for two areas of the Act.

The first area involves determination of a child's best interests when separating spouses make an agreement or when a court makes an order under part 4 of the Act "respecting guardianship, parenting arrangements or contact with a child."[134] While "all of the child's needs and circumstances must be considered," in determining a child's best interests,[135] the Act sets out an inclusive list of factors to consider.[136] Two of these factors refer to family violence.[137] The Act sets out further guidance that "a court must consider" in assessing family violence under this part of the Act.[138]

130. *A.G.M.*, *supra* note 128 at para 47.

131. *A.B. v C.D.*, 2019 BCSC 604 at para 20 [*A.B.* SC], Marzari J, rev'd 2020 BCCA 11 [*A.B.* CA].

132. *A.B.* SC, *supra* note 131 at para 17. See also *A.B.* CA, *supra* note 131 at para 175, Bauman CJ & Fisher JA ("In circumstances that do not fit squarely within the more obvious parameters of the family violence provisions in the *FLA*, it is our view that some caution should be exercised in identifying 'psychological or emotional abuse' as constituting 'family violence.' This is especially important in cases such as this, which involve a complex family relationship stemming from a profound disagreement about important issues of parental roles and medical treatment.")

133. See *supra* note 28, ss 8 (1) (duties of family-dispute-resolution professionals), 62 (1) (a) (when denial of parenting time is not wrongful), 66 (2) (a) (exemption from requirement to give notice of relocation), 147 (1) (b) (duty to provide support for child), 199 (1) (b) (ii) (conduct of proceeding), 245 (1) (e) (regulation-making power respecting family-dispute resolution).

134. *Ibid*, s 37 (1).

135. *Ibid*, s 37 (2).

136. See *ibid*, s 37 (2) (a)–(j).

137. See *ibid*, s 37 (2) (g) ("the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member"), (h) ("whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs").

138. See *ibid*, s 38 ("For the purposes of section 37 (2) (g) and (h) *[best interests of child]*, a court must consider all of the following: (a) the nature and seriousness of the family violence; (b) how recently the family violence occurred; (c) the frequency of the family violence; (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and control-

The second area concerns protection orders from family violence under part 9.[139] Part 9 heralded a new approach to this class of orders, responding to recommendations made to reform the system in place under the previous legislation.[140] The new system in part 9 was designed to achieve a number of goals:

- replacing "[e]xisting restraining orders, which prohibit harassment and contact in specified circumstances, . . . with one type of order: a 'protection order' ";[141]
- moving from a system of enforcing orders through the civil courts to enforcement under criminal law;[142]
- "broaden[ing] the range of family members who are eligible to apply for protection orders";[143]

ling behaviour directed at a family member; (e) whether the family violence was directed toward the child; (f) whether the child was exposed to family violence that was not directed toward the child; (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence; (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring; (i) any other relevant matter." [bracketed text in original]). See also *Family Law Act White Paper*, *supra* note 34 at 46 ("Also proposed is a list of factors for judges to consider when assessing the impact of family violence . . . . The proposed list is adapted from New Zealand's family law. It is designed to produce a more nuanced risk assessment and avoid a one-size-fits-all approach. This approach is seen to be more flexible than legislated presumptions regarding custody or access and takes into account research showing different typologies of violence that carry different levels of future risk.").

139. See *supra* note 28, ss 182–191.

140. See *Family Law Act Transition Guide*, *supra* note 79 at part 9 ("The new regime responds to recommendations made in numerous reports, including the *Keeping Women Safe* report and the Representative for Children and Youth's *Honouring Christian Lee* report, which say consistent enforcement of protection orders is critical to increasing victim safety. The previous scheme, which was enforced through civil law, was identified as problematic on a number of levels. Inconsistent enforcement of civil restraining orders was identified as an issue that impacts families' safety and confidence in the justice system.").

141. *Ibid*.

142. See *ibid* ("A protection order is a safety-related order. Breaches of a protection order will be a criminal offence and may be enforced under section 127 of the Criminal Code.").

143. *Ibid*. See also *Family Law Act*, *supra* note 28, ss 182 "at-risk family member" ("means a person whose safety and security is or is likely at risk from family violence carried out by a family member"), 1 "family member" ("with respect to a person, means (a) the person's spouse or former spouse, (b) a person with whom the person is living, or has lived, in a marriage-like relationship, (c) a parent or guardian of the person's child, (d) a person who lives with, and is related to, (i) the person, or (ii) a person referred to in any of paragraphs (a) to (c), or (e) the per-

- "clarify[ing] the procedure to ensure protection orders are accessible, clear, and effective";[144]
- "provid[ing] guidance on risk factors to promote the use of protection orders in appropriate and safety-related situations."[145]

Should the Child, Family and Community Service Act be amended to incorporate the definition of "family violence" found in the Family Law Act?

Brief description of the issue

The *Child, Family and Community Service Act* employs the expression domestic violence, most notably in a key provision of the Act setting out the grounds for determining when a child needs protection.[146] But the Act doesn't provide a legislative definition of domestic violence. In contrast, the *Family Law Act* contains an extensive definition of family violence, which was explicitly developed as a common point of reference for participants in the family-justice system. Should the references to domestic violence in the *Child, Family and Community Service Act* be replaced with a defined term modelled on the *Family Law Act*'s expression family violence?

Discussion of options for reform

This issue for reform potentially poses two distinct elements for consideration.

First, there is the question of whether to retain domestic violence in the *Child, Family and Community Service Act* as a term without a legislative definition. This is essentially a yes-or-no question.

The status quo relies on the ordinary, everyday understanding of the expression domestic violence. It could be argued that this term is commonly understood and that it's acceptable for purposes to which it is put in the *Child, Family and Community Service Act*. But an undefined term will always be seen as lacking precision in comparison with a term that's given a legislative definition. The expression domestic violence has a significant role in an important section of the Act, which establishes the grounds for protection of a child. Clarity is a major concern in applying this section.

son's child, and includes a child who is living with, or whose parent or guardian is, a person referred to in any of paragraphs (a) to (e)").

144. *Supra* note 34 at part 9.

145. *Ibid*.

146. See *supra* note 1, s 13 (1) (e) (ii), (1.2).

Another concern with the term domestic violence is that it may be seen as outmoded. Domestic violence is increasingly being superseded by terms like intimate-partner violence and family violence. The latter term has already been put to use in the *Family Law Act*. An argument could be made that domestic violence is another term in need of modernization.

Second, there is the question of how to define any replacement term for domestic violence. This question only arises if a decision to depart from the status quo is made in response to the first question.

One obvious option is to use the legislative definition for family violence in the *Family Law Act* and to add that definition to the *Child, Family and Community Service Act*. This option would have the advantage of promoting consistency across legislation in British Columbia. It would also give readers of the *Child, Family and Community Service Act* access to the well-developed body of case law that has interpreted and applied the *Family Law Act*'s definition of family violence.

The potential downside of this option is one that has been encountered in earlier issues for reform considered in this chapter. There may be problems in adopting a term that was developed for one statute in a related, but distinct, area of the law and applying it to the area governed by the *Child, Family and Community Service Act*. The *Family Law Act* has both a definition of family violence and a detailed legal framework applying the term to court orders dealing with family violence. The *Child, Family and Community Service Act* lacks these features. But this Act must also address issues that don't arise under the *Family Law Act*. These considerations might call for a definition that is modelled on the *Family Law Act*'s definition but is also tailored for concerns that arise under the *Child, Family and Community Service Act*, even if such an approach undercuts other goals, such as consistency across statutes.

The committee's tentative recommendations for reform

The committee gave extensive consideration to this issue. It was concerned about the current state of the law. Because domestic violence isn't defined in the *Child, Family and Community Service Act* its scope is unclear. Given that domestic violence appears in a key provision of the Act (setting out the grounds for when a child needs protection), there may be challenges with the vagueness of this term.

The committee was also concerned about retaining the status quo for the *Child, Family and Community Service Act* in the face of the advent of the *Family Law Act*, with its defined term family violence. The two Acts are currently out of sync both in the choice of term (domestic violence as opposed to family violence) and, more im-

portantly, in the approach to defining that term (undefined versus a detailed legislative definition). In the committee's view, this is an undesirable state of affairs.

With these points in mind, the committee gave the *Family Law Act*'s definition of family violence a careful examination. While the committee found much to admire with the definition, it did have concerns about the breadth of its reach and what this very broad conception of family violence would mean within the child protection system.

In particular, the committee was concerned about the aspects of the definition that related to financial abuse ("unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy") and damage to property ("intentional damage to property"). Given the role a definition of family violence will play in setting out the grounds for protecting a child, the committee had reservations about including these forms of abuse in a definition that has such an impact on the actions that may be taken under the Act. It could have the effect of importing poverty into the grounds for protection. In the committee's view, poverty shouldn't be a ground for determining that a child requires protection.

The committee was also concerned about the open-ended nature of the *Family Law Act*'s definition of family violence (which introduces a list with the word includes). This approach allows for further development of the definition through court cases and opens up the possibility that an already-broad definition could be expanded even further in scope. In the committee's view, such an approach isn't appropriate for the child protection system. A closed list (introduced by the word means) would be a better approach.

In brief, the committee decided that leaving a key term in the *Child, Family and Community Service Act* undefined was a real problem for the legislation. Violence is an important issue and it should be addressed with a defined term. The *Family Law Act* provides a good model of such a definition. But some of the elements of its definition, while appropriate in family-law legislation, don't translate well to child protection legislation. A legislative definition for the *Child, Family and Community Service Act* should be tailored to the purposes of this Act, in particular the important role it will play within the grounds for determining when a child needs protection. It is important to guard against an expansive definition that could have the effect of having more children placed in care. It is possible to develop a legislative definition that is broadly in accord with the *Family Law Act*'s definition of family violence but that also takes these distinct child protection concerns into account.

Finally, the committee noted that there may be challenges in choosing the best term or terms for its conception of violence and in integrating those terms into the sec-

tions of the Act that currently use the expression domestic violence. While the committee was primarily focused on the policy implications of its conception of violence, and was aware that decisions on legislative drafting will ultimately be in the hands of legislative counsel, it did think it would be helpful to set out its thoughts on this issue.

The committee discussed a number of replacement terms for domestic violence. It considered using family violence, but quickly rejected this option. In the committee's view, if the *Family Law Act* and the *Child, Family and Community Service Act* each had legislative definitions of family violence that differed significantly in their details then confusion in practice would be the result.

The committee considered redefining domestic violence. In the end, it chose not to pursue this option because the term appears to be considered outdated.

The committee came to favour a combination of the terms violence and violence in the home. The committee noted that, standing alone, these terms individually raise some concerns. Violence appears to be very broad in its reach. Violence in the home, on the other hand, would on its face appear to limit the application of the legislative definition to violence that only occurs within the family home. This interpretation would introduce a limitation on the concept that doesn't appear in the way the Act currently uses the term domestic violence. In two of the key provisions using the expression domestic violence the Act goes on to add the phrase "by or towards a person with whom the child resides."[147] This phrase makes it clear that domestic violence isn't limited to violence that takes place within the home. In the committee's view, this concept should be preserved in the implementation of its defined terms. The committee believes that it can achieve this result by defining the term violence and using the expressions violence in the home and violence by or towards a person with whom the child resides in the presence of a child in the substantive provisions of the Act.

The committee tentatively recommends:

*9. The Child, Family and Community Service Act should be amended to add the following definition: " '**violence'** means*

(a) physical abuse, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse,

147. See *ibid*, s 13 (1) (e) (ii), (1.2).

(c) attempts to commit physical or sexual abuse,

(d) psychological or emotional abuse, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property, and

(ii) stalking or following, and

(e) in the case of a child, direct or indirect exposure to violence."

The committee tentatively recommends:

*10. The Child, Family and Community Service Act should be amended to add the following definition: " '**violence in the home**' means violence."*

The committee tentatively recommends:

11. The Child, Family and Community Service Act should be amended by striking out "domestic violence" wherever it appears and substituting

(a) "violence in the home, or"

(b) "violence by or towards a person with whom the child resides in the presence of a child."

Chapter 3. Disclosure

Scope of this Chapter

Disclosure of information to parties is an important aspect of proceedings in court. After briefly summarizing disclosure in relation to court proceedings generally, this chapter moves on to consider disclosure in child protection proceedings. Its focus is on two issues for reform, which probe whether a director should be required to disclose reasons for seeking an extension to certain orders under the *Child, Family and Community Service Act* and whether the Act's dedicated provision on disclosure could be improved, particularly in light of the body of case law that has developed in relation to this provision.

Background Information on Disclosure

About disclosure

Disclosure, in the everyday sense of the word, refers to revealing new or secret information.[148] In the legal realm, disclosure enables the discovery of relevant documents and pertinent information "in the possession of the other party that may be relevant to [a] claim or defence and that are not subject to privilege."[149]

British Columbia's *Supreme Court Civil Rules* provide that litigants have a duty to disclose documents that can be used by any party to prove or disprove a material fact, or at least assist that party in doing so.[150] This requirement is due in part to the belief that "continuous oral trials are the fairest and most effective means of resolving . . . disputes, [b]ut a continuous oral trial can only be fair if the parties are . . . not taken by surprise by evidence presented against them."[151]

148. See John Simpson et al, eds, *The Oxford English Dictionary*, 3rd ed (December 2015), online: <www.oed.com> sub verbo "disclosure."

149. Janet Walker & Lorne Sossin, *Civil Litigation* (Toronto: Irwin Law, 2010) at 167.

150. See BC Reg 168/2009, r 7-1 (1). See also G Peter Fraser, John W Horn, & Susan A Griffin, *The Conduct of Civil Litigation in British Columbia*, student ed by Jacqueline Hughes & Morgan Camley (Toronto: LexisNexis Canada, 2018) at 235, 240 (citing *Biehl v Strang*, 2010 BCSC 1391 at para 29, Punnett J).

151. Walker & Sossin, *supra* note 149 at 165.

Disclosure in child protection matters

The Supreme Court of Canada has held that child protection proceedings must be conducted "in accordance with the principles of fundamental justice."[152] To ensure a fair trial, "child protection agencies must provide disclosure of information that they have collected to ensure that parents can prepare adequately for trial."[153]

In addition, disclosure under the *Child, Family and Community Service Act* "impl[ies] access by parent's counsel to the factual basis of the [director's] case prior to hearings."[154]

Ideally, disclosure to the parent, or more likely to their lawyer, could include:

- a chronology of the ministry of children and family development's involvement with the parent, including any court documents;
- a list of resources or services a parent has contacted or used;
- copies of any assessments, reports or records, including relevant notes or correspondence;
- any allegations concerning "the parent's care of the child"; and
- information of any criminal proceedings against the parent and if applicable, the parent's criminal record.[155]

Unfortunately, child protection proceedings are often marked by a "relative absence of liberal pre-trial discovery."[156] As a law professor puts it, "[g]iven the nature of the interests at stake, it is somewhat remarkable that pre-trial disclosure requirements in child protection cases should be less demanding than those applicable to a simple contract or motor vehicle case."[157]

152. *New Brunswick (Minister of Health) v G. (J.)*, [1999] 3 SCR 46 at para 91, 177 DLR (4th) 124, Lamer CJ.

153. Nicholas Bala et al, eds, *Canadian Child Welfare Law: Children, Families and the State,* 2nd ed (Toronto: Thompson Educational, 2004) at 53 [*Canadian Child Welfare Law*].

154. Rollie Thompson, "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings" (1988) 7:1 Can J Fam L 11 & (1989) 7:2 Can J Fam L 223 at 235–236 [Thompson, "Taking Children and Facts Seriously"].

155. See *Canadian Child Welfare Law, supra* note 153 at 270.

156. Thompson, "Taking Children and Facts Seriously," *supra* note 154 at 22.

157. Rollie Thompson, "The Charter and Child Protection: The Need for a Strategy" (1986) 5:1 Can J Fam L 69 at 69.

Despite the duty to provide adequate disclosure, which allows parents to know the case they need to meet and ensures the best interests of the child involved are explored, a director may be reluctant to disclose more than the minimum required due to the following considerations:[158]

- **The need to conserve limited resources:** Although the ministry of children and family development is a government agency, which will undoubtedly have greater resources than a parent whose child is the subject of a child protection proceeding, the ministry must be mindful of those resources. A director's file may contain hundreds, if not thousands, of pages and it may therefore take a great deal of time and resources to actually provide parents with relevant disclosure material.[159]
- **The need to ensure confidentiality of third parties:** The material in a director's file will need to be vetted before it can be disclosed to ensure there is no privileged or identifying information of reporters with respect to the countless third parties who are often involved in a child protection matter such as medical professionals, ministry employees, or educators.[160]
- **The need to preserve the integrity of ongoing investigations:** A child protection matter may coincide with a criminal investigation where there has been an allegation of abuse or violence against the child. A director may not be at liberty to disclose certain information that he or she would normally disclose if doing so could potentially jeopardize an ongoing investigation.[161]

Due to the majority of child protection cases involving legal aid, lawyers for parents may actually delay requesting disclosure of a director's file until they are certain a trial is going ahead, in an attempt to ensure the limited fees allocated to the matter are not consumed by a premature review of the often-voluminous disclosure.[162]

Moreover, parents who are self-represented may not know how to go about requesting disclosure, or even what they are entitled to receive, at an early stage of a child protection matter when it would be most advantageous.[163]

158. See *Canadian Child Welfare Law, supra* note 153 at 53.

159. See *ibid* at 55.

160. See *ibid* at 53.

161. See *ibid* at 270. See also *British Columbia (Director of Child, Family and Community Service) v K.S.*, 2013 BCPC 100 at paras 48–49 [*K.S.*], Jardine Prov Ct J.

162. See *Canadian Child Welfare Law, supra* note 153 at 54.

163. *Ibid* at 55.

Disclosure under the Child, Family and Community Service Act

While both of the issues being considered for reform in this chapter are related to disclosure, they involve different parts of the *Child, Family and Community Service Act*. They'll be considered in turn, beginning with extensions and then moving on to full disclosure to parties.

Supervision order and temporary custody order extensions

There are two types of orders with respect to custody for which an extension can be sought under the *Child, Family and Community Service Act*: (1) supervision orders, which return or place "a child in the custody of a parent or other person under specified conditions or a prescribed period of time;"[164] and (2) temporary custody orders, which place "a child in the custody of the Director or another person for a specified period of time."[165]

The term of either of these orders may be extended "if the court is satisfied that the circumstances that cause the child to need protection are likely to improve within a reasonable time."[166] Currently, the *Child, Family and Community Service Act* merely requires "notice of the time, date and place of the hearing" to be served "at least 10 days before the date set for hearing the application."[167]

There is no formal requirement to provide any additional explanation in advance of a court hearing for the basis on which an extension is sought. There are also no special disclosure provisions for extensions of these orders.

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164. Darcie Bennett et al, *Broken Promises: Parents Speak about B.C.'s Child Welfare System* (Vancouver: Pivot Legal Society, 2008), online: <d3n8a8pro7vhmx.cloudfront.net/pivotlegal/pages/82/attachments/original/1345747631/BrokenPromises.pdf?1345747631> [*Broken Promises*] at 6. See also *Child Family and Community Service Act, supra* note 1, s 1 "supervision order" ("means an order made under section 33.2 (2), 35 (2) (b) or (d), 36 (3) (b) (i), 41 (1) (a) or (b), (1.1) or (2.1), 42.2 (4) (a) or (c), 46 (3), 49 (8) or 54.01 (10) requiring a director to supervise a child's care, and includes any extension of or change to that order").

165. *Broken Promises*, *supra* note 164 at 6. See also *Child, Family and Community Service Act, supra* note 1, s 1 "temporary custody order" ("means an order made under section 41 (1) (b) or (c), 42.2 (4) (b) or (c), 49 (7) (b) or (c) or 54.01 (9) (b) or (c) placing a child for a specified period in the custody of a director or another person, and includes any extension of or change to that order").

166. See *Family Practice Manual*, *supra* note 16 at §19.75.

167. *Supra* note 1, ss 44 (2), 44.1(2).

Section 64: full disclosure to parties

Section 64 is the *Child, Family and Community Service Act*'s main disclosure provision. The key part of the section says that, "[i]f requested," any party to a child protection proceeding "must disclose fully and in a timely manner to another party to the proceeding" the following information:

> (a) the orders the party intends to request,
>
> (b) the reasons for requesting those orders, and
>
> (c) the party's intended evidence.[168]

Despite being entitled "full disclosure to parties," section 64 doesn't contain much guidance about what is actually is required to be disclosed. This has opened the door for the case law to provide some guidance.[169]

Case law on disclosure

Section 64 of the *Child, Family and Community Service Act* requires full and timely disclosure of the director, but only makes mention of orders and intended evidence. There is quite a disconnect between this provision and judicially mandated disclosure in the relevant case law.

In a leading case,[170] a lawyer acting for the parents received "130 pages of various records, statements and other documents" from the director on the morning of an application for a continuing custody order.[171] A written statement given by the child's grandmother wasn't discovered until after the lawyer had conducted her cross-examination.[172] As the court remarked, "there can't be fairness in the absence of disclosure which is proportionate to the jeopardy faced by parents in the particular case."[173]

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168. *Ibid*, s 64 (1). Note that section 79 of the *Child, Family and Community Service Act* can be used in tandem with section 64 (1) (c), as it authorizes a director to disclose information obtained without consent under certain circumstances.

169. See *British Columbia (Child, Family and Community Service) v S.M.S.*, 2020 BCPC 87 at paras 44–45 [*S.M.S.*], Dorey Prov Ct J (describing section 64 as establishing "the statutory minimum disclosure requirements," which may be supplemented by "the common law principle of fairness in the duty of disclosure").

170. *British Columbia (Director of Family and Child Services) v T.L.K.*, [1996] BCJ No 2554 (QL) (Prov Ct) [*T.L.K.*].

171. *Ibid* at para 2, Stansfield Prov Ct J.

172. See *ibid* at para 3.

173. *Ibid* at para 12.

In an attempt to ensure fairness going forward, the court provided an extensive list of considerations concerning the content and timing of disclosure. This list is worth quoting in full:

1. all parties (that is, parents as well as the Director) at a minimum are required to comply with the disclosure requirements of section 64;
2. disclosure must be timely; preferably by the date set within 45 days of the presentation for "commencement" of the hearing, in no case later than a few days prior to the case conference (failure to disclose before the case conference functionally sabotages the settlement objective of that process);
3. subject to further or contrary directions from the commencement or case conference or hearing judge, the minimum requirements under section 64 will be sufficient where the Director is seeking minimal interference in the child/parent relationship (for example, a return to the parent(s) with supervision, or perhaps a three-month temporary order where the plan of care reflects a clear commitment to work towards a return of the child);
4. the minimum standard of disclosure is wholly inadequate where the Director is seeking a permanent severance of the child/parent relationship;
5. if any party wishes to question what will be adequate disclosure in a particular case, or wishes a ruling on privilege or other issues, those matters should be raised at the "commencement" date;
6. the requirement to effect reasonable disclosure (that is, beyond the section 64 minimum) applies to all parties; counsel for parents should make diligent enquiry of their clients as to what documents are in their possession or control which may be relevant to the best interests of the children; parents are not criminal defendants who can sit back and withhold their position;
7. in a case such as this one, in which at least inferentially it is alleged that one or [the] other of the parents more likely than not caused [the child's] injuries, and that she cannot ever in safety be returned to either of them, it is all the more important that they be advised of the whole of the case they have to meet; that is especially so when the Director's burden of proof in unexplained injury cases is lower than the normal standard;
8. the responsibility to determine what documents must be disclosed is that of counsel, not the social workers or their supervisors, or parents; counsel should adopt the practice that is well known to them in Supreme Court civil litigation of securing from or reviewing with their client all documents which may be relevant to matters in issue, listening to any concerns of the clients regarding relevance or privilege, and then making the legal determination as to what must be produced, and making any applications that may be necessary to withhold or edit any documents;
9. "relevant" documents include those which are adverse to the party's interest, and definitely are not limited to the party's "intended evidence";
10. "disclosure" need not include photocopying and delivering all documents; subject to any order to the contrary, it is sufficient if the other parties are provided with a reasonable and timely opportunity to inspect all documents, and to copy at their own expense such of them as they require;

> 11. where there is a particular concern as to whether a party has fulfilled its obligations, the court may require an affidavit from that party deposing to the fact all documents have been provided to counsel, and certification from counsel that (s)he has produced or made available to the other parties all relevant documents.[174]

Upon review of the limited case law directly referring to section 64 of the *Child, Family and Community Service Act*, the content of disclosure orders in child protection proceedings ranges from general—for example, requiring the full content of the Director's file be disclosed[175]—to the more specific:

- any evidence in the director's possession or control that may be potentially relevant to the application;[176]
- evidence the director intends to lead, or would have led, at a hearing, even if the director no longer intends to proceed with the application;[177]
- copies of running records of social workers, their notes (also known as their black books), and access supervisors' visit notes and reports;[178] and
- medical reports, third-party reports, and clinical notes.[179]

Several cases also discuss circumstances in which a director is correct in *withholding* information in child protection proceedings:

- where the documents or information requested are not in the possession of the director and the director does not intend to submit them as evidence;[180]

174. *Ibid* at para 14 [citation omitted].

175. See *British Columbia (Director of Child, Family and Community Service) v M.J.,* 2014 BCPC 40 at para 19 [*M.J.*], MacCarthy Prov Ct J. See also *P.L. v N.S.,* [1996] BCJ No 2022 (QL) at para 12 (SC), Clancy J.

176. See *British Columbia (Director of Child, Family and Community Service) v D.L.*, 2002 BCPC 472 at para 43, Bruce Prov Ct J.

177. See *ibid* at para 45; *British Columbia (Director of Child, Family and Community Service) v D.L.*, 2002 BCPC 190 at para 10, Bruce Prov Ct J.

178. See *Re A.L.S.*, [1996] BCJ No 2668 (QL) at para 14 (Prov Ct), Gove Prov Ct J; *Order 02-59, British Columbia (Ministry of Children and Family Development)*, [2002] BCIPCD No 61 (QL) at para 37, Skinner Adj; *British Columbia (Director of Family and Child Services) v S.H.*, 2014 BCPC 270 at para 4 [*S.H.*], Brown Prov Ct J.

179. See *M.J., supra* note 175 at paras 19, 23.

180. See *Re J.L.,* [1997] BCJ No 3060 (QL) at para 9 (Prov Ct), Auxier Prov Ct J.

- where a request for documents or information lacks specificity and is made last minute;[181]
- where extensive disclosure was determined to have previously occurred;[182] and
- where documents or information are part of ongoing criminal proceedings and have the potential to jeopardize an ongoing investigation if disclosed.[183]

Issues for Reform

Should the director be required to provide written information to the parent and the court regarding the reasons an extension of a supervision order or a temporary custody order is sought?

Brief description of the issue

There is currently no requirement placed on the director to give reasons when an extension to a supervision order or temporary custody order is sought. Parents of the child subject to these orders may be frustrated when a decision is made to seek an extension and no reasons are given. Should a requirement be placed on the director to specify the reasons for an extension?

Discussion of options for reform

The committee considered two options in relation to this issue: impose a new requirement on the director to provide reasons for an extension or retain the current position of the law.

The main advantage of mandating the provision of reasons for which an extension is sought is greater transparency. Research has shown that child protection workers' heavy caseloads often prevent them from working with families towards reunification or exploring alternatives other than apprehension.[184] Moreover, parents may be unwilling to obtain services, even if they are available and offered to them, or report instances of domestic abuse for fear that these facts will eventually be used against

181. See *K.S., supra* note 161 at para 48.

182. See *ibid* at para 49.

183. See *ibid* at para 33.

184. See *Broken Promises*, *supra* note 164 at 10.

them.[185] This can result in the material in a director's file containing a one-sided argument, focusing on the negative aspects of assessments while ignoring the positive periods where there was nothing to report, as well as the potential for misinformation that a parent will have no opportunity to correct ahead of a hearing.[186]

Adding this requirement should also help to preserve trial fairness, providing parents with information of the case they need to meet to make them feel more included in the process, while also providing greater clarity for judges who make the ultimate decision with respect to an extension of custody or supervision. Moreover, this requirement would help child protection workers adhere to the guiding principles of the *Child, Family and Community Services Act,* so the apprehension of children can be truly a measure of last resort as opposed to the simplest option.[187]

A disadvantage of adding this new disclosure requirement would be imposing yet another obligation on an already strained system, further increasing the workload of child protection workers who conduct the risk assessments in addition to increasing the preparation required for a child protection hearing. It could also be seen as anomalous to create a special disclosure rule for extensions of supervision orders and temporary custody orders, one which wouldn't apply when the order is initially sought.

The committee's tentative recommendation for reform

The committee favoured creating a new disclosure requirement on the director in these circumstances. The reasons for seeking an extension is helpful information, which would benefit parents. Even though this requirement wouldn't apply when the order is initially sought, there are other provisions that do apply at that time that have the effect of ensuring that this information is disclosed.

In the committee's view, this new disclosure requirement would be best implemented by adding a narrative box to the form used in the application for an extension.[188]

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185. *Ibid* at 71; see Mosoff et al, *supra* note 19 at 484.

186. See *Broken Promises*, *supra* note 164 at 70; see also Mosoff et al*, supra* note 19 at 503.

187. See *supra* note 1, s 2 ("This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles . . . (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents; (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided; . . . (e) kinship ties and a child's attachment to extended family should be preserved if possible.").

188. See *Provincial Court (Child, Family and Community Service Act) Rules*, *supra* note 18, Appendix A,

The committee tentatively recommends:

12. Form 2 (Application for an Order) of the Provincial Court (Child, Family and Community Service Act) Rules should be amended to add a narrative box, which will be used to specify the reasons, in compliance with the Child, Family and Community Service Act, for which the extension is being sought.

Should section 64 of the Child, Family and Community Service Act be amended to conform with case-law stipulations on what a director should disclose?

Brief description of the issue

Section 64 of the *Child, Family and Community Service Act* sets out the general disclosure obligations for child protection proceedings under the Act. The section's provisions are rather skeletal. As a result, a body of case law has developed, which has interpreted the section and elaborated on its requirements. Should any of these case-law stipulations on disclosure be incorporated directly into section 64?

Discussion of options for reform

The main advantage to amending section 64 to incorporate case-law stipulations on disclosure is that it would help to clarify the law in this regard. This section is potentially deficient, as it requires disclosure in a broad sense and does not necessarily encompass the full scope of what the courts have mandated that a director must disclose in child protection matters. Amending section 64 can help alleviate fair-trial concerns by providing a greater sense of clarity and transparency to one of the main disclosure provisions in the *Child, Family and Community Service Act.* In addition to helping practitioners on both sides of a child protection matter, parents should know the case they need to meet. This is vital to correct the power imbalance of power that pits a parent, who is typically relying on legal aid or is self-representing, against the greater resources of the ministry of children and family development, and who is facing the possibility of permanently losing guardianship of a child.[189]

A disadvantage of amending section 64 to encompass what courts have mandated a director must disclose is that it would alter a status quo that appears to be working. Currently, the courts have worked out how to resolve the deficiency in this section of the *Child, Family and Community Service Act.* The legislation has provided a general

Form 2 (Application for an Order).

189. See Thompson, "Taking Children and Facts Seriously," *supra* note 154 at 231.

outline with respect to disclosure requirements and the courts have taken it upon themselves to fill in the details, such as the 11 general principles noted earlier in this chapter,[190] providing guidance for practitioners in this area. This could simply be an example of the law working as it should.

The committee's tentative recommendations for reform

The committee noted that the case law is well-settled. It has helped to fill in some of the details that are lacking in the minimal requirements set out in section 64. That said, it would be difficult to incorporate all of the stipulations found in the case law. Some of the items on the lengthy list set out in the leading case, for example, would be too onerous to comply with in practice. Others would not translate easily into legislation.

The committee favoured a targeted approach to amending section 64. In its view, the section is clearly deficient in some areas. One of these areas relates to the timing of disclosure. In the committee's view, it would be preferable for the section to clearly spell out that disclosure is required before a case conference. Currently, the section calls for disclosure "if requested"—language that the committee viewed as problematic. It sets up a rote requirement for experienced lawyers. But it may also prove to be a stumbling block for self-represented litigants, who may not be aware of the need to make a request.

There were other aspects of section 64 that the committee favoured clarifying. In the committee's view, the section should clearly spell out that all relevant documents must be disclosed, even those that are adverse to the director's position. Even though child protection proceedings are semi-adversarial in nature, the committee was of the view that the director should not withhold such documents and that the legislation should expressly set out this requirement.

The committee also decided that the reference in subsection (1) (c) to "the party's intended evidence" could be clearer and more prescriptive. The committee favoured replacing this provision with a requirement to disclose all documents to which a party intends to refer at trial. This language should be familiar to most practitioners in this area because it is used in the *Supreme Court Family Rules*.[191]

190. See *T.L.K., supra* note 170.

191. See British Columbia, *Supreme Court Family Rules*, BC Reg 169/2009, r 9-1 ("each party to a family law case must (a) prepare a list of documents in Form F20 that lists . . . (ii) all other documents to which the party intends to refer at trial").

The committee tentatively recommends:

13. Section 64 of the Child, Family and Community Service Act should be amended by striking out the words "If requested" and substituting "Prior to a case conference under rule 2 of the Provincial Court (Child, Family and Community Service Act) Rules, or at least 30 days prior to a contested hearing, except when a hearing is scheduled within these 30 days, then as soon as practicable."

The committee tentatively recommends:

14. Section 64 (1) (c) of the Child, Family and Community Service Act should be repealed and the following substituted: "all documents to which the party intends to refer to at trial."

The committee tentatively recommends:

15. Section 64 of the Child, Family and Community Service Act should be amended to add a new subsection (1.1), which should read as follows: "The director must 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."

The committee tentatively recommends:

16. Section 64 (2) of the Child, Family and Community Service Act should be amended by adding "or subsection (1.1)" between "under subsection (1)" and "is subject to any claim of privilege."

Chapter 4. Independent Legal Advice

Scope of this Chapter

There are a handful of provisions in the *Child, Family and Community Service Act* that address independent legal advice before a person consents to an order or a transfer of guardianship of child. The central question of this chapter is whether this idea should be expanded to other agreements under the Act. It also addresses whether a child in child protection proceedings should have a right to independent legal advice. Before tackling these issues for reform, the chapter begins with some background information on the concept of independent legal advice, its application in the *Child, Family and Community Service Act*, and the agreements that will feature in the issues for reform.

Background Information on Independent Legal Advice

About independent legal advice

Independent legal advice is a feature of many transactions and situations.[192] In some cases, the law or a party to a transaction requires it;[193] in others, the parties see it as an attractive way to burnish the integrity of the transaction.[194] While independent legal advice "is not necessary in every situation" and is "a fact specific considera-

192. See Kimberly A Whaley, "Independent Legal Advice: Risks Associated with 'ILA' Where Undue Influence and Capacity are Complicating Factors" (2017) 47:4 Adv Q 459 at 459 ("Situations such as where a conflict of interest arises or exists in joint retainers, or when engaging in certain types of transactions, or upon discovery of an error or omission, constitute more familiar instances where ILA may become relevant."); Paul M. Perell, "Competent Independent Legal Advice" (1989) 9:3 Est & Tr J 225 at 225 ("Common examples are where a client intends to make a substantial gift to a relative, friend or charity or where the client agrees to guarantee repayment of another's debt."); "Giving independent legal advice? Stop. Read this first" (last revised August 2017), online: *Law Society of British Columbia* <www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyers-insurance-fund/risk-management/practice-management-risks-and-tips/independent-legal-advice/> ("ILA is usually given to a client about to enter into some transaction or agreement. In BC, the most frequent requests for ILA relate to marriage and separation agreements, and mortgage loans and guarantees.").

193. See Whaley, *supra* note 192 at 459–460 ("ILA is often required where an individual is borrowing money from a financial institution with, for instance, a third party offering a guarantee for a loan. In this situation, the borrower has all of the benefit and the third party has the obligation.").

194. See *ibid* at 461 ("ILA is usually the best evidence to prove free will is not disputed.").

tion,"[195] calls for it arise more frequently than not when one person is particularly vulnerable, either due to family pressure or lack of relevant information.[196]

A recent court decision has said that "the purpose of independent advice, whether it emanates from an accountant, lawyer, financial advisor, a trusted and knowledgeable friend, or someone else, is to provide evidence that the [person who receives the advice] *knew what he or she was doing, was informed, and was entering into the transaction of their own free will*."[197] On independent legal advice specifically, one commentator has said that a leading case "reveal[s] the following elements of competent independent legal advice: (1) an investigation to obtain knowledge of all circumstances relevant to the transaction; (2) an investigation about whether the client is acting independently; (3) an explanation of the nature and effect of the transaction; (4) an investigation to determine whether the client understands what he or she is doing[;] and (5) private advice."[198] Professional-conduct rules provide more information on independent legal advice, addressing concerns from the advising lawyer's point of view.[199]

These general statements are good starting places for understanding the tasks that typically make up independent legal advice. But these lists must also be considered with some caution. The content of independent legal advice may vary with "such factors as: the age, experience, competence and character of the client."[200] When the client is a child or a youth who hasn't reached the age of majority (as is the case in

195. *Ibid* at 460.

196. See Canadian Centre for Elder Law, *Financial Arrangements Between Older Adults and Family Members: Loans and Guarantees*, Report 1 (2004), online: <www.bcli.org/sites/default/files/Financial_Arrangements_Rep.pdf>.

197. *Thorsteinson Estate v Olson*, 2016 SKCA 134 at para 51, Ryan-Froslie JA [emphasis added].

198. Perell, *supra* note 192 at 226–227 (discussing *Inche Noriah v Shaik Allie Bin Omar*, [1928] UKPC 76, [1929] AC 127).

199. See The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Vancouver: Law Society of British Columbia, 2013, rr 3.4-27 ("In rules 3.4-27 to 3.4-43, when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflicting interest in the matter."), 3.4-27.1 ("A lawyer giving independent legal advice under this section must: (a) advise the client that the client has the right to independent legal representation; (b) explain the legal aspects of the matter to the client, who appears to understand the advice given; and (c) inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view."). See also Law Society of British Columbia, *Independent Legal Advice Checklist* (2014), online: <www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-ila.pdf>.

200. Perell, *supra* note 192 at 231.

the issues considered later in this chapter), then other considerations might come into play.

Independent legal advice in the Child, Family and Community Service Act

Turning to the *Child, Family and Community Service Act*, it's noteworthy that this Act already contains three provisions that address independent legal advice. These provisions deal with the following subjects.

Permanent transfer of custody before continuing custody order

A director may apply to court if a child is in the care of someone other than the child's parents under an agreement with the child's kin and others or under certain specified temporary custody orders for an order to "permanently transfer custody of the child" to the person providing care under the agreement or temporary custody order.[201] Section 54.01 of the Act spells out the procedure and conditions for granting the order. One condition that applies concerns whether specified persons "have consented to the transfer of custody."[202] The section provides that the court "may rely on the consent" if "each person," among other things, "has been advised to consult with independent legal counsel before signing the consent."[203]

Permanent transfer of custody after continuing custody order

After a continuing custody order[204] is made, "a director may apply to the court to permanently transfer the custody of a child who is in the custody of the director . . .

201. S*upra* note 1, s 54.01 (1) ("If a child is in the care or custody of a person other than the child's parent under (a) an agreement made under section 8, or (b) a temporary custody order made under section 41 (1) (b), 42.2 (4) (c), 49 (7) (b) or subsection (9) (b) of this section, a director may, before the agreement or order expires, apply to the court to permanently transfer custody of the child to that person.").

202. *Ibid*, s 54.01 (5) ("A court may make an order permanently transferring custody of a child to the person other than the child's parent referred to in subsection (1) if . . . (b) in respect of a child in the care or custody of a person other than the child's parent under (i) an agreement made under section 8, the persons referred to in subsection (3) (a), (b) and (h) of this section have consented to the transfer of custody, or (ii) a temporary custody order referred to in subsection (1) (b), the persons referred to in subsection (3) (a), (h) and (i) have consented to the transfer of custody"). The specified persons are: "the child, if 12 years of age or over" (*ibid*, s 54.01 (3) (a)); "each parent" (*ibid*, s 54.01 (3) (b)); "the person to whom the court has been requested under subsection (1) of this section to transfer custody" (*ibid*, s 54.01 (3) (h)); "the Public Guardian and Trustee, if appointed the child's property guardian under section 58" (*ibid*, s 54.01 (3) (i)).

203. *Ibid*, 54.01 (7) (a).

204. See *ibid*, s 1 (1) "continuing custody order" ("means an order under section 41 (1) (d),

to a person other than the child's parent."[205] While section 54.1, which sets out the procedure and conditions for making this order, differs in significant ways from section 54.01 (discussed in the previous paragraph), it does contain similar language on independent legal advice. A subsection in section 54.1 spells out when a court may rely on the consent of specified people to the transfer of custody,[206] and one of this provision's conditions is that two groups of the people specified to give consent (the person to whom the court has been requested to transfer custody to and the child, if the child is 12 years old or older) "ha[ve] been advised to consult with independent legal counsel before signing the consent."[207]

Consent orders

Under the Act, orders may be made with the consent of specified people.[208] A court may make an order under this section so long as a set of requirements are met, one of which is that—from the list of specified people—the child (if the child is 12 years old or older), each parent of the child, (if the child is to be placed for a specified period in the custody of a person other than a director) the person in whose custody the child is to be placed, and "any person who has been made a party [by court order] under section 39 (4),"[209] "ha[ve] been advised to consult with independent legal counsel before signing the consent."[210]

42.2 (4) (d) or (7) or 49 (4), (5) or 10 (a) placing a child in the continuing custody of a director").

205. *Ibid*, s 54.1 (1).

206. See *ibid*, s 54.1 (3) (a). The specified people are: "each person to whom the court has been requested under subsection (1) to transfer custody" (*ibid*, s 54.1 (2) (a)); "the child, if 12 years of age or over" (*ibid*, s 54.1 (2) (b)); "the Public Guardian and Trustee" (*ibid*, s 54.1 (2) (f)).

207. *Ibid*, s 54.1 (4) (a). This legal-advice provision doesn't extend to the third specified person, the public guardian and trustee.

208. See *ibid*, s 60 (1) ("With the written consent of the following, the court may, at any time after a presentation hearing, make any custody or supervision order that is provided for in this Part, other than a transfer of custody under section 54.1, but including an order transferring custody of a child under section 54.01 (5) and a continuing custody order: (a) the director; (b) the child, if 12 years of age or over; (c) each parent of the child; (d) if the child is to be placed for a specified period in the custody of a person other than a director, that person; (d.1) any person who has been made a party under section 39 (4); (e) if the child is an Indigenous child, the person who is or would have been entitled under section 38 (1) (c), (c.1), (c.2) or (d) to notice of any protection hearing concerning the child.").

209. *Ibid*, s 60 (1) (d.1). See also *ibid*, s 39 (4) ("The court may order that a person be a party at any hearing.").

210. *Ibid*, s 60 (2) (a).

Voluntary care agreements, special needs agreements, and agreements with child's kin and others under the Child, Family and Community Service Act

This chapter's issues for reform examine whether requirements for independent legal advice should be added to three specific provisions of the *Child, Family and Community Service Act*. These three provisions are section 6 (which provides for voluntary care agreements), section 7 (which provides for special needs agreements), and section 8 (which provides for agreements with the child's kin and others).

Voluntary care agreements

Section 6 of the *Child, Family and Community Service Act* authorizes a director to "make a written agreement with a parent who has custody of a child and is temporarily unable to look after the child in the home."[211] Under these voluntary care agreements, "the parent may give the care of the child to the director and delegate to the director as much of the parent's authority as the child's guardian as is required to give effect to the agreement."[212] Section 6 spells out the provisions a voluntary care agreement must include[213] and contains directions on the initial term and any renewals of the agreement.[214]

Section 6 also provides that a director must (1) seek out a child's views on the agreement and explain the agreement to the child[215] and (2) consider "a less disruptive way of assisting the parent to look after the child" and whether the agreement may be in the child's best interests.[216] But there is no requirement for independent legal advice before entering into the agreement.

211. *Ibid*, s 6 (1).

212. *Ibid*, s 6 (2).

213. See *ibid*, s 6 (5).

214. See *ibid*, s 6 (6)–(8).

215. See *ibid*, s 6 (3) ("If possible, the director must (a) find out the child's views about the agreement and take them into account, and (b) explain the effect of the agreement to the child before the agreement is signed.").

216. *Ibid*, s 6 (4) ("Before making the agreement, the director must (a) consider whether a less disruptive way of assisting the parent to look after the child, such as by providing available services in the child's own home, is appropriate in the circumstances, and (b) consider whether the agreement is in the child's best interests.").

Special needs agreements

Section 7 of the *Child, Family and Community Service Act* authorizes a director to "make a written agreement with a parent who has custody of a child with special needs."[217] Under such an agreement, "the parent may give the care of the child to the director and delegate to the director as much of the parent's authority as the child's guardian as is required to give effect to the agreement."[218]

The bulk of the considerations discussed above for voluntary care agreements also apply to special needs agreements.[219] The section doesn't require independent legal advice before entering into an agreement.

Agreements with child's kin and others

Section 8 of the *Child, Family and Community Service Act* authorizes a director to "make a written agreement with a person who has established a relationship with a child or has a cultural or traditional responsibility toward a child, and is given care of the child by the child's parent."[220] Section 8 goes into less detail than section 6 on the contents and term of the agreement.

Section 8 does provide that if a director enters into an agreement with a child's kin and others, then the agreement "may" include the child's parents as a party (and, if the child is an Indigenous child, may include listed representatives as parties).[221] If a parent or an Indigenous representative is included as a party, then the agreement must include (among other provisions) "a description of the party's role in the agreement."[222]

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217. *Ibid*, s 7 (1).

218. *Ibid*, s 7 (2).

219. See *ibid*, s 7 (3) ("Section 6 (3) to (5) and (8) applies to an agreement under this section.").

220. *Ibid*, s 8 (1).

221. *Ibid*, s 8 (3) ("If a director makes an agreement under subsection (1), the following may be included as a party to the agreement: (a) the child's parent; (b) in the case of the child being an Indigenous child, (i) if the child is a First Nation child, the First Nation, (ii) if the child is a Nisga'a child, the Nisga'a Nation or the child's Nisga'a Village, (iii) if the child is a Treaty First Nation child, the Treaty First Nation, or (iv) if the child is not a First Nation child, a Nisga'a child nor a Treaty First Nation child, the legal entity representing the child's Indigenous community.").

222. *Ibid*, s 8 (4) ("If, under subsection (3), a party is included in an agreement, (a) the agreement must include (i) a description of the party's role in the agreement, and (ii) in the case of a party referred to in subsection (3) (b), conditions on the use, disclosure and security of information provided under the agreement to the party, and (b) a withdrawal from the agreement by the party does not have the effect of terminating the agreement.").

Like sections 6 and 7, section 8 doesn't contain any language referring to independent legal advice on the agreement.

Issues for Reform

Should the Child, Family and Community Service Act be amended to include a provision to provide independent legal advice to a parent and to a child before signing an agreement under sections 6, 7, or section 8?

Brief description of the issue

Voluntary care agreements (made under section 6 of the Act), special needs agreements (made under section 7), and agreements with child's kin and others (made under section 8) can have significant implications for the legal rights of parents and children affected by the agreement or plan. But experience shows that people do enter into these agreements with only an imperfect grasp of how they affect a person's legal rights and responsibilities. The *Child, Family and Community Service Act* has a handful of existing provisions that call for a person to be advised of a right to independent legal advice before certain types of orders are made. Should this concept be extended to agreements under sections 6, 7, or 8?

Discussion of options for reform

The primary advantage of a legislative provision addressing independent legal advice is that it increases the likelihood that a person enters into an agreement well informed about the nature and effects of the agreement and of the person's own free will. Independent legal advice provides an added layer of protection for vulnerable people. It also provides solid evidence that bolsters the integrity of agreements or plans. Since agreements under sections 6, 7, or 8 of the Act are often entered into to address difficult circumstances, a requirement for independent legal advice (which will reinforce the durability of the agreement) may provide some benefits to all participants in the system.

The downsides of having the legislation address independent legal advice relate to the effects such a requirement might have on administering the system. Legislative provisions on independent legal advice may mean that concluding agreements under sections 6, 7, and 8 will take more time. A provision on independent legal advice would add to the cost of those agreements. There is also the question of who should bear those costs. It may be unrealistic to ask parents and children to do this, as cost

could provide a barrier to obtaining independent legal advice, making the requirement a provision that has no real impact in practice. But passing this cost on to a public body will have financial and administrative consequences.

The committee's tentative recommendations for reform

The committee decided that provisions should be added to sections 6, 7, and 8 of the Act, which will require that each parent and child (if 12 years of age or older) must be advised of their rights to independent legal advice before signing an agreement under one of these sections.

The committee noted that agreements under these sections can have a significant impact on a person's legal rights. They can also be rather sparing in detail. Parents, in particular, may often be unaware of the implications of an agreement, because their overriding focus is to avoid removal of the child. The committee viewed a legislative provision requiring that parents and children be advised of their right to independent legal advice as being the best way to address these concerns.

The committee did give extended consideration to the practical implications of tentatively recommending legislative reform. In particular, the committee was concerned about the timing and cost of independent legal advice.

Regarding timing, the committee noted that these agreements function as alternatives to removal of a child. The time it takes to obtain independent legal advice could impair this function. Securing timely access to independent legal advice will be an important component to ensuring the success of legislative reform.

The cost of independent legal advice is also an important practical consideration. Expecting parents and children to pay the full cost would be a significant barrier, one which would dramatically undercut the usefulness of legislative reform. But it also is uncertain whether the government would take on responsibility for the full cost of independent legal advice. This could have a substantial impact on other aspects of the publicly funded child protection system.

The committee addressed aspects of these practical considerations in the next issue for reform.

The committee also considered the language used in the current provisions of the *Child, Family and Community Service Act* that address independent legal advice. These provisions refer to a person having "been advised to consult with independent legal counsel." This language could be criticized as a rather weak requirement.

The committee did consider some more forceful alternatives to the language the Act currently uses. In theory, it would be possible to develop a very strong provision requiring legal advice as a component of the agreement. But this approach could have significant drawbacks. It would likely end up putting significant pressure on public resources, as legal advice would have to be made available to parents and children. Otherwise, the cost of obtaining legal advice would completely sap the strength of such a legislative provision. In addition, it would have the effect of compelling people to receive legal advice, even in those cases when the person has made a fully informed, good-faith decision not to obtain independent legal advice.

In the end, the committee considered the existing language better than any alternative.

In view of the distinctive language of section 8, the committee decided that the scope of its tentative recommendation for this section should be somewhat wider than for sections 6 and 8. If an agreement with a child's kin and others under section 8 involves an Indigenous child, then that child's Indigenous community (if it is going to be a signatory to the agreement) should also be advised of its right to independent legal advice.

The committee tentatively recommends:

17. Section 6 of the Child, Family and Community Service Act should be amended to provide that each parent and child (if 12 years of age or over) must be advised of their rights to independent legal advice before signing a voluntary care agreement under section 6.

The committee tentatively recommends:

18. Section 7 of the Child, Family and Community Service Act should be amended to provide that each parent and child (if 12 years of age or over) must be advised of their rights to independent legal advice before signing a special needs agreement under section 7.

The committee tentatively recommends:

19. Section 8 of the Child, Family and Community Service Act should be amended to provide that each parent, child (if 12 years of age or over), proposed caregiver under the agreement, and (if the child is an Indigenous child) the child's Indigenous community (if it is going to be a signatory to the agreement) must be advised of their rights to independent legal advice before signing an agreement with child's kin and others under section 8.

Should the British Columbia government develop resources to support legislative provisions regarding independent legal advice?

Brief description of the issue

Legislative provisions regarding independent legal advice may prove to be little more than paper tigers without government support. In the absence of this support, many parents and children will likely find the cost of legal advice to be a complete barrier to obtaining it. But direct support (that is, simply paying for lawyers for parents and children) is expensive and may prove to be a burden on the public child protection system. What should the government be called on to provide that will assist parents and children seeking independent legal advice?

Discussion of options for reform

The committee gave some consideration to options at the extreme ends of the spectrum for this issue. At one extreme, it could be argued that legislation should simply establish the right to independent legal advice and leave it to parents and children to avail themselves of that right. At the other, it could be argued that a legislative provision for independent legal advice on agreements in child protection matters must be supported by public funding of lawyers for parents and children.

Both these views have strengths and weaknesses. Focusing just on the right to independent legal advice could be seen as being consistent with this committee's mandate to consider legislative reform. But it might end up leaving access to that right beyond the reach of the people the right is intended to benefit. Calling for public financing would be an effective way to ensure that the right to legal advice doesn't end up having no practical impact. But it is an expensive option, which could drain off resources needed elsewhere in the child protection system.

Between these two options, there exists a wide range of other options. Less-expensive, targeted methods could be developed to support legislative provisions regarding independent legal advice.

The committee's tentative recommendation for reform

The committee decided to tentatively recommend a range of these methods from the space between the two extreme positions.

In the committee's view, there are existing resources that could be enlisted to support the provision of independent legal advice and legal information. There are also cost-effective ways, using online resources, that could also be developed.

In the committee's view, information and advice should also be made available on safety plans. Safety plans aren't provided for in the Act; they are constituted by ministerial policies. These policies call for informing people about their right to obtain in legal advice, in terms similar to those the committee tentatively recommends for agreements under sections 6, 7, and 8 of the Act.[223]

The committee tentatively recommends:

20. The British Columbia government should develop resources to expand the availability of independent legal advice and legal information for individuals and organizations entering into agreements under sections 6, 7, or 8 of the Child, Family and Community Service Act or safety plans, by programs such as online independent legal advice, independent legal advice by telephone, information about available resources (such as the family law line), a website setting out legal information on sections 6, 7, and 8 of the Act, and a roster of lawyers who provide independent legal advice.

Should the Child, Family and Community Service Act be amended to provide for independent legal advice for a child aged 12 years and older whenever the child is served with an application for an order under the Act?

Brief description of the issue

The *Child, Family and Community Service Act* has a limited scope for providing legal advice to a child. Currently, the Act only addresses this issue in three sections: section 54.01 (regarding a "permanent transfer of custody before continuing custody order"), section 54.1 (regarding a "permanent transfer of custody after continuing custody order"), and section 60 (regarding "consent orders").[224] But there are numerous occasions on which a child may become involved in a court process under

223. See British Columbia, Ministry of Children and Family Development, *Child Protection Response Policies—Chapter 3* (effective July 2014; last revised April 2019), online (pdf) *Government of British Columbia*: <www2.gov.bc.ca/assets/gov/family-and-social-supports/policies/cf_3_child_protection_reponse.pdf>, policy 3.2 at 16 & policy 3.3 at 34 ("[a]ll Safety Plans will . . . [a]dvise the parents of their right to review the safety plan with legal counsel").

224. *Supra* note 1, ss 54.01 (heading), 54.1 (heading), 60 (heading).

the Act. Should the Act be amended to adopt a general provision on legal advice applying to cases in which a child becomes involved in a child protection proceeding?

Discussion of options for reform

This issue for reform raises the prospect of a general provision for independent legal advice for all children (aged 12 years and older) within the legal child protection process. In this respect, it differs from the previous issue, which was narrowly aimed at specific agreements and plans. But the advantages and disadvantages of such legislation are similar to those discussed for the previous issue. Requiring independent legal advice will serve as a safeguard for children's rights. It will also facilitate children's participation in the process, ensuring that they are informed and, where applicable, freely consenting. Finally, it may help to strengthen the integrity of the process as a whole. On the other hand, requiring independent legal advice may add delays and costs to the system.

The committee's tentative recommendations for reform

The committee decided that the Act should have a general provision on independent legal advice for children in court-based child protection proceedings. Such a provision would support children's rights. It may also enhance the conduct of proceedings under the Act.

The committee favoured making service on a child (who is 12 years of age or older) of an application for an order under the Act the entry point to independent legal advice. The committee didn't favour requiring legal advice in all cases. A child may have legitimate reasons for not wanting legal advice. The decision should be in the hands of the child.

The committee also decided that the legal framework for child protection proceedings should support the implementation of this tentative recommendation for legislative reform. In the committee's view, this goal may be achieved by the development of a form that records whether a child has requested or declined independent legal advice.

The committee tentatively recommends:

21. The Child, Family and Community Service Act should be amended to provide that a child (if 12 years of age or over) must be offered independent legal advice whenever the child is served with an application for an order under the Act.

The committee tentatively recommends:

22. A form, to be signed by the child, should be developed that the social worker must complete for children 12 and older confirming whether the child has requested or declined independent legal advice.

Chapter 5. Court Procedures and Orders

Scope of this Chapter

A good deal of the *Child, Family and Community Service Act* is taken up with setting out the procedures for various types of court applications and defining the orders that may result from those procedures. This chapter addresses issues for reform concerning selected court procedures and orders. These issues address a range of topics, from specific orders and procedures under sections 54.01 and 60 of the Act, to adding provisions dealing with misuse of court proceedings, to conferring party status on a child in a child protection proceeding.

Issue for Reform—Consent Orders and the Requirement for Written Consent

Background information on section 60

Purpose of section 60

After noting that section 60 created "a new procedure introduced when the new legislation was proclaimed in 1996," a leading case said that the section's purpose is "provid[ing] a means for parents and the Director to agree to a disposition with respect to children without the necessity of a court hearing" in a "private arrangement between the parents and the Director," which "can be accomplished entirely outside the court process."[225] But on the last point the court immediately gave back some ground on its characterization of the section as creating a procedure "entirely outside the court process." It noted that by 2005 (when this case was decided) a "practice" had started to develop to involve the court in matters under section 60.[226]

225. *B.B. v British Columbia (Director of Child, Family and Community Services)*, 2005 BCCA 46 at para 23, Huddart JA.

226. *Ibid* ("[I]t is probably necessary to file the consents required by the section and an order saying that the parents have consented to a section 60 order and setting out the terms. I say that because it seems to make sense from a procedural point of view, but there is no specific direction in the legislation to that effect. In the Lower Mainland at least, the practice has developed to speak to these matters in court, although I suspect that practice varies in other parts of the province where the public does not have daily access to a court sitting."). See also *Provincial Court (Child, Family and Community Service Act) Rules*, *supra* note 18, Form 11 (Written Consent).

Elements of section 60

While the section is lengthy and complex, it's possible to give an overview of its major elements.

- **What orders may be made?** Section 60 authorizes the making of orders by consent in two subsections. Under subsection (1) the court may "make any custody or supervision order that is provided for in this Part, other than a transfer of custody under section 54.1, but including an order transferring custody of a child under section 54.01 (5) and a continuing custody order."[227] This is a fairly broad range of orders.[228] Under subsection (6) this range is broadened even further, as that provision says that the court may "make any other order mentioned in this Act, including a transfer of custody under section 54.1,"[229] so long as—for that last-mentioned order—the conditions spelled out under subsection (7) are met.[230]
- **Who must give written consent?** Subsection (1) lists the following people who must consent to the order: "(a) the director; (b) the child, if 12 years of age or over; (c) each parent of the child; (d) if the child is to be placed for a specified period in the custody of a person other than a director, that person; (d.1) any person who has been made a party under section 39 (4); (e) if the child is an Indigenous child, the person who is or would have been entitled under section 38 (1) (c), (c.1), (c.2) or (d) to notice of any protection

227. *Supra* note 1, s 60 (1).

228. The breadth of subsection (1) can be appreciated by looking at the definitions of the two orders mentioned in the provision. *Supervision order* is defined under the Act by reference to 13 provisions ("means an order made under section 33.2 (2), 35 (2) (b) or (d), 36 (3) (b) (i), 41 (1) (a) or (b), (1.1) or (2.1), 42.2 (4) (a) or (c), 46 (3), 49 (8) or 54.01 (10) requiring a director to supervise a child's care, and includes any extension of or change to that order"—*ibid*, s 1 (1) "supervision order"). *Custody order* isn't defined, but it would in all likelihood include two types of orders that are defined: *temporary custody order*, which is defined by reference to eight provisions ("means an order made under section 41 (1) (b) or (c), 42.2 (4) (b) or (c), 49 (7) (b) or (c) or 54.01 (9) (b) or (c) placing a child for a specified period in the custody of a director or another person, and includes any extension of or change to that order"—*ibid*, s 1 (1) "temporary custody order"), and *continuing custody order*, which is defined by reference to five provisions ("means an order under section 41 (1) (d), 42.2 (4) (d) or (7) or 49 (4), (5) or (10) (a) placing a child in the continuing custody of a director").

229. *Ibid*, s 60 (6).

230. See *ibid*, s 60 (7) ("An order under subsection (6) to transfer custody under section 54.1 must not be made unless (a) the continuing custody order was made by consent, (b) the time limit under section 81 (2) in relation to the continuing custody order has expired and no extension under section 81 (8) has been granted, or (c) all appeals related to the continuing custody order have been heard and the continuing custody order has been upheld.").

hearing concerning the child."[231] Under subsection (6) the order may be made "with the written consent of the parties."[232]

- **When may a consent order be made?** According to subsection (1) a consent order under section 60 may be made "at any time after a presentation hearing."[233]
- **What can't be assumed from the making of a consent order?** A consent order under section 60 may be made "without the court finding that the child needs protection."[234] In addition, "[a] consent by a parent to an order under this section is not an admission by the parent of any grounds alleged by a director for removing the child."[235]
- **What safeguards does the section have in place?** The section consistently requires *written* consent.[236] The section also calls for the court to be satisfied that certain people on the list of those who must consent have been advised to consult with a lawyer, that they understand the nature and consequences of consent, and that they are voluntarily consenting to the order.[237]
- **What power does the court have to dispense with any of the section's requirements?** The court has the power to "dispense with any consent required under subsections (1) and (6)," so long as "the court considers it in the child's best interests to do so."[238]

231. *Ibid*, s 60 (1).

232. *Ibid*, s 60 (6).

233. *Ibid*, s 60 (1).

234. *Ibid*, s 60 (4).

235. *Ibid*, s 60 (5).

236. See *ibid*, s 60 (1), (6).

237. See *ibid*, s 60 (2) ("Despite any other provision of this Act, the court may make an order under this section without a hearing, the completion of a hearing or the giving of evidence, but it must be satisfied that each person whose consent is required, other than those mentioned in subsection (1) (a) and (e) (a) has been advised to consult with independent legal counsel before signing the consent, (b) understands the nature and consequences of the consent, and (c) has given voluntary consent to the order sought.").

238. *Ibid*, s 60 (3).

Should section 60 of the Child, Family and Community Service Act be amended to enable the court to dispense with the requirement that consent to an order under the section must be in writing?

Brief description of the issue

This issue for reform concerns the last two points in the summary of the elements of section 60. The court has some discretion under the section, but it only extends so far as dispensing with the consent itself. In some cases, a practical issue may arise in connection with one of the safeguards that the section has erected around the written-consent requirement. This safeguard is the written requirement. Sometimes, the people required to consent may be present before the court and may offer consent to an order, but their written consent isn't recorded. Should the court's powers be expanded to encompass the discretion to dispense with the requirement that consent under section 60 must be in writing?

Discussion of options for reform

The first option to consider is proposing an amendment to the Act giving the court the discretion to dispense with the written requirement. This would directly address the practical concern. It would also build in some flexibility to the section.

Such an amendment wouldn't be out of keeping with the legislative history of section 60, which has been amended many times since it was enacted in 1996.[239] An early comment on section 60 described it as a "provision [that] can be the most helpful and the most frustrating aspect of the case conference."[240] Many of the amendments to section 60 have involved either extending a helpful feature or addressing a frustration that had arisen. This proposed amendment would be in line with this aspect of the section's development.

239. See *Child, Family and Community Service Amendment Act, 2018*, SBC 2018, c 27, s 39; *Miscellaneous Statutes Amendment Act (No. 2), 2011*, SBC 2011, c 13, s 25; *Final Agreement Consequential Amendments Act, 2007*, SBC 2007, c 36, s 43; *Community Living Authority Act*, SBC 2004, c 60, s 81; *Child, Family and Community Service Amendment Act, 2002*, SBC 2002, c 21, s 22; *Child, Family and Community Service Amendment Act, 1999*, SBC 1999, c 26, s 25; *Nisga'a Final Agreement Act*, SBC 1999, c 2, s 25.

240. Hon Associate Chief Judge E Dennis Schmidt, "The Child, Family and Community Services Act of British Columbia: Judicial Case Conferences" (March 2001), online (pdf): *Provincial Court of British Columbia* <www.provincialcourt.bc.ca/downloads/pdf/cfcsaarticlejudicialcaseconference.pdf> at 7.

Another option to consider would be to give the court discretion to dispense with the written requirement, but to make that discretion depend on the satisfaction of legislative conditions or to render it subject to guidelines. This approach could be seen as being a more cautious, balanced reform. But the danger is that such conditions or guidelines could make the section more complex and could create their own practical problems.

Finally, it's worth considering whether to endorse remaining with the status quo. It could be argued that the written requirement is an integral safeguard for a provision that was meant to provide an out-of-court mechanism for settling issues.

The committee's tentative recommendation for reform

Even though this issue is small in scale, the committee decided that it should be addressed by legislative reform. The committee was concerned about inconsistencies that have appeared in the case law that considers and applies section 60. In particular, a hard line toward the written requirement has appeared in some cases. In these cases, the written requirement is insisted upon, even when it appears to frustrate the broader goal of section 60 to streamline child protection proceedings. In other cases, the courts have adopted a view that is more consistent with the position in most other areas of civil procedure, which would allow the court to make a consent order if the parties are before the court and all consent, even if the parties themselves don't provide their written consent.[241]

Section 60 does provide that a court may dispense with a person's consent, if it is in the child's best interests to do so.[242] But some courts have taken a strict approach to section 60. This may cause delays, as the matter could be adjourned to allow time to obtain the written consent. And, since it's clearly not possible to force a person to consent to an order, proceeding under section 60 would have to be abandoned in the absence of written consent from one of the people listed.

241. See e.g. *Family Law Act*, *supra* note 28, s 219; British Columbia, *Provincial Court (Family) Rules*, BC Reg 417/98, r 14 (4) ("The parties may seek an order by consent before a judge by providing such evidence of consent as the judge may require."). On 1 June 2020, the provincial government announced that the *Provincial Court (Family) Rules* will be repealed and replaced by the *Provincial Court Family Rules*. For the equivalent provision in the new rules, see British Columbia, *Provincial Court Family Rules*, OIC 287/2020, r 85 ("The parties may consent to an order at any time during a court appearance, providing any evidence that the judge or family justice manager may require." [in force 17 May 2021]).

242. See *supra* note 1, s 60 (3) ("The court may dispense with any consent required under subsections (1) and (6), if the court considers it in the child's best interests to do so.").

In the committee's view, section 60 was never intended as a means of circumscribing the court's discretion to make a consent order. Treating it in this way, by strictly applying the written requirement, has created delays and frustration in practice. It would be helpful to clarify that the court does have the discretion to make a consent order even in the absence of written consent. Without such a clarifying amendment to the section, it will be always be possible for courts to point to the written requirement and insist on strict compliance with it.

The committee tentatively recommends:

23. Section 60 (3) of the Child, Family and Community Service Act should be amended by adding ", including the requirement that consent be in writing," after "dispense with any consent under subsections (1) and (6)."

Issue for Reform—Section 54.01 and Continuing Custody Orders

Background information on section 54.01 and continuing custody orders

Purpose of section 54.01

Section 54.01 deals with the "permanent transfer of custody before continuing custody order."[243] The section was a relatively recent addition to the Act. Its source was an amending Act passed by the legislature in 2011.[244] When this Act was introduced in the legislature, the minister described the section's purpose as "creat[ing] an alternative to bringing children into foster care," something which "will provide continuity and permanency for both children and their caregivers," by "allow[ing] the courts to transfer the permanent legal custody of a vulnerable child who is living with a trusted family member or friend to that person."[245]

243. *Ibid*, s 54.01 (heading).

244. See *Miscellaneous Statutes Amendment Act (No. 2), 2011*, *supra* note 239, s 20.

245. British Columbia, Legislative Assembly, *Hansard*, 39-3, vol 24, no 3 (1 June 2011) at 7755 (Hon Barry Penner, QC) ("Amendments to the Child, Family and Community Service Act will allow the courts to transfer the permanent legal custody of a vulnerable child who is living with a trusted family member or friend to that person. This creates an alternative to bringing children into foster care and will provide continuity and permanency for both children and their caregivers. The amendment also includes safeguards to ensure that permanent transfers only occur when they are in the best interests of the child while ensuring that due process is in place before parental rights are severed.").

Elements of section 54.01

Section 54.01 applies if "a child is in the care or custody of a person other than the child's parent" under either:

- an agreement with the child's kin and others;[246] or
- a temporary custody order.[247]

In these circumstances, "a director may, before the agreement or order expires, apply to the court to permanently transfer custody of the child to that person [i.e., the person with care or custody of the child under the agreement or order]."[248]

The remainder of section 54.01 is lengthy and detailed.[249] It tackles such matters as procedure (for example, who must be served on an application),[250] the legal basis for making an order,[251] and what happens if an order isn't made.[252] Subsection (9) limits the orders that a court can make at a section 54.01 hearing to temporary custody orders or an order for the return of a child to a parent but does not include a continuing custody order.

Definition and purpose of continuing custody order

The Act defines *continuing custody order* as "an order under section 41 (1) (d), 42.2 (4) (d) or (7) or 49 (4), (5) or (10) (a) placing a child in the continuing custody of a director."[253] In an academic article, the order was described as "the main way parents could lose permanent custody of their children . . . under which the Director becomes the sole personal guardian of the child and may consent to the child's adoption."[254]

246. See *supra* note 1, s 54.01 (1) (a) (such an agreement must be "made under section 8").

247. See *ibid*, s 54.01 (1) (b) (such an order must be "made under section 41 (1) (b), 42.2 (4) (c), 49 (7) (b) or subsection (9) (b)" of section 54.01).

248. *Ibid*, s 54.01 (1).

249. See *Family Practice Manual*, *supra* note 16 at §§ 19.102–19.105 (summarizing section 54.01).

250. See *supra* note 1, s 54.01 (2), (3).

251. See *ibid*, s 54.01 (5), (6).

252. See *ibid*, s 54.01 (9), (10).

253. *Ibid*, s 1 (1) "continuing custody order."

254. Mosoff et al, *supra* note 19 at 447 [footnote omitted].

Should the court be able to make a continuing custody order in an application under section 54.01 of the Child, Family and Community Service Act?

Brief description of the issue

If a director applies for a hearing and a parent contests it what may be characterized as a procedural issue arises. There is no ability for the court in these circumstances to make a continuing custody order under section 54.01. The only recourse for the director if the court declines to make a section 54.01 order in favour of the nominated party but does not find the child should be returned to the parent is to initiate a new application for a continuing custody order, which would require a new hearing. Should the reach of section 54.01 be extended to allow the court to make a continuing custody order as one of the available outcomes of the section's procedure?

Discussion of options for reform

From a policy point of view, this issue appears to be black and white. The first option to consider is whether to propose amending section 54.01 to give the court the power to make a continuing custody order under the section. The rationale for such an amendment would be to improve the functioning of the section, by cutting down the prospect of a multiplicity of proceedings to deal with a single child protection case. Such a change should also enhance the usefulness of the section, by dispelling inhibitions with proceeding under it because it could result in the need to start a new process for a different hearing.

The other option would be to retain the status quo for section 54.01. An argument could be made that the section was designed for a limited purpose, and it should remain focused on that purpose. Adding the power to make a continuing custody order could be seen to dilute that purpose.

The committee's tentative recommendation for reform

The committee noted that section 54.01 appears to cause duplication of proceedings in some cases. It favoured an amendment to the section to allay this problem.

In practice section 54.01 is only used when the parents have had the opportunity to address the child protection concerns for an extended time, and those concerns haven't been resolved. To take an example discussed by the committee: consider a hypothetical hearing under section 54.01 in which the director was proposing a permanent transfer of custody to the child's aunt and the parents opposed the application. What happens if it becomes clear in the hearing that it isn't appropriate for the

court to make the order transferring custody to the aunt? Say, for instance, that the aunt made a bad impression in the hearing, or the parties led evidence that caused the court to be concerned about the aunt. The court's options would then be limited to the three options set out in subsection (9).[255] These options may be sufficient in some cases, but in others they create frustration. The child may be the subject of lengthy temporary custody orders to allow the parent to work on personal issues, but no progress on those issues has been made. So, even though the court doesn't want to make an order permanently transferring custody to the third party, it also doesn't want to order the child returned to the parent. So another temporary custody order gets made. Giving the court the discretion under section 54.01 to make a continuing custody order should help to address these concerns.

The committee did have concerns that policy and practice under an amended section 54.01 might have to evolve in response to the amendment. In particular, it would have to address a perhaps unexpected move of the child from a long-term placement as a result of a continuing custody order made under section 54.01.

The committee tentatively recommends:

24. Section 54.01 (9) of the Child, Family and Community Service Act should be amended to add a new paragraph (d) that provides that a child be placed in the continuing custody of the director, provided that the test under section 49 (5) is met.

Issues for Reform—Section 54.01 and Parental Rights

Background information on section 54.01 and parental rights

Section 54.01

The purpose and elements of section 54.01 were discussed earlier in this chapter.[256] Here, it's worth noting only that the section lacks a provision setting out the effect of

255. See *supra* note 1, s 54.01 (9) ("If, with respect to a child who is the subject of a temporary custody order referred to in subsection (1) (b), the court does not make an order under subsection (5), the court must make one of the following orders: (a) that the child be returned to the custody of the parent apparently entitled to custody; (b) that the child remain in the temporary custody of the person other than the parent for a specified period of up to 6 months, but not beyond the period permitted under section 45; (c) that the child be placed in the custody of the director for a specified period of up to 6 months, but not beyond the period permitted under section 45.").

256. See, above, at 80–81.

the order on parental rights. In fact, apart from using the word *permanently*,[257] section 54.01 doesn't contain any language characterizing the effect of an order under this section.

Section 54.2

The effect of an order under section 54.01 is spelled out in a later section of the Act. This section is section 54.2. Even though that section is detailed, it can be boiled down to one provision that should be paid particular heed for this issue for reform: "[w]hen an order is made transferring custody of a child under section 54.01 (5) or 54.1, the individual to whom custody is transferred becomes the child's guardian."[258] Section 54.2 doesn't expressly state what effect the order has on parental rights.

Case law

There are no cases directly on point for this issue. That is, there are no cases focused on the issue of whether an order under section 54.01 terminates parental rights. Casting the net a little more broadly, one court has commented on the effect of an order under section 54.01 in an application to determine guardianship under the *Family Law Act*.[259] In considering the best interests of the child, the court noted that this case had been marked by the parties' "differing perceptions" of the permanence

257. See *supra* note 1, s 54.01 (1).

258. See *ibid*, s 54.2 (1) (a). The full text of section 54.2 reads as follows: "(1) When an order is made transferring custody of a child under section 54.01 (5) or 54.1, (a) the individual to whom custody is transferred becomes the child's guardian, and (b) the order does not affect the child's rights respecting inheritance or succession to property. (2) A custody order made under section 54.01 (5) or 54.1 is not (a) enforceable under this Act, and (b) capable of being confirmed, modified or cancelled under this Act. (2.1) On custody of a child being transferred under section 54.01 (5), an order under section 57.01 permitting access to the child automatically (a) becomes an access order that is solely between the person who is granted custody and the person who is granted access under that order, and (b) ceases to be an access order that is capable of being confirmed, modified or cancelled under this Act. (3) On custody of a child being transferred under section 54.1, an order under section 56 permitting access to the child, including any changes to that order, automatically (a) becomes an access order that is solely between the person who is granted custody and the person who is granted access under that order, and (b) ceases to be an access order that is capable of being confirmed, modified or cancelled under this Act. (4) The director must send to the Public Guardian and Trustee a copy of an order transferring custody of a child to a person other than a parent if (a) the order is made under section 54.01 (5) and the Public Guardian and Trustee is the child's property guardian under section 58 at the time the order is made, or (b) the order is made under section 54.1."

259. *F.E. v S.E.V.*, 2016 BCPC 108.

of an earlier order under section 54.01.[260] This case could be seen as an example of confusion flowing from the lack of a clear legislative provision on the effect of an order under section 54.01. Since the result of this case was that the "application for guardianship should succeed and [the respondent's] guardianship [under the section 54.01 order] should be cancelled,"[261] the case could be viewed as showing that courts interpret the legislation as not terminating parental rights. But it could also be read as a one-off case that reflects its own unusual set of facts.[262]

There has been no significant judicial comment on section 54.2.[263]

Should the Child, Family and Community Service Act be amended to clarify whether parental rights are terminated on the making of an order under section 54.01?

Brief description of the issue

The absence of a provision in section 54.2 setting out the effect of an order under section 54.01 on parental rights can be seen as a gap in this legislation. This gap is causing problems in giving advice to potential caregivers. Should the legislation be amended to add a provision to section 54.2 that clearly states what the effect of an order under section 54.01 is on parental rights?

260. *Ibid* at para 22, Brooks Prov Ct J ("At this point, however, it is important to note the differing perceptions of the s.54.01 order. To S.E.V. the order provided a 'forever' home for C.R. To her, the obligation of access contained in the September order now became a matter of her discretion. For her, this order created a very different relationship with F.E. For F.E. the order created a very different framework from that perceived by S.E.V. Most importantly, F.E. understood that S.E.V.'s home was not a permanent home and that C.R. would be reunited with his mother sooner rather than later. I mention these different perceptions of the March 2014 order as they contribute to what happened thereafter. Their actions reflected what each party took as the order's intention and what they themselves wanted to achieve. As will be seen, I am satisfied that those actions did not protect C.R.'s best interests.").

261. *Ibid* at para 104.

262. See e.g. *ibid* at paras 18, 56 (order characterized by social worker as having "very rare" access provisions); 35, 38 (criticism of the parties' credibility).

263. The section is noted in a score of judgments that cite—and quote—section 59 of the *Family Law Act*, *supra* note 28, or its predecessor (*Family Relations Act*, *supra* note 35, s 35 [repealed]), both of which contain a reference to an "access order referred to in section 54.2 (2.1) or (3) of the *Child, Family and Community Service Act*."

Discussion of options for reform

At the highest level there are two clear options for this issue: either propose amending section 54.2 to add a provision expressly addressing the effect of an order under section 54.01, or propose retaining the status quo.

There may be advantages to the current wording of section 54.2, which doesn't address the effect of an order under section 54.01 on parental rights. This may be the best approach, if questions involving parental rights vary with the circumstances of each case. By not pronouncing on the effect that an order under section 54.01 has on parental rights, the legislation may effectively be clearing out a space for the courts to resolve this issue, case by case. The absence of a legislative provision on point might be giving the law the flexibility it needs to deal with significantly varying cases.

But, on the other hand, the absence of legislation could be creating confusion and uncertainty. Proposing legislation would address these concerns and clarify the law.

But taking this approach could open up a range of other questions for consideration. Should the legislation contain a simple and direct declaration that an order under section 54.01 has effect of terminating parental rights? Should a more complex provision be proposed, one which would place some conditions on terminating parental rights? Or should the proposed provision be one that attempts to strike a balance between the permanent nature of the order and parental rights?

The committee's tentative recommendation for reform

The committee decided that the Act should be amended to clarify the effect of an order under section 54.01.

The committee understands that when section 54.01 was enacted, there were different views on whether an order to permanently transfer custody under that section effectively terminated parental rights. Some people thought that it did; others said that the order simply added another person as a guardian, meaning that the parents remained at least in some aspects the child's guardians. Section 54.01 didn't set out the effect of the order, so this difference in views persisted. Eventually, section 54.2 was enacted to deal with the effect of a permanent transfer of custody under section 54.01 (and section 54.1). But the relevant provision of section 54.2 only refers to the person "becoming the child's guardian."[264] It doesn't use the word *sole* to

264. *Supra* note 1, s 54.2 (1) ("When an order is made transferring custody of a child under section 54.01 (5) or 54.1, (a) the individual to whom custody is transferred becomes the child's guardian, and (b) the order does not affect the child's rights respecting inheritance or succession

modify guardian. So some doubts persist about the effect of an order under section 54.01.

It should be noted that the same confusion does not attach to orders made under section 54.1. Section 54.1 orders follow the making of a continuing custody order. Section 50 (1) (a) clearly states that when a continuing custody order is made the director becomes the sole personal guardian of the child and may consent to the child's adoption.

In the committee's view, these doubts could easily lead to confusion in practice. The simplest way to circumvent this confusion is to amend section 54.2 (which sets out the effect of an order under section 54.01) to make it clear that an order under section 54.01 renders a person the child's sole guardian.

The committee tentatively recommends:

25. Section 54.2 (1) (a) of the Child, Family and Community Service Act should be amended by adding "sole" between "child's" and "guardian."

Should the Child, Family and Community Service Act be amended to provide that an order under a section (other than section 54.2) transferring guardianship of a child to a third party has the effect of transferring sole guardianship of the child?

Brief description of the issue

This issue for reform follows upon the previous issue. In addition to orders under section 54.01, there is a long list of provisions in the Act that have the effect of transferring guardianship of a child to someone who isn't a director or the child's parent.[265] Should any or all of these provisions be amended to make it clear that the third party becomes a child's sole guardian by virtue of the order?

Discussion of options for reform

There is potentially a wide range of options to consider for this issue.

to property.").

265. See *ibid*, ss 35 (2) (d), 41 (1) (b), 42.1 (6) (b) (i), 42.2 (3) (a), 42.2 (4) (a) (i), 42.2 (4) (c), 49 (7) (b), 54.1 (1).

At one end, there are proposed amendments to each of the provisions, which would declare that orders under those provisions result in sole guardianship.[266] The main rationale for proposing such amendments would be to clarify the law.

At the other end of this range, there is retaining the status quo across the board. This proposal may be justified if the current law is working well, or if there is a sense that declaring in legislation that a third party has sole guardianship under the orders found in the above-noted sections would be going too far.

Between these two ends of the range, there are proposals that a provision declaring the third party to have sole guardianship would be appropriate for some of these sections but not for others.

The committee's tentative recommendation for reform

The committee noted that all of the sections considered within the ambit of this issue (with the exception of section 54.1) deal with interim or temporary guardianship. This quality sets these sections apart from section 54.01, which was discussed in the previous issue. In the committee's view, this difference justified not making amendments to the legislation to address this issue.

The committee tentatively recommends:

26. The Child, Family and Community Service Act should not be amended to provide that an order under a section (other than section 54.2 (1) (a)) transferring guardianship of a child to a person who is not the child's parent or the director has the effect of transferring sole guardianship of the child.

266. See, for an example of such a declarative provision, *ibid*, s 50 (1) (a) and (b) ("[w]hen an order is made placing a child in the continuing custody of a director, (a) the director becomes the sole personal guardian of the child and may consent to the child's adoption, (b) the Public Guardian and Trustee becomes the sole property guardian of the child").

Issue for Reform—Misuse of Court Processes, Orders Respecting Conduct, and Vexatious Proceedings

Background information

Baseline legislation on vexatious proceedings in civil courts

The *Supreme Court Act*[267] contains a provision on vexatious proceedings that applies generally to civil litigation in British Columbia—whether the proceedings are in the supreme court or the provincial court. This section is engaged if "the court is satisfied that a person has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court against the same or different persons."[268]

If an applicant to the court meets this test, then "the court may, after hearing that person [i.e., the person under scrutiny as a vexatious litigant] or giving him or her an opportunity to be heard, order that a legal proceeding must not, without leave of the court, be instituted by that person in any court."[269]

This section has been applied in proceedings involving the *Child, Family and Community Service Act*.[270] As one judge has explained, the purpose of this section is to give "the Court the ability to control its own process to prevent the abuse of that process by a litigant repetitively bringing unmeritorious proceedings that result in the needless expenditure of judicial resources and cause unnecessary expense to other parties."[271]

Because an order under this section sharply limits a person's rights, many judges have made the point that "the power to limit access to the courts is one to be used sparingly and only in the clearest of cases."[272]

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267. RSBC 1996, c 443.

268. *Ibid*, s 18.

269. *Ibid*, s 18.

270. See *Harrison v Gunn*, 2016 BCSC 1980 [*Harrison* SC]. See also *Harrison v British Columbia* (24 February 2016), Vancouver CA41710 (BCCA) (court applying s 29 of the *Court of Appeal Act*, RSBC 1996, c 77—equivalent rule for proceedings in the court of appeal—cited in *Harrison* SC, *supra* note 270, at para 56).

271. *Dawson v Dawson*, 2014 BCCA 44 at para 17.

272. *Houweling Nurseries Ltd v Houweling*, 2010 BCCA 315 at para 44, Frankel JA.

Special provisions in the Family Law Act

The *Family Law Act* has two sets of special provisions that deal with misconduct in family-law litigation. The first applies to misuse of court process (section 221). The second empowers the court to make orders respecting a litigant's conduct (part 10, division 5). These special provisions apply in addition to section 18 of the *Supreme Court Act*.

Purpose of section dealing with misuse of court process

Section 221 "was new to the *FLA*, and had no analogous predecessor in the [*Family Relations Act*]."[273] The section "permits the court to issue an order prohibiting a litigant from making further applications or continuing a proceeding if satisfied that the litigant has brought a trivial application, has conducted the proceedings in a manner that is a misuse of the court process, or has otherwise frustrated or misused the court process," so long as the order does "not impinge on the best interests of the children."[274]

One judge has summed up the goal of section 221 as follows: "[i]t appears that the legislature, because of tendency of family litigation to involve heightened levels of conflict, intended to provide 'broader' tools to the courts under the *FLA* than had previously been available. That is, s. 221 is engaged by a wider scope of conduct than the vexatious litigant regime, though the relief available under s. 221 is more limited."[275]

Elements of section dealing with misuse of court process

The "wider scope of conduct" that section 221 embraces is shown in the three elements that form the basis of a remedy under this section. These elements entail the court being satisfied "that the party (a) has made an application that is trivial, (b) is conducting a proceeding in a manner that is a misuse of the court process, or (c) is otherwise acting in a manner that frustrates or misuses the court process."[276]

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273. *Williams v Williams*, 2015 BCSC 928 at para 138 [*Williams*], Punnett J.

274. *Ibid* at para 137.

275. *Ibid* at para 143 (quoting *Dawson v Dawson*, 2014 BCSC 44 at para 26).

276. *Supra* note 28, s 221 (1). Compare this language with the operative part of section 18 of the *Supreme Court Act*, *supra* note 267, which requires showing to the satisfaction of the court that the litigant "has habitually, persistently and without reasonable grounds, instituted vexatious legal proceedings in the Supreme Court or in the Provincial Court."

If the court determines that at least one of these three elements is present, then section 221 provides a remedy that's similar to the one provided by section 18 of the *Supreme Court Act*: the court "may make an order prohibiting a party from making further applications or continuing a proceeding without leave of the court."[277] But section 221 differs from section 18 by going on to spell out specific powers for the court to attach time limits, impose terms and conditions, and require the payment of costs and fines in relation to this order.[278]

Purpose of division setting out orders respecting conduct

Orders respecting conduct are the subject of an entire division of the *Family Law Act*, comprising seven sections.[279] As the ministry of attorney general has noted, "[t]his Division provides a court with a wide range of tools to help judges manage behaviour, deescalate tensions, promote compliance, and facilitate the settlement of disputes."[280] Orders respecting conduct are intended to "allow a judge to tailor processes to the needs of a particular family," by choosing from "a collection of tools and remedies that range from preventive measures, such as sending people to counselling or programs to punitive measures, such as fines or payment of expenses to encourage compliance."[281]

Elements of division setting out orders respecting conduct

The division provides for specific types of orders, respecting (1) case management,[282] (2) dispute resolution, counselling, and programs,[283] (3) communica-

277. *Supra* note 28, s 211 (1). Compare with "order that a legal proceeding must not, without leave of the court, be instituted by that person in any court" (*Supreme Court Act*, *supra* note 267, s 18).

278. See *supra* note 28, s 211 (2) ("If an order is made under subsection (1), the court may do one or more of the following: (a) make the order apply (i) for a specified period of time, or (ii) until the party has complied with an order made under this Act; (b) impose any terms and conditions respecting the granting of leave to make further applications or to continue a proceeding; (c) require the party to pay (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution, (ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or (iii) a fine not exceeding $5 000.").

279. See *ibid*, ss 222–228.

280. *Family Law Act Transition Guide*, *supra* note 79 at part 10, division 5.

281. *Ibid*.

282. See *supra* note 28, s 223.

283. See *ibid*, s 224.

tions,[284] (4) residence,[285] and (5) conduct.[286] The division concludes with a section setting out enforcement options for these orders.[287] The division authorizes the court to "make an order under this Division for one or more of the following purposes":

> (a) to facilitate the settlement of a family law dispute or of an issue that may become the subject of a family law dispute;
>
> (b) to manage behaviours that might frustrate the resolution of a family law dispute by an agreement or order;
>
> (c) to prevent misuse of the court process;
>
> (d) to facilitate arrangements pending final determination of a family law dispute.[288]

Should the Child, Family and Community Service Act be amended to incorporate provisions modelled on provisions in the Family Law Act regarding misuse of court process and orders respecting conduct?

Brief description of the issue

Special provisions were developed to curb misconduct in family-law litigation in view of problems that have arisen in that area of litigation. Do similar considerations apply to litigation under the *Child, Family and Community Service Act*, such that amendments to this Act would be appropriate to give the court similar powers for litigation under this Act?

Discussion of options for reform

The two main options to consider for this issue are (1) proposing to amend the *Child, Family and Community Service Act* to incorporate provisions dealing with misuse of court process and the conduct of litigation modelled on those found in the *Family Law Act* or (2) proposing to retain the status quo, which relies on section 18 of the *Supreme Court Act* for all its tools to deal with vexatious litigants.

284. See *ibid*, s 225.

285. See *ibid*, s 226.

286. See *ibid*, s 227.

287. See *ibid*, s 228.

288. *Ibid*, s 222.

These provisions from the *Family Law Act* may have several advantages. In comparison to section 18 of the *Supreme Court Act*, these provisions from the *Family Law Act* apply to a wider range of conduct. They also allow the court to craft remedies that are less harsh than the single remedy provided for under section 18. These qualities should give the court more control over the process and more scope to intervene before problems become intractable.

On the other hand, a case could be made that the status quo is the more appropriate option. The *Family Law Act*'s provisions were developed, as a leading case has put it, "because of tendency of family litigation to involve heightened levels of conflict."[289] In other words, there may be unique qualities of family-law litigation that don't translate to child protection proceedings. In the absence of these qualities, it could be seen to be inappropriate to incorporate legislation developed for a special purpose to a different area of the law.

Between these two options, it is possible to propose that some aspects of the *Family Law Act*'s provisions be adopted for the *Child, Family and Community Service Act*, while other aspects are left out.

The committee's tentative recommendation for reform

Even though there are child protection litigants who have displayed the kind of behaviour that the *Family Law Act*'s provisions were aimed at (filing application after application, for example), the committee didn't favour adopting the *Family Law Act*'s provisions on misuse of court process and orders respecting conduct in the *Child, Family and Community Service Act*.

The committee noted that realistically, these would only apply to parents. This is because parents already have a remedy against the director under the *Judicial Review Procedure Act*.[290] The committee had concerns about the power imbalance between the director and parents in child protection proceedings, and the potential for these provisions to exacerbate that power imbalance.

In the committee's view, the high test that the courts apply for a remedy under section 18 of the *Supreme Court Act* is appropriate for child protection proceedings.

289. *Williams*, *supra* note 273 at para 143.

290. RSBC 1996, c 241.

The committee tentatively recommends:

27. The Child, Family and Community Service Act should not be amended to adopt provisions modelled on the sections of the Family Law Act dealing with misuse of court process and orders respecting conduct.

Issue for Reform—Party Status for Children

Background information

Common approach to serving documents and naming parties

The provisions of the *Child, Family and Community Service Act* that deal with serving documents and parties to proceedings follow a consistent pattern. First, a subsection sets out a list of people on whom specified documents must be served. Second, another subsection provides that selected people on that list of people who must be served documents are "entitled to be a party at a hearing," so long as the person "appears at the commencement of the hearing."[291]

Sections that include children as parties to a proceeding

Only one section in the Act includes a child in the list of people who are considered parties to the proceeding. This is a section dealing with applications to court for a child who requires necessary health care.[292] The child in this case must be mature enough to be "capable of consenting to health care."[293]

Sections that don't include children as parties to a proceeding

All other sections include a child, "if 12 years of age or over," on the list of people who must be served documents, but a child is not considered a party to the hearing. These sections are the following:

291. See e.g. *supra* note 1, s 28 (2), (2.2).

292. See *ibid*, 29 (1)–(2.1) ("(1)If a child or a parent of a child refuses to give consent to health care that, in the opinion of 2 medical practitioners, is necessary to preserve the child's life or to prevent serious or permanent impairment of the child's health, a director may apply to the court for an order under this section. (2) At least 2 days before the date set for hearing the application, notice of the time, date and place of the hearing must be served on (a) each parent, (b) the child, if capable of consenting to health care, and (c) any other person the court directs. (2.1) If a person referred to in subsection (2) (a) or (b) appears at the commencement of the hearing, that person is entitled to be a party at the hearing.").

293. *Ibid*, s 29 (2) (b).

- section 28 (2) (b), (2.2)—child who needs to be protected from contact with someone;
- section 33.1 (2) (a), (6)—timing and notice of presentation hearing about application for supervision order;
- section 34 (3) (a), (4)—duty to attend and inform others of presentation hearing;
- sections 38 (1) (a), 39 (1)—notice of protection hearing; parties to proceeding;
- section 42.2 (1) (a), (2)—subsequent hearing about enforcement of supervision order;
- section 44 (2) (a), (2.1)—extension of supervision orders and temporary orders;
- section 44.1 (2) (a), (2.1)—extension of temporary custody order if permanent transfer of custody planned;
- section 46 (2) (a), (2.1)—supervision of child after temporary custody order ends;
- section 49 (2) (a), (3)—continuing custody hearing and orders;
- section 54 (2) (a), (2.1)—cancellation of continuing custody order;
- section 54.01 (3) (a), (4)—permanent transfer of custody before continuing custody order;
- section 54.1 (2) (b), (2.1)—permanent transfer of custody after continuing custody order;
- section 55 (3) (a), (3.1)—access to child in interim or temporary custody of director or other person;
- section 56 (2) (a), (2.1)—access to child in continuing custody of director;
- section 57 (2) (a), (2.1)—changes to supervision, temporary custody and access orders;
- section 57.01 (2) (a), (2.1)—access orders if application made under section 54.01;
- section 57.1 (2) (a), (2.1)—access orders if application made under section 54.1;
- section 58 (2) (b)—if child needs assistance of Public Guardian and Trustee;
- section 59 (2) (b), (2.1)—psychiatric or medical examination orders.

The closest thing on this list to a general provision on parties to child protection proceedings is section 39.[294] Section 39 is the only section in the Act that has parties to a proceeding as its sole subject, but it doesn't apply across the board. The bulk of the section is directed at a "protection hearing."[295] That said, section 39 does contain a provision empowering the court to "order that a person be a party at *any* hearing."[296] This provision has been used to make a child a party to child protection proceedings. But courts have said that "[t]his discretion, according to the scheme of the whole section, should only be used sparingly and, I conclude, only if the matter before the court demands it for the proper resolution of the issues under consideration."[297]

Significance of being a party

A *party* is "[o]ne by or against whom a lawsuit is brought; anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment."[298] In addition to these general concerns for parties to civil litigation, there is a specific point relevant to children in child protection proceedings that should be borne in mind while considering this issue. This

294. See *Director v M.L.*, 2005 BCPC 77 at para 44, Raven Prov Ct J.

295. *Supra* note 1, s 39 ("(1) If the following persons appear at the commencement of the protection hearing, they are entitled to be parties at the hearing: (a) each parent of the child; (b) the director; (c) if the child is an Indigenous child, other than a Nisga'a child or a Treaty First Nation child, the designated representative of the First Nation or other Indigenous community who was served with notice of the hearing; (d) if the child is a Nisga'a child, the designated representative of the Nisga'a Lisims Government who was served with notice of the hearing; (d.1) if the child is a Treaty First Nation child, the designated representative of the Treaty First Nation who was served with notice of the hearing; (e) a person who has an interim order for custody of the child under section 35 (2) (d). (2) If a person referred to in subsection (1) (a), (b), (c), (d) or (d.1) appears at the commencement of a protection hearing or a person becomes a party under subsection (4), that person is entitled (a)to notice of a hearing under section 42.1, 42.2, 44, 44.1, 46, 49, 55, 57 or 58 relating to the child, and (b) if the person appears at the commencement of the hearing, to be a party at that hearing. (3) If the court orders under section 41 (1) (b) that the child be placed in the custody of a person other than the parent or a director, that person is entitled (a) to notice of a hearing under section 42.1, 42.2, 44, 44.1, 46, 49, 54.01, 55, 57 or 58 relating to the child, and (b) if the person appears at the commencement of the hearing, to be a party at that hearing. (4) The court may order that a person be a party at any hearing.").

296. *Ibid*, s 39 (4) [emphasis added].

297. *J.L. v British Columbia (Director of Child, Family & Community Service Act)*, 2001 BCSC 1604 at para 10, Hutchinson J. See also *Director v G.M.B.*, 2016 BCPC 54 at paras 29–30, Wright Prov Ct J.

298. Bryan A Garner et al, eds, *Black's Law Dictionary*, 11th ed (St Paul: Thomson Reuters, 2019) sub verbo "party."

specific point is that "[t]he Attorney General will appoint counsel for children who are made parties to a proceeding."[299]

Should the Child, Family and Community Service Act be amended to make a child who has been served with court documents in a child protection proceeding automatically a party in that proceeding?

Brief description of the issue

The *Child, Family and Community Service Act* contains a large number of provisions that declare people to be parties to specific court proceedings under the Act. In the vast majority of these provisions, children (if 12 years of age or older) are required to be served documents in the proceedings but are not parties to the proceeding. Since having the status of a party has implications for a child's role in the proceedings and for access to a lawyer, should these provisions, or some of them, be amended to provide that a child (if 12 years of age or older) is entitled to be a party to the proceeding?

Discussion of options for reform

The options to address this issue range from systematically amending all the listed provisions to add language making children parties to child protection proceedings to proposing to amend only some of the listed provisions to supporting the status quo.

The main advantage to amending the legislation and adding children as parties to child protection proceedings is that it ensures children's voices are heard in those proceedings. Arguably, giving children the status of parties is the strongest possible way to achieve that outcome, as party status gives a person some measure of control

299. Law Society of British Columbia, "Practice Checklists Manual: *Child, Family and Community Service Act* Procedure" (1 September 2018), online (pdf): *Law Society of British Columbia* <www.lawsociety.bc.ca/Website/media/Shared/docs/practice/checklists/D-6.pdf> ["*Child, Family and Community Service Act* Practice Checklists"] at para 7.10 ("The Attorney General will appoint counsel for children who are made parties to a proceeding. The criteria the Attorney General normally requires to consent to an order that a child be made a party are that the child's views cannot be adequately represented by counsel for the parent(s) or counsel for the director, and that the child wishes to be made a party to the proceeding. Counsel should discuss making an application to have a child made a party with director's counsel before the application is made, but the application can be made over the objection of the director. The Attorney General will sometimes deny counsel for children when the child is consenting to the order sought by the director.").

over the proceeding. Party status for children would also have to go hand in hand with legal representation, which would give children a valuable safeguard for their rights in child protection proceedings.

The downside of amending the legislation is that it would put in place an idea that doesn't have much of a track record and that could add significant administrative and financial costs to the child protection system. As a commentator has noted, "[i]n most instances of CLR [children's legal representation], the child does not have party status."[300] There may be more limited tools that achieve results for children without imposing added costs and uncertainty.

The committee's tentative recommendations for reform

The committee favoured a middle approach to this issue, one that would fall between automatically making children a party to child protection proceedings and retaining the status quo.

While children value participation in proceedings, having their views taken seriously by decision-makers, and legal representation (topics that will all be addressed later in this consultation paper),[301] party status goes well beyond these concerns. Party status requires a person to be an active player in litigation. Many children do not want to play this role. This reluctance is reflected in child protection legislation across the country, which contains few examples of legislative provisions that automatically make children parties to a child protection proceeding.[302]

That said, the committee decided that there are ways to improve the status quo. A provision could be added to section 39 to deal substantively with the special case of a child applying to the court to become a party.

In discussing this issue, the committee noted that section 39 (like many other provisions in the Act) relies on an age cut-off. The committee noted that these references to a child's age function as proxies for assessing a child's capacity to participate as a

300. Canadian Bar Association, "Children's Legal Representation" (last visited 26 November 2019), online: *Canadian Bar Association* <www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Legal-Representation-of-Children>.

301. See, below, at 119–131 (child's views), 133–147 (legal representation).

302. Notably, new federal legislation doesn't automatically confer party status on children. See Federal Act, *supra* note 3, s 13 ("In the context of a civil proceeding in respect of the provision of child and family services in relation to an Indigenous child, (a) the child's parent and the care provider have the right to make representations and to have party status; and (b) the Indigenous governing body acting on behalf of the Indigenous group, community or people to which the child belongs has the right to make representations.").

party. This approach is open to question, as it excludes mature children, who don't meet the age cut-off but who may have the capacity to benefit from this legislative provision. A better approach might be to carry out individual assessment of a child's mental capacity, coupled with a legislative presumption of capacity. That said, the committee was aware that this issue was outside its mandate. It felt constrained to accommodate its tentative recommendation within the terms of the statute on this point. But further study of this issue (by an organization that has the mandate to directly take it on) would be welcome.

The committee tentatively recommends:

28. Section 39 of the Child, Family and Community Service Act should be amended to add a new subsection (2.1) that reads as follows: "A child, if 12 years of age or older, who appears at the commencement of a hearing is entitled to be a party, subject to the court's discretion."

In addition to proposing legislative reform, the committee decided that there were changes to practice that could help support its proposed new legislative provision. This support would come from the development of a new form, which could be used to record the child's views on applying to become a party to a child protection proceeding.

The committee tentatively recommends:

29. A form should be developed for use by lawyers who give independent legal advice, which requires the lawyer to confirm whether or not the child wishes to be a party to a hearing.

The committee tentatively recommends:

30. The lawyer who gives independent legal advice to a child should provide to the social worker the new form that records whether or not a child wants to be a party, to be maintained on the child's file, and made available to be filed with the court at the request of the child or any other party.

Chapter 6. Selected Protection Issues

Scope of this Chapter

Section 13 of the *Child, Family and Community Service Act* sets out a list of "circumstances" in which "[a] child needs protection."[303] There are 12 separate grounds for protection on this list. These grounds for protection cover a number of harms to children: from physical harm and sexual abuse and exploitation, to emotional harm, to neglect and deprivation, to abandonment, to other forms of harm.[304]

This chapter contains four issues for reform that focus on selected aspects of these grounds for protection and related areas of the Act. It begins by looking closely at one of the grounds for protection, the ground relating to emotional harm. After examining issues arising from this ground, the chapter broadens its scope. It considers the adoption of a requirement for regular reassessments before decisions are made on whether a child should remain in protective care. Then it examines whether the

303. *Supra* note 1, s 13 (1).

304. See *ibid*, s 13 ("(1) A child needs protection in the following circumstances: (a) if the child has been, or is likely to be, physically harmed by the child's parent; (b) if the child has been, or is likely to be, sexually abused or exploited by the child's parent; (c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person and if the child's parent is unwilling or unable to protect the child; (d) if the child has been, or is likely to be, physically harmed because of neglect by the child's parent; (e) if the child is emotionally harmed by (i) the parent's conduct, or (ii) living in a situation where there is domestic violence by or towards a person with whom the child resides; (f) if the child is deprived of necessary health care; (g) if the child's development is likely to be seriously impaired by a treatable condition and the child's parent refuses to provide or consent to treatment; (h) if the child's parent is unable or unwilling to care for the child and has not made adequate provision for the child's care; (i) if the child is or has been absent from home in circumstances that endanger the child's safety or well-being; (j) if the child's parent is dead and adequate provision has not been made for the child's care; (k) if the child has been abandoned and adequate provision has not been made for the child's care; (l) if the child is in the care of a director or another person by agreement and the child's parent is unwilling or unable to resume care when the agreement is no longer in force. (1.1) For the purpose of subsection (1) (b) and (c) but without limiting the meaning of 'sexually abused' or 'sexually exploited,' a child has been or is likely to be sexually abused or sexually exploited if the child has been, or is likely to be, (a) encouraged or helped to engage in prostitution, or (b) coerced or inveigled into engaging in prostitution. (1.2) For the purpose of subsection (1) (a) and (c) but without limiting the circumstances that may increase the likelihood of physical harm to a child, the likelihood of physical harm to a child increases when the child is living in a situation where there is domestic violence by or towards a person with whom the child resides. (2) For the purpose of subsection (1) (e), a child is emotionally harmed if the child demonstrates severe (a) anxiety, (b) depression, (c) withdrawal, or (d) self-destructive or aggressive behaviour.").

Act should adopt new legislative provisions promoting contact between children and their parents, siblings, and other extended-family members.

Issues for Reform—Emotional Harm and Violence

Background information on the ground of protection relating to emotional harm

There are three special features of the ground for protection relating to emotional harm that set it apart from the other grounds for protection in section 13 that address harms: (1) the bifurcated nature of the ground, which causes it to address both the parent's conduct and what the Act calls domestic violence;[305] (2) its focus on past and current events to the exclusion of the risk of future harm; (3) its relation to another provision in section 13, which defines the scope of this ground for protection by requiring that the harm produce certain, listed effects in the child in order for it to be considered emotional harm.

Parent's conduct and domestic violence

The grounds for protection in section 13 (1) of the *Child, Family and Community Service Act* are set out in a list of what a legislative drafter would call paragraphs. The ground for protection relating to emotional harm—paragraph (e) on the list—is the only paragraph that divides into to two subparagraphs.

These two subparagraphs track two distinct ways in which a child may be emotionally harmed. The first subparagraph lists "the parent's conduct" as the cause of the harm. The second lists emotional harm to the child caused by "living in a situation where there is domestic violence by or towards a person with whom the child resides."

Past events and risk of future harm

There are five grounds for protection that refer to a child being harmed. They make up the first five paragraphs of section 13 (1).

Four of these grounds for protection cover both past events and the risk of future harm. This is clear from the language of the paragraphs that set out the grounds,

305. See, above, at 39–48 (discussion of the Act's use of the term domestic violence and tentative recommendations to replace the term).

which all use the formulation *has been, or is likely to be* (e.g., "the child has been, or is likely to be, physically harmed by the child's parent").[306]

In contrast, the ground for protection relating to emotional harm simply uses the verb *is* ("the child is emotionally harmed by . . ."). [307] This present-tense verb has been interpreted as restricting the scope of this ground for protection to past and present instances of emotional harm. It isn't open, under this ground for protection, to consider the future risk of emotional harm.

Apart from introducing some variation into the grounds for protection, this restriction of the scope of the ground relating to emotional harm also appears to have an effect on decision-making about the application of section 13. The significance of the wording used in the grounds for protection that address harms is explained in a leading court case on section 13.[308]

As the court noted, "the burden of proof in child protection cases rests on the person who asserts the need for protection."[309] But whether the court is considering a past event or the risk of future harm appears to affect how it perceives that burden of proof.

As court explained, "[w]hen the assertion being made is about a past event then the actual occurrence of that event must be shown by the weight of the evidence to have been more probable than not."[310] In contrast, "where the assertion being made is that there is a risk that an event will occur in the future, then it is the *risk of the future event and not the future event itself* that must be shown by the weight of the evidence to be more probable than not."[311]

"The result" of this shift in emphasis "is that in considering past abuse the degree of certainty that it has occurred will be more than is required in considering whether abuse will occur in the future."[312] The court used mathematical terms to illustrate

306. *Supra* note 1, s 13 (1) (a).

307. *Ibid*, s 13 (1) (e). The other eight grounds for protection variously use "is" (*ibid*, s 13 (1) (f), (g), (h), (j), (l)), "is or has been" (*ibid*, s 13 (1) (i)), and "has been" (*ibid*, s 13 (1) (k)).

308. See *B.S. v British Columbia (Director of Child, Family and Community Services)* (1998), 160 DLR (4th) 264, 48 BCLR (3d) 107 (CA) [*B.S.* cited to BCLR]

309. *Ibid* at para 26, Lambert JA.

310. *Ibid* at para 27.

311. *Ibid* at para 28 [emphasis in original].

312. *Ibid* at para 29.

how this "degree of certainty" may differ in the two types of cases: "[a] ten percent risk of future abuse may meet the test of the *risk* being shown to exist on the balance of probabilities, whereas a ten percent assignment of the probability that the abuse had occurred in the past would not meet the balance of probability test."[313]

Requirement that emotional harm produce specific effects in child

The ground for protection relating to emotional harm that's set out in section 13 (1) is linked to a later subsection in section 13. This subsection provides an interpretation of what is meant by emotional harm for the purposes of the ground for protection.

Under this subsection, emotional harm can only form the basis of a ground for protection if it produces specific effects in a child. As the subsection provides, "a child is emotionally harmed if the child demonstrates severe":

(a) anxiety,

(b) depression,

(c) withdrawal, or

(d) self-destructive or aggressive behaviour.[314]

Should the ground for protection relating to emotional harm of a child be expanded from circumstances in which a child is emotionally harmed to embrace circumstances in which a child has been or is likely to be emotionally harmed?

Brief description of the issue

The *Child, Family and Community Service Act*'s ground for protection relating to emotional harm of a child only applies if the child *is* emotionally harmed. That is, its focus is only on past or ongoing current events, which place the child at need of protection.[315] In contrast, four other grounds for protection apply to past, current, *and*

313. *Ibid* [emphasis in original].

314. *Supra* note 1, s 13 (2).

315. See *C.(E.J.) v Director of Child, Family and Community Service*, 2005 BCSC 932 at paras 53–54, Halfyard J ("s. 13(1)(e) of the Act states that a child is in need of protection: '(e) if the child *is* emotionally harmed by the parent's conduct.' In my opinion, that provision requires proof that the child in question is presently in need of protection, by reason of having been, and continuing to be, emotionally harmed. The wording is entirely different than s. 13(1)(d), which clearly contemplates the risk of harm in the future." [emphasis in original]). See also *F.P. v British Columbia*

future events, by virtue of language stating, *if the child has been, or is likely to be*. Should the ground for protection for emotional harm be amended to adopt similar language, which would expand its reach to embrace events that may occur in the future?

Discussion of options for reform

There are essentially two options to consider for this issue. The first would be to propose an amendment to section 13 (1) (e), replacing the word is with has been, or is likely to be. This would make paragraph (e) consistent with paragraphs (a) to (d) and would broaden the reach of the provision to incorporate cases in which emotional harm of the child is a likely future event. Extending the reach of section 13 (1) (e) could be seen as an amendment that is in harmony with the broader purposes of section 13 and the Act as a whole, which have been described as being "to provide for the protection of *every* child who needs protection."[316] This proposed change would also bring paragraph (e) into line with the preceding four paragraphs of the subsection, promoting consistency of language within the provision.

The other option would be to endorse the status quo. Retaining the current provision could be appropriate if it's seen to be functioning well. It may also be seen as a better option than extending the ground for protection to embrace the potential of emotional harm to a child in the future. This extension could make decision-making more difficult, by focusing attention on forecasting possible developments in the future. It could also lead to more children being taken into care. There has been academic criticism of the existing provisions that contain the words likely to be.[317]

(Director of Child, Family and Community Services), 2016 BCSC 24 at para 24, Ball J.

316. *B.S.*, *supra* note 308 at para 23.

317. See Mosoff et al, *supra* note 19 at 443–444 ("Another significant law reform was an expansion of the grounds on which a child may be found in need of protection, which is the crucial first step in a child being removed either temporarily or permanently. Specifically, children can now be found in need of protection if there is a *risk* of future harm, whereas previously the harm must have already occurred. For example, a child needs protection if the child has been, or is likely to be, physically harmed because of neglect by the child's parent. The risk-based inquiry increases the need for social workers (and judges) to predict future harm, and mental disability, poverty, and domestic violence inevitably play an important role in these risk assessments. The test to be applied for risk of future harm is lower than that used to determine past harm. The focus on future harm has resulted in the adoption of standardized risk assessment models, a practice that has been the subject of considerable criticism from social workers and researchers. Because mental disability is seen as a risk factor for future harm, using these models is likely to have a particular impact on parents with mental disabilities. Once identified, such parents will be viewed with stricter scrutiny. The case law also reveals an overrepresentation of children labelled as 'special needs,' another complicating factor to the risk calculation. Since these children may have been identified as being at higher risk by other state systems, such as education and

The committee's tentative recommendation for reform

The committee favoured making the ground for protection relating to emotional harm consistent with the four grounds for protection that precede it. This would mean replacing the ground's verb is with the formulation used in the other four grounds: has been, or is likely to be.

The committee was concerned that this proposal would end up broadening the ground for protection relating to emotional harm. A broader ground for protection could result in more children being taken into care. But the committee decided that there are ways to mitigate this concern.

First, there is the existing interpretive provision in section 13, which limits the reach of emotional harm to only those cases that produce specific effects in children ("anxiety, depression, withdrawal, or self-destructive or aggressive behaviour").[318]

Second, there are other legislative changes that could be made to support this proposed reform. Two particular areas of concern are the bifurcated nature of the ground for reform relating to emotional harm and the way the case law perceives the burden of proof for the risk of future harm. These topics are taken up in the next two issues for reform.

The committee tentatively recommends:

31. Section 13 (1) (e) of the Child, Family and Community Service Act should be amended by

(a) striking out "is" and replacing it with "has been, or is likely to be," and

(b) striking out subparagraph (ii).

Should the Child, Family and Community Service Act be amended to provide that living in a situation where there is violence is a separate ground for protection?

Brief description of the issue

This issue is connected with the previous issue for reform. The ground for protection relating to emotional harm addresses two distinct situations: (1) when emo-

health, there is heightened surveillance on these families." [emphasis in original; footnotes omitted]).

318. *Supra* note 1, s 13 (2).

tional harm to a child is caused by "the parent's conduct"; and (2) when that harm is the result of the child "living in a situation where there is domestic violence by or towards a person with whom the child resides."[319] Should this ground for protection be divided to create two grounds?

Discussion of options for reform

There are two options to consider for this issue. One option would be to divide the emotional-harm ground for protection into two. The other would be to retain the bifurcated character of the ground for protection, with two subparagraphs contained within a single ground. Both options should be considered in relation to the tentative recommendation proposed for the previous issue for reform, which would broaden consideration of emotional harm to embrace the future risk of harm.

Dividing the ground for protection would be an appropriate response if the ground were perceived to have yoked together dissimilar harms. It could be argued that the current provision sets out a ground for protection dealing with emotional harm that's caused by a child's parents and ties it to a distinct harm, which relates to a child living in a violent situation. This harm may be seen as embracing more than just emotional harm caused to the child by living in this situation. An argument could also be made that while it may be appropriate to consider the future risk of emotional harm caused by a parent, it isn't appropriate to make this extension for living in a violent situation.

On the other hand, arguments could be made that the ground is best left in its bifurcated state. The two subparagraphs may be understood as two distinct but related instances of emotional harm. It could also be argued that both subparagraphs should be considered in terms of past instances of harm and future risk of harm.

The committee's tentative recommendation for reform

The committee decided that the best course would be to divide paragraph (e) in two, leaving a ground for protection relating to emotional harm caused by a parent in that paragraph and creating a new ground for protection (which would become paragraph (m)) to address a child living in a violent situation. In considering the previous issue for reform, the committee was particularly concerned with how expanding the scope of existing paragraph (e) to embrace the risk of future harm would affect consideration of cases in which a child was harmed by living in a violent situation. By creating a new ground of protection for this situation, the committee believed that it could avoid a set of problems that would have been caused by that extension.

319. *Ibid*, s 13 (1) (e).

The committee also noted that the violence contemplated by this new ground for protection goes beyond emotional harm. Exposure to this kind of violence carries with it the risk of physical as well as emotional harm.

The committee avoided the use of the expression domestic violence in its tentative recommendation, which it has previously proposed eliminating in the Act.[320] Instead, the committee framed this tentative recommendation using the terms it proposed as replacements for domestic violence.

The committee tentatively recommends:

32. Section 13 (1) of the Child, Family and Community Service Act should be amended by adding the following as new paragraph (m): "if the child is living in a situation where there is (i) violence in the home or (ii) violence by or towards a person with whom the child resides in the presence of the child," and removing section 13 (1) (e) (ii).

Should the Child, Family and Community Service Act be amended to clarify that, whether dealing with past harm or likelihood of future harm, the same test on a balance of probabilities applies?

Brief description of the issue

Case law on section 13 of the *Child, Family and Community Service Act* has said that "the degree of certainty" in applying the test of a balance of probabilities may differ "in considering past abuse" as opposed to "considering whether abuse will occur in the future."[321] It may be difficult to grasp how this distinction should be applied in a given case, as it appears to point to the notion that different tests are applicable. Should the Act be amended to clarify that a single test applies in these cases?

Discussion of options for reform

The options for this issue consist of proposing an amendment to the legislation to address the concerns raised by the case law or leaving the legislation silent on the issue.

Proposing an amendment to the legislation would be supported by a perception that comments in the case law have created uncertainties in applying the test on a bal-

320. See, above, at 44–48.

321. See *B.S.*, *supra* note 308 at para 29.

ance of probabilities. Since the court of appeal's decision in 1998 there have been a series of decisions that have attempted to explain and apply its comments.[322] This has become increasingly difficult since a 2008 decision of the Supreme Court of Canada, which held that "in civil cases there is only one standard of proof and that is proof on a balance of probabilities."[323] Legislative reform would clear up this confusion.

But it could be argued that this is an issue for the courts to sort out. They have traditionally dealt with these kinds of issues and are often able to find better solutions. Legislation can be a blunt tool in these circumstances.

The committee's tentative recommendation for reform

The committee favoured amending the Act to address this issue. It was particularly concerned with the effect that comments in the case law could have on its proposed reforms for the ground for protection dealing with emotional harm. There may be some reluctance to have that ground for protection embrace the future risk of harm if it means that a significantly lower threshold exists for finding that a child needs protection.

The committee tentatively recommends:

33. Section 13 of the Child, Family and Community Service Act should be amended to make it clear that, whether dealing with past harm or likelihood of future harm, the same test on a balance of probabilities applies.

322. See e.g. *British Columbia (Director of Child, Family & Community Service) v O.*, 2009 BCSC 1370 at paras 47–51, Brown J; *C.C.V. v British Columbia (Child, Family and Community Service)*, 2017 BCSC 412 at paras 13–28 [*C.C.V.*], Tindale J.

323. *F.H. v McDougall*, 2008 SCC 53 at para 49, Rothstein J. But see *C.C.V.*, *supra* note 322 at para 27 (concluding that the decisions "were not inconsistent").

Issue for Reform—Least Disruptive Means and Reassessment

Background information

Use of expression "less disruptive" in the Child, Family and Community Service Act

The *Child, Family and Community Service Act* uses the phrase *less disruptive* in four sections. The phrase is used in connection with voluntary care agreements[324] and returning a child before an order is made at a protection hearing.[325] But, for the purposes of this issue for reform, it's more important to note that the use of the phrase in two sections that involve a child being taken into care: (1) the provision governing removal of a child;[326] and (2) the provision setting out the procedure at a protection hearing and the court orders that may result from that hearing.[327]

Case law interpreting the phrase in a provision dealing with a decision to take a child into care has said that it requires establishing that the director "has been active and diligent in attempting to find other alternatives to removing a child."[328] This requirement "is not only consistent with the underlying purpose of the Act to ensure the well-being of children, it is also a safeguard to ensure that when children are removed, they are [exposed to] as little disruption and emotional distress as possible."[329]

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324. See *supra* note 1, s 6 (4) (a) ("[b]efore making the agreement, the director must consider whether a *less disruptive way* of assisting the parent to look after the child, such as by providing available services in the child's own home, is appropriate in the circumstances" [emphasis added]). See also, above, at 65 (for more information on voluntary care agreements).

325. See *supra* note 1, s 33 (1) (d) ("[b]efore a presentation hearing, or before the conclusion of a presentation hearing, relating to the removal of a child under section 30, the director may return the child to the parent apparently entitled to custody if . . . a *less disruptive means* of protecting the child becomes available" [emphasis added]).

326. See *ibid*, s 30 (1) (b) ("[a] director may, without a court order, remove a child if the director has reasonable grounds to believe that the child needs protection and that . . . *no other less disruptive measure* that is available is adequate to protect the child" [emphasis added]).

327. See *ibid*, s 35 (1) (c) ("[a]t a presentation hearing relating to the removal of a child under section 30, the director must present to the court a written report that includes . . . information about *any less disruptive measures considered* by the director before removing the child." [emphasis added]).

328. *Director v L.D.S.*, 2018 BCPC 61 at para 94, Flewelling Prov Ct J.

329. *Ibid* at para 95. See also *ibid* at para 97 ("In the circumstances here, it was not sufficient to remove V.D.C. from her primary parent and simply offer only one safe alternative, particularly

Provisions in the Act relating to decisions on whether a child should remain in care

There are several provisions in the *Child, Family and Community Service Act* that relate to a decision on whether a child should remain in care.[330] These provisions contain a wide range of considerations that apply to the decision. None of them uses the phrase less disruptive or provides that the decision must amount to the least disruptive means that protects the child.

Reassessments under the Federal Act

The Federal Act is recently enacted legislation that is intended to "set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children."[331] While the Federal Act doesn't use the concept of least disruptive means, it does have a provision with some similarities to this idea for decisions about children remaining in care. This provision calls for "a reassessment, conducted on a[n] ongoing basis of whether it would be appropriate to place the child with" the child's parent or another adult member of the child's family, as opposed to having the child remain in care.[332]

Should the Child, Family and Community Service Act be amended to add a provision requiring a reassessment before a decision is made on a child remaining in care?

Brief description of the issue

The *Child, Family and Community Service Act* provides that "[a] director may, without a court order, remove a child if the director has reasonable grounds to believe that the child needs protection and that (a) the child's health or safety is in immediate danger, or (b) no other less disruptive measure that is available is adequate to protect the child."[333] Similar language relating to least disruptive means—or to a reas-

where that alternative is clearly disruptive to the child and in fact may be harmful to her in the long term.").

330. See *supra* note 1, ss 42.2 (subsequent hearing about enforcement of supervision order), 44 (extension of supervision orders and temporary orders), 44.1 (extension of temporary custody order if permanent transfer of custody planned), 49 (continuing custody hearing and orders), 54.01 (permanent transfer of custody before continuing custody order).

331. *Supra* note 3, s 8 (b).

332. *Ibid*, s 16 (3).

333. *Supra* note 1, s 30 (1).

sessment of the circumstances—doesn't appear in provisions that provide for a child remaining in care. Should one or the other of these concepts be extended to decisions on whether a child should remain in care?

Discussion of options for reform

There are three approaches that could be considered for this issue.

The first is proposing to import the concept of least disruptive means into the provisions of the dealing with a child remaining in care. As noted earlier, the rationales for provisions referring to least disruptive means are to (1) further the broad purpose of the Act to secure the wellbeing of the child[334] and (2) to provide a safeguard in specific circumstances against causing a child undue disruption and emotional distress. An argument may be made that these rationales are present when a decision is being made about a child remaining in care. This decision also focuses on the child's wellbeing and calls for safeguards to protect against potentially compounding disruption and distress. It could also be argued that adding language about least disruptive means to provisions dealing with a child remaining in care would help to make those provisions more consistent with the section that provided for a child being taken into care in the first place.[335]

A second approach would be to propose instead that the *Child, Family and Community Service Act* adopt instead the language from the Federal Act relating to reassessments and apply it to decisions on whether a child should remain in care. This approach is similar in concept to the one discussed in the previous paragraph. So much of the rationale discussed in that paragraph would apply to this approach. But the language of reassessments might also prove to be a better fit with the *Child, Family and Community Service Act*'s provisions on children remaining in care.[336]

A third approach would be to carry on with the status quo. There may be compelling reasons to retain the current provisions relating to a child remaining in care as they are, without additional requirements. It could be argued that these provisions differ significantly from provisions that authorize a child to be taken into care. In that case, disruption to a child's relationship with the family may be a vital concern. But if the focus is on a child remaining in care, then it might be more difficult to assess disrup-

334. See *ibid*, s 2 ("[t]his Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations").

335. See *ibid*, s 30 (1) (b).

336. But see *Pathways in a Forest*, *supra* note 2 at 51, 94 (considering whether to recommend adoption of section 16 (3) of the Federal Act, *supra* note 3, and deciding instead to recommend adoption of the *Indian Child Welfare Act of 1978*, 25 USC § 1912 (d)).

tion. In some cases, extending the child's stay in care might be disruptive, but ending it might be disruptive too. Applying the language in these circumstances might be a considerable challenge. By a similar token, engaging in continual reassessments might prove to be a considerable administrative burden.

The committee's tentative recommendation for reform

The committee began consideration of this issue by discussing the Act's existing concept of least disruptive means. It noted that there are concerns about children being in care for long periods, even in cases in which other options are available. The committee gave considerable thought to whether the concept of least disruptive means could address this concern. It decided that extending this concept wouldn't be the best approach.

The committee noted that the lens changes when the inquiry moves from when a child should be taken into care to whether a child should remain in care. When this move occurs the focus shifts from the child's need for protection to be strictly on the child's best interests. The pre- and post-removal situations are somewhat different, and these differences may justify the use of different language in the Act. It's important to ask, least disruptive to whom? It should be the child. Once the child is in care there has to be a two-pronged approach: (1) what is least disruptive for the child? and (2) what is in the child's best interests? For example, it may be disruptive for a child to remain in care, but it may also be in the best interests of the child to do so, because it gives the parent time to address the protection concerns.

With these considerations in mind, the committee turned to consider adapting the language of reassessment from the Federal Act. The committee found it to be a better fit with provisions of the *Child, Family and Community Service Act* regarding decisions on a child remaining in care. The committee was concerned about the perception of an administrative burden being created by a requirement for ongoing assessments. The committee favoured using the term regular, which should be coupled with a specific requirement for a reassessment before a subsequent custody application to court.

The committee tentatively recommends:

34. The Child, Family and Community Service Act should be amended by adding a new section that provides "In the context of providing child and family services in relation to a child, there must be a reassessment, conducted on a regular basis, and prior to any subsequent custody application before the court, of whether it would be appropriate to place the child with (a) one of the child's parents, if the child does not reside with such a person; or (b) another adult member of the child's family, if the child does not reside with such a person."

Issue for Reform—Promoting Contact with Parents, Siblings, and Other Extended-Family Members

Should the Child, Family and Community Service Act be amended to adopt new provisions promoting contact between children and their parents, siblings, and other extended family?

Brief description of the issue

There are provisions in the *Child, Family and Community Service Act* that relate to orders for a child's access to a parent in specific circumstances.[337] Should this concept of access be expanded to cover other circumstances and to acknowledge access to siblings and other extended-family members?[338]

Discussion of options for reform

This issue is primarily a yes-or-no choice between proposing to add new provisions on access to the *Child, Family and Community Service Act* or to retain the status quo.

Enhancing a child's relationships with parents and other family members is generally seen to be in the best interests of children. It supports some of the guiding princi-

337. See *supra* note 1, ss 55 (access to child in interim or temporary custody of director or other person), 56 (access to child in continuing custody of director).

338. See Federal Act, *supra* note 3, ss 11, 16, 17; *Child, Family and Community Service Act*, *supra* note 1, ss 2 (b), (b.1). See also Indigenous Services Canada, "Key highlights of the act" (last modified: 20 February 2020), online: *Indigenous Services Canada* <www.sac-isc.gc.ca/eng/1568071056750/1568071121755> (commentary on section 11: provision of child and family services: "The *Act respecting First Nations, Inuit and Métis children, youth and families* emphasizes the need for the system to shift from apprehension to prevention, with priority given to services that promote preventive care to support families. It gives priority to services like prenatal care and support to parents. The act also clearly indicates that no Indigenous child should be apprehended solely on the basis or as a result of his or her socio-economic conditions, including poverty, lack of housing or related infrastructure, or state of health of the child's parent or care provider."; commentary on sections 16 and 17: placement of an Indigenous child: "The act seeks to preserve a child's connection to his or her family, community and culture.").

ples of the Act.[339] Promoting access may be seen as "a positive force in a child's life and in the development of that child to a mature adult."[340]

Even though the benefits of access are acknowledged in the *Child, Family and Community Service Act*, there may be gaps in the Act's approach to access. One gap may relate to the period between a child being removed and an interim custody order being made. Another gap may be that the existing provisions only mention parents, leaving siblings and other extended-family members outside their scope. Amendments to the Act can directly address these concerns.

On the other hand, it could be argued that the provisions currently in the Act adequately deal with the issue of access. These provisions are more focused in nature. This could be seen as a better approach. Expanding the Act's reach on this issue could create additional costs, administrative issues, and court proceedings.

The committee's tentative recommendations for reform

The committee decided that there are gaps in the *Child, Family and Community Service Act* that could be filled by new provisions promoting access. The committee pointed to two areas of concern.

The first area relates to the period after a child is removed but before an interim order is made under section 55.[341] Even though the committee understands that, in practice, the director often does try to establish access during this period, the committee felt it was significant that the legislation doesn't address access during the period. In the absence of legislation, it was felt that practices varied throughout the province. In the committee's view, it was important to establish a clear principle in

339. See *ibid*, s 2 (b) ("a family is the preferred environment for the care and upbringing of children . . ."), (b.1) ("Indigenous families and Indigenous communities share responsibility for the upbringing and well-being of Indigenous children").

340. *Sherry v Sherry* (1993), 114 Nfld & PEIR 67, 1 RFL (4th) 146 at para 39 (PEISC), McQuaid J.

341. See *S.M.S.*, *supra* note 169 at para 42 ("On a plain reading of s. 55 of the *Act*, it is my opinion that the triggering event for an access application is an 'order,' which would include an interim order under s. 35(2). On the authority of the *LS* decision [*L.S. v British Columbia (Director of Child, Family and Community Services)*, 2018 BCSC 255], S.M.S.'s application for further access to the children cannot proceed until either an order or an interim order is made at the completion of the presentation hearing. As this Court is a statutory court, the *parens patriae* power is not available to a judge of the Provincial Court, and therefore, I do not have jurisdiction to hear S.M.S.'s access application at this time."); *British Columbia (Child, Family and Community Service) v S.J.P.*, 2020 BCPC 129 at para 29, Doulis Prov Ct J.

the legislation. The committee pointed to section 32, which deals with care of a child if a child has been removed, as a logical place for a new provision.[342]

The second area relates to the list of the rights of children in care, which is found in section 70.[343] In the committee's view, it would be beneficial to establish that children have a right to contact with parents, siblings, and other extended-family members, as one of a list of rights that children in care have. In its consideration of this issue, the committee noted that section 70 doesn't contain an enforcement mechanism for the rights listed in subsection (1).[344] In the committee's view, this point didn't attenuate the value of establishing this principle among the rights set out in this sec-

342. See *supra* note 1, s 32 ("(1)If a child is removed under section 30, 36 or 42, the director has care of the child until (a) the child is returned by the director under section 33 (1) or (1.1), (a.1) the director withdraws from a presentation hearing under section 33.01 (1), (b) the court makes an interim order about the child under section 35 (2), 36 (3) or 42.1 (6), or (c) the child is returned by the court under section 35 (2) (c), (d) [Repealed 1999-26-13.] whichever happens first. (2) While the child is in the director's care, the director may (a) authorize a health care provider to examine the child, and (b) consent to necessary health care for the child if, in the opinion of a health care provider, the health care should be provided without delay. (3) On consenting to health care for the child, the director must, if practicable, notify the parent who at the time of the child's removal was apparently entitled to custody. (4) Subsection (2) does not affect a child's right under section 17 of the *Infants Act* to consent to health care. (5) While the child is in the director's care, the director may consent to the child's participation in routine school, social or recreational activities." [bracketed text in original]).

343. See *ibid*, s 70 (1) ("Children in care have the following rights: (a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement; (b) to be informed about their plans of care; (c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them; (d) to reasonable privacy and to possession of their personal belongings; (e) to be free from corporal punishment; (f) to be informed of the standard of behaviour expected by their caregivers or prospective adoptive parents and of the consequences of not meeting the expectations of their caregivers or prospective adoptive parents, as applicable; (g) to receive medical and dental care when required; (h) to participate in social and recreational activities if available and appropriate and according to their abilities and interests; (i) to receive the religious instruction and to participate in the religious activities of their choice; (j) to receive guidance and encouragement to maintain their cultural heritage; (k) to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care; (l) to privacy during discussions with members of their families, subject to subsection (2); (m) to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the *Representative for Children and Youth Act*, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament; (n) to be informed about and to be assisted in contacting the representative under the *Representative for Children and Youth Act*, or the Ombudsperson; (o) to be informed of their rights, and the procedures available for enforcing their rights, under (i) this Act, or (ii) the *Freedom of Information and Protection of Privacy Act*.").

344. Some of the rights listed in section 70 (1) refer to other statutes, which may have their own enforcement mechanisms.

tion. Section 70 (1) may primarily have an educational value. That said, the proposed amendment to section 32 would carry consequences in the event that its provisions on access were not met, so the right set out in section 70 (1) is not simply a paper tiger.

The committee also favoured covering siblings and other extended-family members in its proposals. The committee noted that, in some cases, a parent may have been absent throughout a child's life. A relationship with another family member might be more important to the child. The legislation should recognize the importance of such relationships.

The committee tentatively recommends:

35. Section 32 of the Child, Family and Community Service Act should be amended by adding a new subsection that provides "A director must use best efforts to arrange access between the parents, siblings, and other extended family with the child prior to an order being made under section 55 for access."

The committee tentatively recommends:

36. Section 70 (1) of the Child, Family and Community Service Act should be amended by adding a new paragraph that provides "to contact with parents, siblings, and other extended family, except where such contact could compromise the child's safety and wellbeing, and subject to any order of the court under this Act."

Chapter 7. Incorporating Children's Views in Child Protection Proceedings

Scope of this Chapter

The *Child, Family and Community Service Act* states that "the child's views should be taken into account when decisions relating to a child are made."[345] But its few references to children's views tend to be found in broad statements of principle. The Act doesn't contain provisions on how children's views should be incorporated into court proceedings. In contrast, child protection legislation in force elsewhere in Canada does contain express enabling provisions on this topic.

This chapter is concerned with whether the *Child, Family and Community Service Act* should be amended to adopt such enabling provisions.

Background Information on Incorporating a Child's Views in Child Protection Proceedings

UN Convention on the Rights of the Child

The starting place for considering incorporating a child's views in a child protection proceeding is the United Nations' *Convention on the Rights of the Child*,[346] a broad-based international instrument that has been called "the cornerstone of children's rights worldwide."[347] Canada has signed and ratified this UN Convention.[348]

Article 12 of the UN Convention directly addresses the issue of incorporating a child's views into decision-making about the child. It sets out a right for a child to express those views. The article frames this right in the following terms:

345. *Supra* note 1, s 2 (d).

346. 30 November 1989, 1577 UNTS 3 (2 September 1990) [UN Convention].

347. Suzanne Williams, "Legal Hooks and Springboards to Advance Children's Access to Justice" (February 2016), online (pdf): *Canadian Bar Association* <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/Toolkits/ChildRights/legalHooksAndSpringboards_Williams.pdf> at para 8 [footnote omitted] [Williams, "Legal Hooks"].

348. See Can TS 1992 No 3.

> **Article 12**
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.[349]

Official commentary on article 12 notes the dual nature of the right articulated in paragraph 1: first, it "establishes the right of every child to freely express her or his views, in all matters affecting her or him" and then it sets out "the subsequent right for those views to be given due weight, according to the child's age and maturity."[350] Paragraph 2 contains a right specifically to be heard "in any judicial and administrative proceedings affecting the child." Official commentary "emphasizes" that "this provision applies to all relevant judicial proceedings affecting the child, without limitation."[351]

Note that the "legal right" children have under the UN Convention "to express their views. . . . is not a legal requirement to do so": "[t]hey can choose not to participate."[352]

349. See UN Convention, *supra* note 346 at 48. Article 12 has a special link with the article of the UN Convention establishing the best-interests principle, as official commentary on the UN Convention explains: "Article 12, as a general principle, is linked to the other general principles of the Convention, such as article 2 (the right to non-discrimination), article 6 (the right to life, survival and development) and, in particular, is interdependent with article 3 (primary consideration of the best interests of the child). . . . There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives." See United Nations Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc CRC/C/GC/12 (20 July 2009), online: <www.refworld.org/docid/4ae562c52.htmlat> [UN General Comment No. 12] at paras 68–74.

350. UN General Comment No. 12, *supra* note 349 at para 15.

351. *Ibid* at para 32.

352. *G. (B.J.) v G. (D.L.)*, 2010 YKSC 44 at para 26 [*G. (B.J.)*], Martinson J.

Implementation of the UN Convention

There's a lengthy discussion that could be had about the status of the UN Convention in Canadian law,[353] but that discussion would exist on a tangent from this chapter's topic. As a bare minimum, it's worth noting that (as is the case with any international instrument) the provisions of the UN Convention didn't become a direct source of Canadian law upon ratification. Instead, some further steps are needed to implement the UN Convention.

These steps have involved a combination of enacting legislation to give effect to the UN Convention's rights and interpretation of existing legislation.

Most of the emphasis has fallen on how courts interpret existing legislation. As a leading case has observed, "Canada has chosen not to incorporate the provisions of the *Convention* directly into domestic law because it takes the position that Canadian domestic law complies with the *Convention*."[354] Canada asserts this position "because Canadian jurisprudence provides that in interpreting domestic statutes, Parliament and provincial legislatures are presumed to respect the rights and values set out in the *Convention*."[355]

But commentators have also identified some legislation that actively implements elements of the UN Convention. Typically, this point is phrased as a lament about the

353. See e.g. *J.E.S.D. v Y.E.P.*, 2018 BCCA 286 at paras 32–37 [*J.E.S.D.*], Groberman JA (discussion of the status of the UN Convention in Canadian law). In particular, the court took this approach: "Care must be exercised in interpreting the provisions of international conventions. The UNCRC applies across diverse legal systems and traditions. In the result, a purposive approach to its interpretation is required; it would be a mistake to assume that words in the convention necessarily correspond to specific concepts established in the Canadian legal system" (*ibid* at para 35). See also Hon Donna Martinson, QC, & Hon Judge Rose Raven, "Implementing Children's Participation in Family Court Cases: View of the Child and Beyond," in Halie Kwanxwa'loga Bruce et al, eds, *Access to Justice for Children: Best Interests of the Child: Materials prepared for the Continuing Legal Education course, Access to Justice for Children: Best Interests of the Child, held in Vancouver, BC, on March 6, 2020* (Vancouver: Continuing Legal Education Society of British Columbia, 2020) 5.1 at 5.1.26, n 7 [Martinson & Raven].

354. *G. (B.J.)*, *supra* note 352 at para 5. But see Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada, adopted by the Committee at its sixty-first session*, UNCRCOR, 2012, UN Doc CRC/C/CAN/CO/3-4, online: <docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsh8%2FU426pHwccUxzN5kmnhLtdnrWm1hJzGwfirOtSF7im%2Btj4%2BJ5n5CPlpIDWXA35DpHXskxTdDvCoa0RW9yOJTACORyOJ17Auf%2Bpplgz6CB> at para 36 ("the Committee is concerned that there are inadequate mechanisms for facilitating meaningful and empowered child participation in legal, policy, environmental issues, and administrative processes that impact children").

355. *G. (B.J.)*, *supra* note 352 at para 5.

piecemeal nature of Canada's legislation on children's rights. For instance, one commentator has pointed out that even though "no comprehensive legal framework exists to ensure the CRC is applied automatically or consistently to all cases involving Canadian children, or to all jurisdictions across Canada. . . . there are examples of express provisions in domestic statutes that recognize the legal rights of children."[356]

The small number of statutory provisions that implement aspects of the UN Convention are more relevant for the committee than the mainline of the jurisprudence, which runs through court decisions. This is because these provisions can assist the committee in its main task, which is recommending reforms to legislation, by providing concrete models for consideration. So they are worth a closer look, beginning with some existing provisions in the *Child, Family and Community Service Act*, and then moving on to provisions in other statutes that might serve as models for reforms to enshrine the views of the child in child protection proceedings.

Statutory provisions on children expressing their views in proceedings

In a detailed review of how Canadian law implements children's participation rights that are set out in the UN Convention,[357] one report helpfully organizes relevant statutory provisions into groups that correspond to the following methods of bringing a child's views before a court:

- "[a]n assessor or child's counsel may introduce children's statements";[358]
- "children may meet directly with the judge";[359]
- "children may[,] more infrequently [than meeting directly with the judge,] testify";[360] or

356. Williams, "Legal Hooks," *supra* note 347 at para 27.

357. Nicholas Bala, Claire Houston, & Canada, Department of Justice, Family, Children and Youth Section, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada* (Ottawa: Department of Justice Canada, 2015), online: <www.justice.gc.ca/eng/rp-pr/other-autre/article12/Article12-eng.pdf> [Bala et al, *Article 12*].

358. *Ibid* at 38.

359. *Ibid*.

360. *Ibid*.

- "children's out-of-court statements may be put before the court as hearsay exceptions."[361]

Child, Family and Community Service Act provisions

The *Child, Family and Community Service Act* directly addresses only the methods in the first point (assessments)[362] and the last point (hearsay exceptions).[363] But the relevant provisions don't refer to the views of the child.

The Act has a handful of provisions that do refer to a child's right to express views on a topic. These provisions can be divided into two groups.

The first group is made up of general statements on a child's rights. These provisions appear in the Act's sections on its guiding principles,[364] determining the best interests of the child,[365] and listing the rights afforded to a child in care.[366]

These general statements are important because, in practice, commentators have said that when they are combined with other general doctrines (such as the inherent powers of a court to control its proceedings) they have formed the basis for using

361. *Ibid*. As a general point, the authors note that "[t]he views of children in child protection proceedings are heard in similar ways to children in custody and access proceedings" (*ibid*).

362. See *supra* note 1, s 59 (1) ("On application the court may order that a child or a parent of a child undergo a medical, psychiatric or other examination if the court considers the examination is likely to assist it (a) in determining whether the child needs protection, or (b) in making an order relating to the child.").

363. See *ibid*, s 67 ("At a hearing under this Act, the court may, having regard to the child's best interests, do one or more of the following: (a) exclude the child from the courtroom, despite the *Provincial Court Act*; (b) *admit any hearsay evidence of the child that it considers reliable*; (c) give any other direction concerning the receipt of the child's evidence that it considers just." [emphasis added]).

364. See *ibid*, s 2 ("[t]his Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles: . . . (d) the child's views should be taken into account when decisions relating to a child are made").

365. See *ibid*, s 4 (1) ("[w]here there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example: . . . (f) the child's views").

366. See *ibid*, s 70 (1) ("[c]hildren in care have the following rights: . . . (c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them").

the listed methods to incorporate a child's views into child protection proceedings.[367]

The second group contains provisions incorporating a child's views in the development of certain documents. Specifically, the Act requires that a child's views be taken into account in relation to voluntary care agreements[368] and plans of care.[369]

What the statute lacks is any provision directly incorporating a child's views in child protection proceedings in court. But there are examples of these types of provisions in other British Columbia legislation and child protection legislation from other provinces and territories.

Family Law Act

Like the *Child, Family and Community Service Act*, the *Family Law Act*[370] contains a provision dealing with assessments. But unlike section 59 of the *Child, Family and Community Service Act*, section 211 of the *Family Law Act* expressly mentions the views of the child.

Section 211 of the *Family Law Act* specifically empowers a court to "appoint a person to assess . . . the views of a child in relation to a family law dispute."[371] Under this provision, "a judge hearing a custody and access dispute is empowered to make an order requesting the involvement of an independent third party, typically a social worker or mental health professional, to assess the case and provide a report to the

367. See Bala et al, *Article 12*, *supra* note 357 at 34, 42–43 (on judicial interviews, citing *W. (M.) v British Columbia (Director of Child, Family & Community Service)*, 2004 BCPC 452 at paras 15–17); David C Dundee, "Children's Rights and Participation in Family Law (BC): What They Are; Where They Come From; and How and Why We Should Promote Them" (March 2016), online (pdf): *Canadian Bar Association* <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/Toolkits/ChildRights/Dundee-ChildrensRightsandParticipation.pdf> at 2–3, 9, n 11 (on views of the child reports), 18–19.

368. See *supra* note 1, s 6 (3) ("[i]f possible, the director must (a) find out the child's views about the agreement and take them into account").

369. See *ibid*, s 21 (3) ("If the child is 12 years of age or over, the director must before agreeing to the plan of care . . . (b) take the child's views into account.").

370. *Supra* note 28.

371. *Ibid*, s 211 (1) (b).

court."[372] In evidentiary terms, assessments "are a way of introducing expert opinion" in court.[373]

In practice, there are two types of assessments carried out under this provision. One has been called "a full section 211 assessment,"[374] which entails "[i]nterviews with children and observation of parent-child interactions."[375] While this approach yields a comprehensive expert report, it has been criticized as being expensive and time consuming.[376] There has also been growing criticism in relation to the lack of cultural relevance, particularly for Indigenous children.

As an alternative to a full assessment, "a growing practice has been the preparation of non-evaluative Views of the Child Reports (also called Voice of the Child, Wishes of the Child or Hear the Child Reports)," which are "typically prepared by a lawyer or mental health professional, are based on one or more interviews with the child and are meant to provide the court with information about the child's perspective on his or her life and the matters in dispute" and "are much narrower in scope than traditional custody assessments."[377] Even though these alternative reports aren't mentioned by name in section 211, commentary has said that the court's broad power to order an assessment under that section embraces the specific power to order a views of the child report.[378]

Child protection legislation in other provinces

Some provinces have provisions in their child protection legislation that are geared to giving children specific ways to make their views known in court proceedings. These provisions can encompass the full range of methods listed earlier.

Child protection legislation in Saskatchewan contains a provision enabling judicial interviews.[379] And Newfoundland and Labrador has legislation setting out a list of

372. Bala et al, *Article 12*, *supra* note 357 at 14.

373. Dundee, *supra* note 367 at 14.

374. *Ibid* at 15.

375. Bala et al, *Article 12*, *supra* note 357 at 14.

376. See Dundee, *supra* note 367 at 15-16; Bala et al, *Article 12*, *supra* note 357 at 15.

377. Bala et al, *Article 12*, *supra* note 357 at 21–22.

378. See *ibid* at 22 ("Although none of the provinces or territories in Canada have legislation that specifically provides for the preparation of Views of the Child Reports, courts have ordered these reports under the broader power to order assessments.").

379. See *The Child and Family Services Act*, SS 1989–90, c C-7.2, s 29 (1) ("At a protection hearing, the

procedures that may be used to incorporate a child's views into a child protection proceeding:

> **Participation by child**
>
> **56**. Where a child who is the subject of a proceeding under this Act requests that his or her views be known at the proceeding, a judge shall
>
> (a) meet with the child with or without the other parties and their legal counsel;
>
> (b) permit the child to testify at the proceeding;
>
> (c) consider written material submitted by the child; or
>
> (d) allow the child to express his or her views in some other way.[380]

Manitoba's legislation also contains a general provision on the incorporation of a child's views into a child protection proceeding:

> **Child 12 years of age to be advised**
>
> (2) In any proceeding under this Act, a child 12 years of age or more is entitled to be advised of the proceedings and of their possible implications for the child and shall be given an opportunity to make his or her views and preferences known to a judge or master making a decision in the proceedings.
>
> **Child's views may be considered**
>
> (3) In any court proceeding under this Act, a judge or master who is satisfied that a child less than 12 years of age is able to understand the nature of the proceedings and is of the opinion that it would not be harmful to the child, may consider the views and preferences of the child.[381]

court may, if it considers it to be in the best interests of a child who is the subject of the hearing, order that the child be: . . . (b) brought before the court and interviewed by the court."). Québec has a provision in its civil code that applies generally to all civil proceedings on making the child's views known to the court. See art 34 CCQ ("The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it."). As one commentator has noted, "[t]his provision is commonly used to allow children to meet with judges, either in their chambers, or in the court room, invariably without the parents present" (Bala et al, *Article 12*, *supra* note 357 at 20).

380. *Children, Youth and Families Act*, SNL 2018, c C-12.3, s 56.

381. *The Child and Family Services Act*, SM 1985–86, c 8, CCSM c C-80, s 2 (2)–(3).

As one commentator has noted, this provision "is the only child protection statute that establishes a presumptive age at which a child's views should be considered."[382]

Finally, it's worth noting that the Federal Act contains several statements on consideration of a child's views in making decisions affecting the child.[383]

General advice on implementing article 12

This chapter isn't necessarily limited to proposing reforms that simply bring the *Child, Family and Community Service Act* into line with how incorporating a child's views is treated in other statutes. It's also possible to develop new approaches to how legislation may incorporate a child's views into child protection proceedings.

Developing these new approaches could bring the discussion back full circle to the UN Convention and its broad provisions spelling out children's rights. As one commentator has noted, article 12, which sets out the right of children to express views in advance of decisions that affect them and to have those views considered by decision-makers, "is written in such a way as to place as few restrictions on children's participation as possible."[384]

While article 12 is broad and open-ended, official commentary has provided some general advice to jurisdictions on how to implement the rights set out in the article. This commentary is itself rather broad and abstract. It seems to be geared more to conducting hearings and proceedings. But it might be helpful to bear in mind while considering legislative amendments. This broad advice could form the backdrop for

382. Bala et al, *Article 12*, *supra* note 357 at 35 [footnote omitted].

383. See Federal Act, *supra* note 3, ss 9 (3) (b) ("a child must be able to exercise his or her rights under this Act, including the right to have his or her views and preferences considered in decisions that affect him or her, and he or she must be able to do so without discrimination, including discrimination based on sex or gender identity or expression"), 10 (3) ("[t]o determine the best interests of an Indigenous child, all factors related to the circumstances of the child must be considered, including . . . (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained"), 24 (1) ("If there is a conflict or inconsistency between a provision respecting child and family services that is in a law of an Indigenous group, community or people and a provision respecting child and family services that is in a law of another Indigenous group, community or people, the provision that is in the law of the Indigenous group, community or people with which the child has stronger ties—taking into consideration his or her habitual residence as well as his or her views and preferences, giving due weight to his or her age and maturity, unless they cannot be ascertained, and the views and preferences of his or her parent and the care provider—prevails to the extent of the conflict or inconsistency.").

384. *Ibid* at 4.

developing specific proposals or evaluating existing legislative provisions as models for reform in British Columbia.

Official commentary has said that "[i]mplementation of the two paragraphs of article 12 requires five steps to be taken in order to effectively realize the right of the child to be heard whenever a matter affects a child or when the child is invited to give her or his views in a formal proceeding as well as in other settings."[385] These five steps are:

- **preparation:** "Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome."[386]
- **the hearing:** "The context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate."[387]
- **assessment of capacity of the child:** "The child's views must be given due weight, when a case-by-case analysis indicates that the child is capable of forming her or his own views."[388]
- **information about the weight given to the views of the child (feedback)**: "Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously."[389]
- **complaints, remedies, and redress:** "Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated."[390]

385. UN General Comment No. 12, *supra* note 349 at para 40.

386. *Ibid* at para 41.

387. *Ibid* at para 42.

388. *Ibid* at para 44.

389. *Ibid* at para 45.

390. *Ibid* at para 46 [footnote omitted].

Official commentary also "urges States parties to avoid tokenistic approaches,"[391] by ensuring that "[a]ll processes in which a child or children are heard and participate, must be":

- transparent and informative;
- voluntary;
- respectful;
- relevant;
- child-friendly;
- inclusive;
- supported by training;
- safe and sensitive to risk; and
- accountable.[392]

Issue for Reform

Should the Child, Family and Community Service Act be amended to provide a means to incorporate the child's views into child protection proceedings?

Brief description of the issue

The *Child, Family and Community Service Act* relies on broad statements of principle, a court's inherent powers, and judges' interpretations of legislation to establish the means by which a child's views may be incorporated into a child protection proceeding. In contrast, other statutes contain provisions that directly provide for how a child's views are to be incorporated. Should the Act be amended to adopt enabling provisions that expressly set out how a child's views are to be incorporated in a child protection proceeding?

391. *Ibid* at para 132.

392. See *ibid* at para 134.

Discussion of options for reform

There's potentially a large number of options that could be considered in response to this issue. To organize the discussion of them, these options may be put into two groups.

The first group of options draw on existing legislation in British Columbia and elsewhere. For example, one proposal to consider would be to adopt language in the *Family Law Act*'s provision on assessments (section 211), notably its express reference to the views of the child. Another proposal would be to adopt provisions that enable specific methods of bringing the child's views into a child protection proceeding, such as those found in Saskatchewan's Act (judicial interviews) or Newfoundland and Labrador's Act (judicial interviews, oral testimony, written submissions, other means at the discretion of the court).

The main purpose of this group of proposals is to create clarity and certainty in the law. Express enabling provisions make it clear that a given procedure may be used to introduce the child's views in a child protection proceeding. In their absence, there may be uncertainty about the availability of a given method. For example, one commentator has noted that some people "have suggested that since the CFCSA does not have a counterpart to s211 FLA, there is no authority for the court to order views of the child reports."[393] Even though the commentator rebutted this suggestion (saying that general provisions in the Act, article 12 of the UN Convention, "and the court's inherent powers over its own procedure should fill any perceived gap"),[394] having enabling provisions in the legislation would circumvent the need to consider this argument in the first place. Another advantage of this group of options is that they likely wouldn't prove to be disruptive or to have any unwanted effects, because these proposed reforms are based on provisions already in force, with a track record in British Columbia and other jurisdictions.

But this last advantage also points to the main downside of this group of options. They represent modest reforms, at best. In fact, a case could be made that they don't really introduce anything new in British Columbia's child protection system. Assessment alternatives (such as views of the child reports) and court procedures (such as judicial interviews) appear to be available, even though they lack a foundation in the *Child, Family and Community Service Act*. This point raises the question of whether it's desirable to amend the Act to include methods of obtaining the child's views that are already being used in practice.

393. Dundee, *supra* note 367 at 9, n 11.

394. *Ibid* [citation omitted].

This leads potentially to a second group of options, which are options that don't simply involve clarifying the *Child, Family and Community Service Act* by adding enabling provisions based on provisions already in force in other legislation. It's possible to consider developing new procedures, through consideration of the UN Convention and the advice given in official commentary on implementing the convention's rights. This is a more difficult option to evaluate, as it could potentially take many forms. It would carry the risk inherent in implementing untested legislative provisions, which is that such provisions could have unwanted effects.

The committee's tentative recommendation for reform

The committee favoured the approach of amending the *Child, Family and Community Service Act* to include express provisions for incorporating a child's views in a child protection proceeding. In the committee's view, other legislation provides useful models to draw on in amending the *Child, Family and Community Service Act*.

The committee favours this approach because it would clarify the law. An enabling provision in the *Child, Family and Community Service Act* would give the court greater certainty about the options that are available for incorporating a child's views into a child protection proceeding. The current approach, which leaves a great deal to judicial interpretation, runs the risk of options being overlooked or, in the worst case, a failure to incorporate a child's views into a proceeding.

In the committee's view, the trend toward incorporating a child's views in decision-making that affects the child is one that should be encouraged. Adopting an express enabling provision in the *Child, Family and Community Service Act* is an important way to support developments in this area of the law. Such a provision should be wide ranging. It should provide judges with a detailed list of options and should preserve their discretion. The provision shouldn't become a means to limit a court's options.

The committee did believe that the provision should also provide some guidance for judges in exercising their discretion. It favoured directing judges to consider the best interests of the child, the child's safety and wellbeing, and the child's preferences in deciding on the method of making a child's views known in the proceeding. The committee was particularly sensitive to the possibility that testimony in court could be harmful in certain cases and for certain children.

Finally, the committee was aware that full implementation of its tentative recommendation will involve changes that go beyond amending the *Child, Family and Community Service Act*. There will likely need to be a policy developed to support the legislation. Such a policy will be needed to assist in determining whether a child

wishes to have views put before the court and how the child's decision on expressing views is made known to the court.

The committee tentatively recommends:

37. The Child, Family and Community Service Act should be amended by adding a new section providing that if a child who is the subject of a proceeding under this Act requests that his or her views be known at the proceeding, the court must, after a consideration of the child's best interests, the safety and wellbeing of the child, and the preferences of the child,

- *(a) meet with the child with or without the other parties and their legal counsel,*
- *(b) permit the child to testify at the proceeding,*
- *(c) consider written material submitted by the child,*
- *(d) appoint a family justice counsellor, a social worker, a psychologist, a lawyer or another person approved by the court to assess and report on the views of the child in relation to the application before the court, or*
- *(e) allow the child to express his or her views in some other way.*

Chapter 8. Legal Representation for Children in Child Protection Proceedings

Scope of this Chapter

This chapter examines whether the *Child, Family and Community Service Act* should be amended to adopt a provision that enables legal representation for a child in a child protection proceeding. As will be seen, British Columbia is an outlier in Canada in that its child protection statute lacks such a provision. The overriding question for this chapter is whether to add an enabling provision to the legislation. The chapter also contains some discussion of the detailed considerations that would have to be thought through in developing any legal-representation program for children, though the committee has not made tentative recommendations on these considerations.

Background Information on Children's Legal Representation

Introduction

Academic commentary studying legal representation for children has pointed out the importance of both "the legal authority to appoint counsel for a child" (which is typically found in enabling provisions in child protection legislation) and "the institutional structures in place to provide representation or information to the court about a child's views" (which is typically found in government programs and policies).[395] Given this project's focus on legislative reform, this chapter places its emphasis on the first of these two topics.

The *Child, Family and Community Service Act* lacks a provision that directly enables legal representation for a child. Instead, legal representation is a matter of policy and inherent judicial power. This approach stands in contrast to the approach taken in British Columbia's *Family Law Act* and in most other child protection statutes in Canada.

395. Nicholas Bala & Rachel Birnbaum, "Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases" (2018) 59:4 C de D 787 at 809 [Bala & Birnbaum, "Child Representation"].

Child, Family and Community Service Act

While there is no provision in the *Child, Family and Community Service Act* that directly deals with appointing a lawyer for a child in a child protection proceeding,[396] there is a ministerial policy that provides "[t]he Attorney General will appoint counsel for children who are made parties to a proceeding."[397] Children aren't automatically parties to child protection proceedings, but the Act contains a provision enabling a court to "order that a person be a party at any hearing."[398] A child may be made a party to a proceeding by a court order under this provision.

As for cases in which a child isn't made a party, one commentator has pointed out "[w]here the legislation is silent, superior court judges have relied on the court's *parens patriae* power to appoint child's counsel."[399] But "[o]nly superior courts in Canada have the *parens patriae* (Latin for 'parent of the country') jurisdiction . . . as a part of their inherent powers as a court of equity, and provincially appointed judges do not have this power."[400] This point is significant because most child protection proceedings in British Columbia take place in provincial court.

Family Law Act

In contrast to the *Child, Family and Community Service Act*, the *Family Law Act* contains a section expressly enabling a court to "at any time appoint a lawyer to represent the interests of a child in a proceeding under this Act."[401] But an appointment under this enabling provision may only be made if the court "is satisfied that" the following two conditions are met:

> (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and

396. There was formerly a program providing legal representation for children under the Act. See *Director of Child Family and Community Service v T.T.*, 2008 BCPC 114 at para 15, Pothecary Prov Ct J ("Previously in British Columbia, it was possible for the Court to order the appointment of a Child Advocate to represent children where appropriate. Unfortunately that capability was discontinued a number of years ago."). See also Suzanne Williams, "Perspective of the Child in Custody and Access Decisions: Implementing a Best Interests and Rights of the Child Test" (2007) 86:3 Can Bar Rev 633 at 651.

397. "*Child, Family and Community Service Act* Practice Checklists," *supra* note 299 at para 7.10.

398. *Supra* note 1, s 39 (4).

399. Bala et al, *Article 12*, *supra* note 357 at 39 (citing *Re L. (G.)*, 2012 SKQB 388).

400. Bala & Birnbaum, "Child Representation," *supra* note 395 at 802, n 36. See also *S.M.S.*, *supra* note 169 at para 42.

401. *Supra* note 28, s 203 (1).

(b) it is necessary to protect the best interests of the child.[402]

On their face, these two conditions appear to set rather high hurdles before a court considering the appointment of a lawyer for a child. Case law has confirmed that the section is to be read strictly. In a recent decision, the court of appeal rejected a rights-based interpretation of section 203,[403] which would have led to a reading of the section "as providing a more expansive right of representation for children than is apparent on its wording."[404]

Both the section and its interpretation in the case law have been the subject of criticism.[405]

402. *Ibid*, s 203 (1). The section also contains a provision on paying the lawyer: "[i]f the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements" (*ibid*, s 203 (2)).

403. That is, an interpretation of the section informed by the broadly framed rights found in the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, and article 12 of the UN Convention, *supra* note 346.

404. *J.E.S.D.*, *supra* note 353 at para 29.

405. See Martinson & Raven, *supra* note 353 at 5.1.17 ("The right provided by the legislature under this section is limited and has been narrowly applied by the B.C. Supreme Court, supported by the B.C.C.A. The section makes parental conflict and parents' inability to decide what is in the best interests of the child the determining factors. Doing so is arguably not consistent with treating the child as a person with rights separate . . . from those of the child's parents." [footnote omitted]). The authors also note that, in the face of these perceived limitations to section 203, "[t]here is an emerging view that s. 201(2)(b) can be used to provide the child with participation rights with independent legal representation" (*ibid*). See *Family Law Act*, *supra* note 28, s 201 ("(1) A child has the capacity to make, conduct or defend a proceeding under this Act without a litigation guardian if the child is (a) 16 years of age or older, (b) a spouse, or (c) a parent. (2) Nothing in subsection (1) prevents a court, if the court considers it appropriate, from (a) appointing a litigation guardian for a child described in subsection (1), or (b) *allowing a child who is not described in subsection (1) to make, conduct or defend a proceeding under this Act without a litigation guardian*." [emphasis added]). See also *Supreme Court Family Rules*, *supra* note 191, r 20-2; *A.B. v C.D.*, 2019 BCSC 254, rev'd in part, 2020 BCCA 11; *N.K. v A.H.*, 2016 BCSC 744 at paras 39–52, Skolrood J (appointing lawyer for a child under section 201).

Other Canadian child protection legislation

One commentator has noted that "[m]ost provinces and territories have statu[t]es providing for the appointment of legal representation for children in child protection proceedings."[406] Specifically, only British Columbia and Newfoundland and Labrador lack this kind of legislation.[407]

This legislation does tend to address a consistent set of topics. But it isn't consistent in its details. Here is an overview of how the various provisions address appointing a lawyer for a child in a child protection proceeding.

Scope: which proceedings are embraced by the legislation?

In some jurisdictions, provisions are limited to specific kinds of procedures and hearings.[408] But the more-common approach in the legislation is to have it apply expansively to any child protection proceeding in court.[409] Ontario goes even further,

406. Bala et al, *Article 12*, *supra* note 357 at 39. See Alberta: *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 112; Saskatchewan: *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, s 33.1; *The Provincial Court Act, 1988*, SS 1998, c P-30.11, s 64.1; *The Public Guardian and Trustee Act*, SS 1983, c P-36.3, s 6.3; Manitoba: *The Child and Family Services Act*, *supra* note 381, s 34 (2)–(3); Ontario: *Child, Youth and Family Services Act, 2017*, SO 2017, c 14, Sch 1, ss 17 (3) (representation in alternative dispute resolution), 78 (representation in court proceedings); Québec: *Youth Protection Act*, CQLR c P-34.1, s 80; New Brunswick: *Family Services Act*, SNB 1980, c F-2.2, ss 7–7.1; Prince Edward Island: *Child Protection Act*, RSPEI 1988, c C-5.1, s 34 (1); Nova Scotia: *Children and Family Services Act*, SNS 1990, c 5, s 37; Yukon: *Child and Family Services Act*, SY 2008, c 1, s 76; Northwest Territories: *Child and Family Services Act*, SNWT 1997, c 13, ss 3.1, 86; Nunavut: *Child and Family Services Act*, SNWT 1997, c 13, ss 3.1, 86, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28.

407. See Debra Lovinsky, Jessica Gagne, & Canada, Department of Justice, Family, Children and Youth Section, *Legal Representation of Children in Canada* (Ottawa: Department of Justice Canada, 2016), online: <www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/lrc-rje.pdf> at 16.

408. See Alberta: *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112 (1) ("[i]f an application is made for a supervision order, a private guardianship order or a temporary or permanent guardianship order, or a child is the subject of a supervision order or a temporary or permanent guardianship order or a permanent guardianship agreement, and the child is not represented by a lawyer in a proceeding under Part 1, Division 3, 4 or 5"); Prince Edward Island: *Child Protection Act*, *supra* note 406, s 34 (1) ("[w]here the Director has made an application pursuant to section 29").

409. See Manitoba: *The Child and Family Services Act*, *supra* note 381, s 34 (2) ("[i]n the case of the child who is the subject of the hearing"); Saskatchewan: *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (2); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (2); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (2) ("if an application for a protection hearing is made"); Ontario: *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 78 (2) ("[w]here a child does not have legal representation in a proceeding under this Part"); Québec: *Youth Protec-*

having a provision that deals with representation for children in alternative dispute resolution.[410]

Who makes the decision to appoint a lawyer for a child?

Most of the legislative provisions call on the court to decide whether or not a child should receive legal representation.[411] There is some variation on how these decisions get carried out and who makes the decisions. In Alberta, while the court makes a decision on legal representation, the province's child and youth advocate actually implements the decision.[412] In a similar vein, Saskatchewan hands the job of implementing the court's decision to its public guardian and trustee.[413] Alberta, Saskatchewan, and New Brunswick provide for alternative decision-makers, in addition to their courts. In Alberta, the child and youth advocate may decide to appoint a lawyer

tion Act, *supra* note 406, s 80; New Brunswick: *Family Services Act*, *supra* note 406, s 7 ("[i]n any proceeding with respect to the custody of a child, whether under this or any other Act"); Nova Scotia: *Children and Family Services Act*, *supra* note 406, s 37; Yukon: *Child and Family Services Act*, *supra* note 406, s 76 (1) ("[f]or the purposes of an application made or proposed by any person to a judge under this Part"); Northwest Territories and Nunavut: *Child and Family Services Act*, *supra* note 406, s 86 (1) ("a child who is the child subject of a hearing").

410. See *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 17 (3) ("If a society or a person, including a child, who is receiving child welfare services proposes that an alternative dispute resolution method or process referred to in subsection (1) or (2) be undertaken to assist in resolving an issue relating to a child or a plan for the child's care, the Children's Lawyer may provide legal representation to the child if, in the opinion of the Children's Lawyer, such legal representation is appropriate.").

411. See Alberta: *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112 (1); Saskatchewan: *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (2); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (2); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (2); Manitoba: *The Child and Family Services Act*, *supra* note 381, s 34 (2) ("a judge or master"); Ontario: *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 78 (2); Québec: *Youth Protection Act*, *supra* note 406, s 80; New Brunswick: *Family Services Act*, *supra* note 406, s 7 (b); Prince Edward Island: *Child Protection Act*, *supra* note 406, s 34 (1) (b); Nova Scotia: *Children and Family Services Act*, *supra* note 406, s 37 (2); Northwest Territories and Nunavut: *Child and Family Services Act*, *supra* note 406, s 86 (1).

412. See *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112 (2) ("If the Court directs that a child be represented by a lawyer pursuant to subsection (1), (a) it shall refer the child to the Child and Youth Advocate."), (3) ("If a referral is made under subsection (2), the Child and Youth Advocate shall appoint or cause to be appointed a lawyer to represent the child.").

413. See *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (3); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (3); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (3) ("If the court directs that a child be represented by a lawyer pursuant to subsection (2), the court shall refer the child to the public guardian and trustee and the public guardian and trustee shall appoint a lawyer to represent the child.").

for a child.[414] In Saskatchewan, the public guardian and trustee may also make this decision.[415] In New Brunswick, the minister of social development is an alternative decision-maker.[416] Yukon doesn't involve the courts at all in the decision; it is solely the call of the province's official guardian.[417] Ontario's legislation provides that the Office of the Children's Lawyer for Ontario is the decision-maker if the child is involved in alternative dispute resolution.[418] Finally, legal representation is mandatory in Nova Scotia, if the child is 16 years old or older and the child asks for a lawyer.[419]

How is determining a child's capacity to instruct a lawyer dealt with?

One of the practical issues that comes up for legal representation is whether a child has the capacity to instruct a lawyer.[420] Provinces and territories address this issue

414. See *Child and Youth Advocate Act*, SA 2011, c C-11.5, s 9 (1) (c); *Child and Youth Advocate Regulation*, Alta Reg 53/2012, s 1 (1).

415. See *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (4) ("On receiving a referral from anyone other than the court, the public guardian and trustee may appoint a lawyer to represent a child with respect to all matters relating to the protection of the child.").

416. See New Brunswick: *Family Services Act*, *supra* note 406, s 7 (a) ("the Minister may intervene in the proceeding and may take whatever steps he considers necessary to ensure that the interests and concerns of the child are properly represented separate from those of any other person, including the appointment of counsel or a responsible spokesman to assist in the representation of the interests and concerns of the child").

417. See *Child and Family Services Act*, *supra* note 406, s 76 (1) ("the official guardian has the exclusive right to determine whether a child requires the appointment of a guardian, or separate representation by a lawyer or any other person").

418. See *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 17 (3).

419. See *Children and Family Services Act*, *supra* note 406, s 37 (1) ("A child who is sixteen years of age or more is a party to a proceeding unless the court otherwise orders and, if a party, is, upon the request of the child, entitled to counsel for the purposes of a proceeding.").

420. Canadian law doesn't recognize a general test of mental capacity. (Perhaps the closest that it comes to taking a general approach is in age-of-majority legislation for children—see e.g. *Age of Majority Act*, RSBC 1996, c 7; *Infants Act*, RSBC 1996, c 223—but even those laws are shot through with specific exceptions.) Mental capacity is viewed as task specific. A person might have the mental capacity to do one thing (say, enter into a contract), but this doesn't necessarily mean that the person has the mental capacity to do something else (say, make a will). So, in thinking about capacity, it's critically important to know just what task the person whose capacity is at issue is being called on to perform. In the text, the task is described as instructing a lawyer. In describing the task in this way, the text is following the commentary (see Bala et al, *Article 12*, *supra* note 357 at 40–41) and case law (see *Re T.L.F.*, 2001 SKQB 271 at paras 30–31, Ryan-Froslie J). And it makes sense to home in on capacity to instruct a lawyer in these circumstances. Capacity to instruct a lawyer is a critical element of the traditional lawyer-client relationship. There is some controversy about how a lawyer should represent a child in child protec-

in different ways. In some cases, the enabling legislation calls on the court to consider the child's capacity to instruct a lawyer before ordering legal representation.[421] Other provinces' legislation relies on an age limit as a proxy for capacity.[422] Prince Edward Island uses a combination of these two approaches ("at least 12 years old and apparently capable of understanding the circumstances").[423] Finally, there are

tion proceedings, which may affect how capacity should be considered in these circumstances. Some people have said that the traditional lawyer-client relationship—in which a lawyer takes instructions from a child and acts as an advocate for the child's views—is inappropriate and lawyers should instead advance a position that is in the child's best interests, as determined by the lawyer, or take on a more neutral, friend-of-the-court role. Others have said that adopting such a role is inconsistent with treating children as fully fledged rights-holders. See *Re T.L.F*, *ibid* at paras 23–32; *Dormer v Thomas* (1990), 65 BCLR (3d) 290, [1999] BCJ No 1463 (QL) at paras 43–53 (SC), Martinson J). Having the capacity to instruct a lawyer is critical to the traditional relationship because if a lawyer acts for a client who lacks this capacity it places the lawyer at risk of professional discipline (see *Code of Professional Conduct for British Columbia*, *supra* note 199, r 3.2-9) and sanctions from the court (see *Tran v Ha*, 2011 BCSC 1077—costs awarded personally against lawyer who acted for client lacking capacity to instruct a lawyer in a court application). Having this capacity may be less relevant if the lawyer's role is seen as acting in the child's best interests or as a friend of the court. It is noteworthy that none of the legislation that addresses the capacity issue is actually framed in terms of capacity to instruct a lawyer. Instead, the relevant provisions (which are cited *infra* note 421) seem to be more concerned with the capacity to understand and participate in the court proceeding. It isn't hard to see how selecting the relevant task could lead a decision-maker to different results. Take, as an example, a mature youth who is slightly younger than the age of majority and whose capacity is being assessed by a court in relation to a decision whether to grant the youth legal representation in child protection proceeding. If the court determines that the youth has the capacity to instruct a lawyer, then this conclusion would logically have to be taken as a factor in support of granting legal representation. But it's much less clear how a determination that the youth is capable of understanding and participating in a court proceeding would affect the ultimate decision on legal representation. Does it provide support for granting legal representation for the capable youth? Or does it give support to a conclusion that such a youth is capable of self-representation and therefore doesn't need a lawyer?

421. See Saskatchewan: *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (4) (c); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (4) (c); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (9) (c) ("the ability of the child to express his or her interests or views"); Manitoba: *The Child and Family Services Act*, *supra* note 381, s 34 (3) (d) ("the capacity of the child to express his or her views to the court"); Yukon: *Child and Family Services Act*, *supra* note 406, s 76 (3) (b) (i) ("the ability of the child to comprehend the application"); Northwest Territories and Nunavut: *Child and Family Services Act*, *supra* note 406, s 3.1 (1) (b) ("a child who is able to express his or her views and preferences respecting decisions affecting him or her").

422. See New Brunswick: *Family Services Act*, *supra* note 406, s 7.1 (1) (a) ("12 years of age or older"); Nova Scotia: *Children and Family Services Act*, *supra* note 406, s 37 (1) ("sixteen years of age or more" entitled to lawyer on request), (2) ("twelve years of age or more" court may appoint lawyer).

423. *Child Protection Act*, *supra* note 406, s 34 (1).

legislative enabling provisions that don't address this issue.[424] None of the provisions discussed in this paragraph creates a presumption of capacity to instruct a lawyer, which is something that some commentators have called on the legislation to provide.[425]

What other factors does the legislation direct the decision-maker to consider?

The provisions on capacity to instruct a lawyer discussed in the previous paragraph aren't freestanding legislative tests of capacity. Instead, they appear as items in a list. As one commentator has noted, "most child protection statutes provide guidance on the judicial appointment of representation for a child."[426] The legislation does this by listing factors that a court must consider in deciding whether to order representation for a child. These factors differ from statute to statute.

In brief, here are factors commonly found in the legislation:

- whether a lawyer is needed to adequately represent the child's views;[427]
- whether there are any differences between the child's views and the views of a parent or another party;[428]

424. See Alberta: *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112; Ontario: *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 78; Québec: *Youth Protection Act*, *supra* note 406, s 80.

425. See Bala & Birnbaum, "Child Representation," *supra* note 395 at 823.

426. See Bala et al, *Article 12*, *supra* note 357 at 40.

427. See Alberta: *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112 (1) (b) ("the Court is satisfied that the interests or views of the child would not be otherwise adequately represented"); New Brunswick: *Family Services Act*, *supra* note 406, s 7.1 (1) ("(b) whether the child's wishes, where they can be expressed and where the child is capable of understanding the nature of any choices that may be available to him or her, have been given consideration in determining his or her interests and concerns; . . . (e) whether counsel is better able to identify the child's interests and concerns"); Yukon: *Child and Family Services Act*, *supra* note 406, s 76 (3) (b) (iii) ("whether the parties to the application will put or are putting before the judge the relevant evidence in respect of the interests of the child that can reasonably be adduced").

428. See Saskatchewan: *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (4) (a); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (4) (a); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (9) (a) ("any difference between the interests or views of the child and the interests or views of the parties to the protection hearing"); Manitoba: *The Child and Family Services Act*, *supra* note 381, s 34 (3) ("(a) any difference in the view of the child and the views of the other parties to the hearing; (b) any difference in the interests of the child and the interests of the other parties to the hearing"); Ontario: *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 78 (4) (a) ("the court is of the opinion that there is a difference of views between the

- whether the nature of the proceedings (including their complexity or seriousness) calls for legal representation;[429]
- whether the child favours or requests legal representation;[430]
- whether it's in the best interests of the child to order legal representation.[431]

Who pays for the child's lawyer?

Finally, a handful of these legislative provisions deal with paying for a child's lawyer. In a couple of cases, the legislation addresses assigning payment to or apportioning costs among the child, the child's parents, or some public figure.[432] The legislative

child and a parent or a society"); Québec: *Youth Protection Act*, *supra* note 406, s 80 ("the interests of the child are opposed to those of his parents"); New Brunswick: *Family Services Act*, *supra* note 406, s 7.1 (1) (d) ("whether the interests and concerns of the child and those of the Minister differ"); Yukon: *Child and Family Services Act*, *supra* note 406, s 76 (3) (b) (ii) ("whether there exists a conflict between the interests of the child and the interests of any party to the application and, if so, the nature of the conflict"); Northwest Territories and Nunavut: *Child and Family Services Act*, *supra* note 406, s 86 (1) (a) ("the interests of the child and the child's parents are in conflict").

429. See Saskatchewan: *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (4) (b); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (4) (b); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (9) (b) ("the nature of the protection hearing, including the seriousness and complexity of the issues"); Manitoba: *The Child and Family Services Act*, *supra* note 406, s 34 (3) (c) ("the nature of the hearing, including the seriousness and complexity of the issues and whether the agency is requesting that the child be removed from the home"); Ontario: *Child, Youth and Family Services Act, 2017*, *supra* note 406, s 78 (4) ("(a) . . . the society proposes that the child be removed from a person's care or be placed in interim or extended society care under paragraph 2 or 3 of subsection 101 (1); (b) the child is in the society's care and, (i) no parent appears before the court, or (ii) it is alleged that the child is in need of protection within the meaning of clause 74 (2) (a), (c), (f), (g) or (j); or (c) the child is not permitted to be present at the hearing").

430. See Alberta: *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112 (1) (a) ("the child, the guardian of the child or a director requests the Court to do so"); Saskatchewan: *The Queen's Bench Act, 1998*, *supra* note 406, s 33.1 (4) (d); *The Provincial Court Act, 1988*, *supra* note 406, s 64.1 (4) (d); *The Public Guardian and Trustee Act*, *supra* note 406, s 6.3 (9) (d) ("the views of the child regarding representation"); Manitoba: *The Child and Family Services Act*, *supra* note 381, s 34 (3) (e) ("the views of the child regarding separate representation, where such views can reasonably be ascertained"); Nova Scotia: *Children and Family Services Act*, *supra* note 406, s 37 (1) ("upon the request of the child").

431. See Nova Scotia: *Children and Family Services Act*, *supra* note 406, s 37 (2) ("where the court determines that such status [as a party to the proceedings] and representation is desirable to protect the child's interests"); Northwest Territories and Nunavut: *Child and Family Services Act*, *supra* note 406, s 86 (1) (b) ("it would be in the best interests of the child to be represented by his or her own counsel").

432. See Alberta: *Child, Youth and Family Enhancement Act*, *supra* note 406, s 112 (4) ("If a referral is made under subsection (2), the Court may make an order directing that the costs of the lawyer

enabling provisions for Nova Scotia and Yukon provide for public funding,[433] but this appears to be the exception rather than the rule. In other provinces and territories the enabling legislation doesn't mention public funding, but there are programs in place that do provide it.[434]

Issue for Reform

Should the Child, Family and Community Service Act be amended to provide for legal representation for children in child protection proceedings?

Brief description of the issue

In contrast to British Columbia's *Family Law Act* and child protection legislation in most of the rest of Canada, the *Child, Family and Community Service Act* lacks a provision that addresses appointing a lawyer for a child in a court proceeding. This issue has been governed by ministerial policy, with the court's inherent powers potentially available in some cases as a basis for relief. Should the Act be amended to add a provision on children's legal representation in child protection proceedings?

Discussion of options for reform

Initially, this issue essentially raises a yes-or-no question: either propose an amendment to the Act or decide that the status quo is preferable to reform.

be paid by the child, the guardian of the child or a director or apportioned among all or any of them, having regard to the means of the child and the guardian."); Northwest Territories and Nunavut: *Child and Family Services Act*, *supra* note 406, s 86 (2) ("The court may require the parents of the child to pay the fees, disbursements and expenses of counsel and expenses referred to in subsection (1) and shall specify in the order the proportion or amounts of the fees, disbursements and expenses that each parent is required to pay.").

433. See Nova Scotia: *Children and Family Services Act*, *supra* note 406, s 37 (4) ("Where a child is represented by counsel or a guardian *ad litem* pursuant to this Section, the Minister shall in accordance with the regulations, pay the reasonable fees and disbursements of the counsel or guardian as the case may be, including the reasonable fees and disbursements of counsel for the guardian."); Yukon: *Child and Family Services Act*, *supra* note 406, s 76 (1) ("will be paid for at public expense chargeable to the Government of Yukon's consolidated revenue fund").

434. See Bala & Birnbaum, "Child Representation," *supra* note 395 at 805–806 (discussing program in Alberta), 807–809 (discussing programs in Ontario, Prince Edward Island, and the Northwest Territories).

The advantages of having legal representation available for a child have been affirmed in the case law[435] and commentary.[436] Legal representation can have a significant, even decisive, impact on making a child's views known and ensuring that those views are given serious consideration by decision-makers in child protection proceedings. So the question is more a matter of determining the best way to enable legal representation: through legislation or through a combination of ministerial policy and judicial powers.

There may be advantages to British Columbia's current approach to legal representation for children in child protection proceedings. An argument could be made that this approach is tailored to British Columbia's current needs. And, since ministerial policies are easier to amend than legislation, this approach may be more flexible and better able to respond to changing circumstances. Further, the courts may be able to bolster the current system on a case-by-case basis.

But these perceived strengths of the current system could also be seen as weaknesses. The flexibility provided by ministerial policies often comes at the cost of certainty, predictability, and clarity. Programs established under a policy can change significantly in a short time or even be abruptly terminated. Further, relying on the courts to craft individual remedies has significant limitations. The courts' powers to act in this area are grounded in inherent powers that a superior court has but that the provincial court (which handles the bulk of child protection proceedings in British Columbia) does not have. As a statutory court, the provincial court may be limited to the one route that the *Child, Family and Community Service Act* clearly provides to legal representation for children: an order that a child be made a party to the proceeding.[437] But this remedy amounts to a significant overcorrection, as party status has implications that go far beyond legal representation. Court remedies are also, in general, costly and time consuming to obtain—challenges that are likely to be especially acute for an unrepresented child.

435. See *G. (B.J.)*, *supra* note 352.

436. See Hon Donna J Martinson, QC, "Children's Legal Rights in Canada under the United Nations Convention on the Rights of the Child" (February 2016), online (pdf): *Canadian Bar Association* <www.cba.org/CBAMediaLibrary/cba_na/PDFs/Publications%20And%20Resources/Toolkits/ChildRights/LegalRightsUnderUNConvention_Martinson.pdf> at 55–56 ("While laws alone cannot solve all of the issues that children face, applying 'the law,' using a child rights based approach, is a very important method of effectively advancing their overall interests and well-being and of including their meaningful participation. . . . A very good start would be to take seriously children's rights to independent legal representation.").

437. See *supra* note 1, s 39 (4).

Legislative enabling provisions have the advantage of making the law relatively clear, consistent, and predictable. Amending the *Child, Family and Community Service Act* to enact such a provision would also have the benefit of bringing this Act into line with the *Family Law Act* and most other child protection legislation in Canada.

In comparison with ministerial policy, legislation's main downside is that it can be rigid and difficult to change. Legislation may also be dependent on policies and programs to be effective. Simply enacting a legislative enabling provision might not be a meaningful change in the law if the rights that it provides for aren't supported by adequately funded programs.

The preceding paragraphs have delved into the general advantages and disadvantages of policy-based and legislation-based approaches to children's legal representation. There may also be some specific problems with the status quo that could be addressed. In particular, British Columbia's current approach is more restrictive than what is found in most other Canadian provinces and territories. Of course, it should be borne in mind that expanding access to legal representation can be expensive.

This point leads into a potential broadening of this issue. If an enabling provision is the preferred option for reform, then questions may arise about the legislative details and government policies and programs that may be necessary to support such an enabling provision.

At this point, the issue could develop into a more open-ended inquiry, embracing a wide range of options. A review of the legislative provisions already in force points to some of the options that could be considered here, although this list is far from exhaustive.

- **Harmonizing with the *Family Law Act*.** The *Family Law Act* contains an enabling provision for legal representation for a child (section 203). One option would be to propose that the *Child, Family and Community Service Act* be amended to adopt a substantively similar provision. Selecting this option would provide clarity on the details of the provision and would promote consistency among British Columbia's family-law statutes. But it would also take a more restrictive approach to legal representation than is typically found in other Canadian child protection legislation.
- **Picking the best of the provisions in other child protection legislation in Canada.** Another option would be to draw on child protection legislation in force elsewhere in Canada as models for an enabling provision for the *Child, Family and Community Service Act*. There is considerable variation

among this legislation. But it does consistently address the following four topics, even though the details of the various provisions are different.

- **Scope of the provision.** In most cases, the legislation applies broadly to all child protection proceedings. But there are examples of provisions that limit their scope to certain kinds of proceedings.
- **Addressing who decides whether a child should receive legal representation.** With the exception of Nova Scotia (which makes legal representation mandatory on request of a child who is 16 years old or older), Canadian child protection legislation treats representation for a child as a legal issue to be decided by a decision-maker. In most cases, this decision-maker is a court. Another option seen in a handful of provisions is to assign decision-making responsibility to a government ministry (such as the Ministry of Children and Family Development or the Ministry of Attorney General) or an arm's-length government agency (such as the Public Guardian and Trustee or Representative for Children and Youth). The legislation grants these bodies either sole decision-making responsibility or responsibility as an alternative to the court.
- **Should this decision-maker be guided by a list of factors? If so, what should those factors be?** Most of the provisions require the decision-maker to consider a list of factors before making a decision on legal representation. The most common factors to consider are: (1) the nature of the proceeding (especially taking note of the seriousness and complexity of the issues it raises); (2) whether the views and interests of the child are in conflict with or differ from those of another party to the proceeding; (3) whether there are methods other than legal representation to bring the child's views before the proceeding; (4) the views of the child on legal representation; (5) the child's capacity to instruct a lawyer.
- **Addressing capacity.** Most of the provisions deal with a child's capacity to instruct a lawyer as a factor for the decision-maker to consider. Many of them use age as a proxy for capacity (common thresholds are 16 and 12 years old). Others use evaluative language, directing the decision-maker to consider assessing the child's capacity. None of them does what some commentators have suggested is a better approach: a freestanding provision that presumes capacity in children unless it can be demonstrated that they lack it. The *Family Law Act* comes closest to this approach, though it does rely on an age threshold.[438]

438. See *supra* note 28, s 201 ("(1) A child has the capacity to make, conduct or defend a proceeding under this Act without a litigation guardian if the child is (a) 16 years of age or older, (b) a spouse, or (c) a parent. (2) Nothing in subsection (1) prevents a court, if the court considers it

- **Other details.** Some of the provisions deal with responsibility to pay for the child's lawyer, among other details that could be addressed.

The committee's tentative recommendation for reform

In considering this issue, the committee noted that it had already made tentative recommendations liberalizing party status for children[439] and enabling the incorporation of a child's views in a child protection proceeding.[440] These tentative recommendations may help to address issues that are now met with calls for legal representation for children.

That said, the committee recognized the importance of this issue. It favoured a proposal to amend the Act, adding an enabling provision for legal representation for children. Such a provision would make the law on this issue clearer and more consistent. It would also bring British Columbia into line with the rest of the country.

The committee also discussed the details that would need to be in place to support an effective enabling provision. In addition to the details noted in the discussion of the options for reform on the preceding pages, the committee also took notice of a point of debate in the case law and commentary about the model of legal representation that children may receive. In brief, there are typically said to be three models to choose from: (1) the traditional representation model, where a child has the capacity to instruct a lawyer and does instruct the lawyer, who advocates in accordance with the child's instructions; (2) the best-interests model, where the child has a lawyer, and it's the lawyer's job to advocate for what he or she views to be in the child's best interests, which may diverge from the child's own views or wishes; (3) the friend-of-the-court model, where the lawyer's role is to provide information to the judge to support the court's determination of the child's best interests.[441] In the committee's view, it would be necessary to choose a model from among these three, because this decision would guide further decisions on what details the legislation should address.

Even though the committee understands that these details and considerations would have to be addressed in order to implement an effective legislative enabling provision, it decided to confine its tentative recommendation mainly to the need for

appropriate, from (a) appointing a litigation guardian for a child described in subsection (1), or (b) allowing a child who is not described in subsection (1) to make, conduct or defend a proceeding under this Act without a litigation guardian.").

439. See tentative recommendation nos. (28), (29), and (30), above, at 97–99.

440. See tentative recommendation no. (37), above, at 129–131.

441. See *supra* note 420.

such a provision. The committee made this decision for two reasons. First, it noted that while there is a legislative component to some of these details, in many respects the legislative provisions will rely on ministerial policy and government programs to be effective. The design of such policies and programs falls outside the committee's mandate. Second, settling all the details of the actual legislation requires more time and resources than this committee has at its disposal.

Finally, the committee was aware that, in the vast majority of cases, legal representation for a child will lead to a decision that a child become a party to a proceeding. In view of this consideration, the committee decided that its tentative recommendation should address party status as well as legal representation. The committee made this decision for several reasons. First, as a practical matter, fulfilling many of the aspects of legal representation turns on a child participating in the proceeding as a party and having rights to disclosure of information. Second, the committee was concerned about the procedural awkwardness of calling for an application for legal representation under its proposed enabling provision and then requiring a further application to be appointed a party under section 39 of the Act. Third, the committee found it significant that the proposed provision deals with a court appointing a lawyer for a child.

The committee framed its tentative recommendation in a deliberate way, embracing first the question of legal representation and then party status. While the committee envisions a single application, it also sees that application as being taken up with two distinct questions. A court's decision to appoint a lawyer for a child doesn't automatically lead to the child becoming a party. There has to be some mechanism for the court to deal with rare cases where party status could be harmful to a child. In particular, the committee was concerned about cases in which a party's right to full disclosure could lead to a child receiving information detrimental to the child's well-being.

The committee was aware that the Act has another procedure for a person to be made a party, which is set out in section 39. The committee views the two procedures as operating independently.

The committee tentatively recommends:

38. The Child, Family and Community Service Act should be amended by adding a provision that enables a court to appoint a lawyer for a child in a child protection proceeding and to make that child a party to that proceeding.

Chapter 9. Conclusion

This consultation paper has set out the Child Protection Project Committee's tentative recommendations for reform. These tentative recommendations are made up of proposals to amend specific areas of the *Child, Family and Community Service Act*.

The committee has tentatively recommended that the Act's terminology be modernized and generally brought into line with developments in family-law legislation, such as British Columbia's *Family Law Act* and the federal *Divorce Act*. In particular, the committee proposes to replace custody (a word that has acquired negative connotations) with guardianship. But the committee has taken care to avoid simply copying and pasting terminology from the *Family Law Act* and the *Divorce Act* into the *Child, Family and Community Service Act*. It has sought to ensure that new terminology respects the special needs of the child protection system, even if this means departing from strict harmonization with family-law legislation.

The committee has tentatively recommended that the *Child, Family and Community Service Act* adopt new provisions that enhance disclosure from a director to a parent or other party to a child protection proceeding. In particular, the committee proposed requiring the director to disclose the reasons for which an extension of an order is being sought. The committee also proposed specific improvements to clarify and enhance the Act's general provision on disclosure in child protection proceedings.

The committee has tentatively recommended expanding the role independent legal advice plays in the *Child, Family and Community Service Act*. The committee proposed amending provisions relating to various agreements to include statements that parents and children (who are 12 years of age or older) must be advised of their right to independent legal advice before entering into the agreement. The committee also proposed amending the Act to provide that a child (who is 12 years of age or older) must be offered independent legal advice whenever the child is served with an application for an order under the Act.

The committee has made a series of tentative recommendations intended to clarify and enhance provisions of the Act dealing with court procedures and orders. These proposals include changes to consent orders and party status for children, among other changes.

The committee has tentatively recommended amendments to the Act to address selected protection issues. The committee proposed clarifying the ground for protection relating to emotional harm. It also proposed adding a new provision, requiring a

reassessment of whether a child should remain in care before any decision is made to extend the child's time in care. Finally, the committee proposed amendments to spell out a child's right of access to parents, siblings, and extended family.

The committee has tentatively recommended that the Act be amended to adopt a provision that clearly sets out a court's options in incorporating a child's views into a child protection proceeding.

The committee has tentatively recommended that the *Child, Family and Community Service Act* be amended to adopt a provision enabling legal representation for a child in child protection proceedings.

The committee hopes to receive a wide range of responses to its tentative recommendations. Public comment is an integral part of the process of developing law-reform recommendations. Final recommendations are often shaped by input received at the consultation stage. The committee is proposing a host of changes to the *Child, Family and Community Service Act*, on which it would like to receive additional consideration before they are made final recommendations.

The committee's final recommendations will be submitted to the provincial government. In considering the committee's recommendations, the provincial government should take into account the need for broader consultations than BCLI is capable of carrying out, bearing in mind (in particular) the provincial government's obligation to consult with Indigenous communities, who are particularly affected by legislation on child welfare

APPENDIX A

List of Tentative Recommendations

Definitions and terms—custody and access

1. The Child, Family and Community Service Act should be amended by repealing the definition of "custody." **(19–20)**

2. The Child, Family and Community Service Act should be amended to strike out "custody" and replace it with "guardianship," wherever "custody" is used in connection with a child, that child's relationship to a parent, a director, or another person who may act as a guardian to the child, or the name of an order or proceeding under the Act. **(21–22)**

3. The Child, Family and Community Service Act should retain its current definition of "guardianship." **(22–23)**

4. The Child, Family and Community Service Act should retain all its references to "access." **(23–24)**

Definitions and terms—parent and the parent apparently entitled to custody of the child

5. The definition of "parent" in the Child, Family and Community Service Act should be amended by adding the following as a new paragraph (c): "a parent as defined in the Family Law Act." **(31–33)**

6. The Child, Family and Community Service Act should be amended to strike out "the parent apparently entitled to custody" wherever it appears and replace it with "a parent or guardian." **(36–37)**

7. Section 55 of the Child, Family and Community Service Act should be amended

(a) in subsection (4) by striking out "the parent who had custody when the child was removed" and substituting "a parent or guardian" and

(b) in subsection (5) by striking out "the parent who had custody when the child was removed" and substituting "a parent or guardian." **(37–38)**

8. A new section 55.1 should be added to the Child, Family and Community Service Act, which should provide that, upon the making of an order pursuant to section 55 (4) or (5), any existing orders made pursuant to family-law legislation in relation to parenting time, contact, or access are suspended during the period a child remains in the guardianship of the director, subject only to other orders subsequently made under section 55. **(38–39)**

Definitions and terms—domestic violence

*9. The Child, Family and Community Service Act should be amended to add the following definition: " '**violence**' means*

(a) physical abuse, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse,

(c) attempts to commit physical or sexual abuse,

(d) psychological or emotional abuse, including

(i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property, and

(ii) stalking or following, and

(e) in the case of a child, direct or indirect exposure to violence." **(44–48)**

*10. The Child, Family and Community Service Act should be amended to add the following definition: " '**violence in the home**' means violence."* **(44–48)**

11. The Child, Family and Community Service Act should be amended by striking out "domestic violence" wherever it appears and substituting

(a) "violence in the home, or"

(b) "violence by or towards a person with whom the child resides in the presence of a child." **(44–48)**

Disclosure

12. Form 2 (Application for an Order) of the Provincial Court (Child, Family and Community Service Act) Rules should be amended to add a narrative box, which will be used to specify the reasons, in compliance with the Child, Family and Community Service Act, for which the extension is being sought. **(56–58)**

13. Section 64 of the Child, Family and Community Service Act should be amended by striking out the words "If requested" and substituting "Prior to a case conference under rule 2 of the Provincial Court (Child, Family and Community Service Act) Rules, or at least 30 days prior to a contested hearing, except when a hearing is scheduled within these 30 days, then as soon as practicable." **(58–60)**

14. Section 64 (1) (c) of the Child, Family and Community Service Act should be repealed and the following substituted: "all documents to which the party intends to refer to at trial." **(58–60)**

15. Section 64 of the Child, Family and Community Service Act should be amended to add a new subsection (1.1), which should read as follows: "The director must 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." **(58–60)**

16. Section 64 (2) of the Child, Family and Community Service Act should be amended by adding "or subsection (1.1)" between "under subsection (1)" and "is subject to any claim of privilege." **(58–60)**

Independent legal advice

17. Section 6 of the Child, Family and Community Service Act should be amended to provide that each parent and child (if 12 years of age or over) must be advised of their rights to independent legal advice before signing a voluntary care agreement under section 6. **(68–69)**

18. Section 7 of the Child, Family and Community Service Act should be amended to provide that each parent and child (if 12 years of age or over) must be advised of their rights to independent legal advice before signing a special needs agreement under section 7. **(68–69)**

19. Section 8 of the Child, Family and Community Service Act should be amended to provide that each parent, child (if 12 years of age or over), proposed caregiver under the agreement, and (if the child is an Indigenous child) the child's Indigenous community (if it is going to be a signatory to the agreement) must be advised of their rights to independent legal advice before signing an agreement with child's kin and others under section 8. **(68–69)**

20. The British Columbia government should develop resources to expand the availability of independent legal advice and legal information for individuals and organizations

entering into agreements under sections 6, 7, or 8 of the Child, Family and Community Service Act or safety plans, by programs such as online independent legal advice, independent legal advice by telephone, information about available resources (such as the family law line), a website setting out legal information on sections 6, 7, and 8 of the Act, and a roster of lawyers who provide independent legal advice. **(70–71)**

21. The Child, Family and Community Service Act should be amended to provide that a child (if 12 years of age or over) must be offered independent legal advice whenever the child is served with an application for an order under the Act. **(71–72)**

22. A form, to be signed by the child, should be developed that the social worker must complete for children 12 and older confirming whether the child has requested or declined independent legal advice. **(71–73)**

Court procedures and orders

23. Section 60 (3) of the Child, Family and Community Service Act should be amended by adding ", including the requirement that consent be in writing," after "dispense with any consent under subsections (1) and (6)." **(78–80)**

24. Section 54.01 (9) of the Child, Family and Community Service Act should be amended to add a new paragraph (d) that provides that a child be placed in the continuing custody of the director, provided that the test under section 49 (5) is met. **(82–83)**

25. Section 54.2 (1) (a) of the Child, Family and Community Service Act should be amended by adding "sole" between "child's" and "guardian." **(85–87)**

26. The Child, Family and Community Service Act should not be amended to provide that an order under a section (other than section 54.2 (1) (a)) transferring guardianship of a child to a person who is not the child's parent or the director has the effect of transferring sole guardianship of the child. **(87–88)**

27. The Child, Family and Community Service Act should not be amended to adopt provisions modelled on the sections of the Family Law Act dealing with misuse of court process and orders respecting conduct. **(92–94)**

28. Section 39 of the Child, Family and Community Service Act should be amended to add a new subsection (2.1) that reads as follows: "A child, if 12 years of age or older, who appears at the commencement of a hearing is entitled to be a party, subject to the court's discretion." **(97–99)**

29. A form should be developed for use by lawyers who give independent legal advice, which requires the lawyer to confirm whether or not the child wishes to be a party to a hearing. **(97–99)**

30. The lawyer who gives independent legal advice to a child should provide to the social worker the new form that records whether or not a child wants to be a party, to be maintained on the child's file, and made available to be filed with the court at the request of the child or any other party. **(97–99)**

Selected protection issues

31. Section 13 (1) (e) of the Child, Family and Community Service Act should be amended by

(a) striking out "is" and replacing it with "has been, or is likely to be," and

(b) striking out subparagraph (ii). **(104–106)**

32. Section 13 (1) of the Child, Family and Community Service Act should be amended by adding the following as new paragraph (m): "if the child is living in a situation where there is (i) violence in the home or (ii) violence by or towards a person with whom the child resides in the presence of the child," and removing section 13 (1) (e) (ii). **(106–108)**

33. Section 13 of the Child, Family and Community Service Act should be amended to make it clear that, whether dealing with past harm or likelihood of future harm, the same test on a balance of probabilities applies. **(108–109)**

34. The Child, Family and Community Service Act should be amended by adding a new section that provides "In the context of providing child and family services in relation to a child, there must be a reassessment, conducted on a regular basis, and prior to any subsequent custody application before the court, of whether it would be appropriate to place the child with (a) one of the child's parents, if the child does not reside with such a person; or (b) another adult member of the child's family, if the child does not reside with such a person." **(111–113)**

35. Section 32 of the Child, Family and Community Service Act should be amended by adding a new subsection that provides "A director must use best efforts to arrange access between the parents, siblings, and other extended family with the child prior to an order being made under section 55 for access." **(114–117)**

36. Section 70 (1) of the Child, Family and Community Service Act should be amended by adding a new paragraph that provides "to contact with parents, siblings, and other

extended family, except where such contact could compromise the child's safety and wellbeing, and subject to any order of the court under this Act. **(114–117)**

Incorporating children's views in child protection proceedings

37. The Child, Family and Community Service Act should be amended by adding a new section providing that if a child who is the subject of a proceeding under this Act requests that his or her views be known at the proceeding, the court must, after a consideration of the child's best interests, the safety and wellbeing of the child, and the preferences of the child,

(a) meet with the child with or without the other parties and their legal counsel,

(b) permit the child to testify at the proceeding,

(c) consider written material submitted by the child,

(d) appoint a family justice counsellor, a social worker, a psychologist, a lawyer or another person approved by the court to assess and report on the views of the child in relation to the application before the court, or

(e) allow the child to express his or her views in some other way. **(129–132)**

Legal representation for children in child protection proceedings

38. The Child, Family and Community Service Act should be amended by adding a provision that enables a court to appoint a lawyer for a child in a child protection proceeding and to make that child a party to that proceeding. **(142–147)**

APPENDIX B

Biographies of Project-Committee Members

Corinne P. Feenie (committee co-chair) graduated from the Faculty of Law at the University of British Columbia in 1988 and was called to the British Columbia Bar in 1989.

Corinne was Provincial Crown Counsel at 222 Main Street in Vancouver for a year before joining the law firm of Gove, McLachlan, Brown, acting for the Director of Child, Family and Community Services while maintaining a small criminal-defence practice.

In March of 1989, she became a partner in the law firm of Stewart Feenie (now Feenie MacDonald) where she continued to practice child protection as counsel for the Director in Vancouver for both the Ministry of Children and Family Development (MCFD) and Vancouver Aboriginal Child and Family Services Society (VACFSS) and for MCFD in North Vancouver, Squamish, and Pemberton, until her recent retirement from that practice.

Corinne is an active member of the Association of Family and Conciliation Courts (AFCC), an international interdisciplinary family-law association, and has been a regular speaker and Chair at Continuing Legal Education courses on child protection over the past 20 years. Corinne has also provided educational seminars for social workers, Provincial Court judges, and child protection lawyers in BC and Ontario.

Katrina Harry (committee co-chair) is a member of the Esketemc First Nation and the Manager, Indigenous Services, PLC, for Legal Services Society of British Columbia. Katrina opened the first Parents Legal Centre (PLC) for LSS, and now oversees the 10 locations across the province. The PLCs focus on collaborative practice and wrap-around support to clients engaged in the child-welfare system. In the last 10 years of practice Katrina focused mainly on child protection, which included representing clients at court at collaborative processes, writing or reviewing legal publications, presenting at or co-chairing conferences, and presenting as a guest lecturer at various law-related organizations. In her free time, she enjoys travel, food, music, and her wonderful family.

Holly Anderson is a Métis social worker whose roots lie in Manitoba. Holding a bachelor's of social work degree and a master's degree in Social Justice, she is the current Guardianship Manager with Vancouver Aboriginal Child and Family Services. Her focus is on practising from a restorative place with families, emphasizing an inclusive approach that is grounded in the belief that relationships with family, culture, and community are healing and in the best interest of the child. In her free time, Holly enjoys participating in her community and celebrating her family.

Fiona M. Beveridge is the Principal of Fiona Beveridge Family Law and has a specific focus on children, child protection, collaborative family law, and mediation. She is a certified Parenting Coordinator and is on the BC Hear the Child Society's roster of trained neutral child interviewers, providing reports that allow the views of the children to be considered in mediation or court cases.

Fiona has extensive experience in the area of child protection. Fiona was director's counsel for six years in the areas of Squamish and Pemberton. For the last eight years, Fiona has acted as counsel for parents and mostly for children in the care of the Ministry of Children and Family Development for British Columbia.

Fiona is the editor of the child protection chapters for Continuing Legal Education publications, including the *Family Law Sourcebook*, *Annotated Family Practice*, and the *British Columbia Family Practice Manual*, as well as the professional legal training course materials. Fiona has presented at CLE conferences about Acting as Counsel for Children in Child Protection Proceedings. Fiona was previously an Executive Member of the Canadian Bar Association's Children's Law Section and is now on the board of the BC Parenting Coordinators Roster Society.

Fiona is a practising member of the Law Society of British Columbia and holds a bachelor of laws degree from the University of Alberta and a master of laws degree from the University of Cambridge. She was called to the British Columbia bar in 2003 after working as a Judicial Law Clerk at the Supreme Court of British Columbia.

Jennifer A. Davenport was appointed as per diem Judicial Justice of the Provincial Court of British Columbia on April 1, 2020. Jennifer spent 20 years working for the Public Guardian and Trustee, retiring in 2019. She was appointed Deputy Public Guardian and Trustee on January 3, 2012 after serving as the Acting Director of Legal Services. Prior to that, Jennifer spent 12 years as legal counsel to the Public Guardian and Trustee both in the Child and Youth Services and Services to Adults divisions. As Deputy Public Guardian and Trustee, Jennifer was a member of the Executive Committee, the Director of Legal Services and Chief Legal Counsel to the Public Guardian and Trustee. Before joining the Public Guardian and Trustee, Jen-

nifer practiced law in Vancouver and Surrey, in the areas of small business and wills and estates law.

Jennifer completed her Bachelor of Commerce degree at the University of British Columbia and obtained a Juris Doctor degree from the University of Victoria. She has been on many volunteer boards and is the past Chair of the Canadian Bar Association Wills and Trusts subsection (Vancouver).

Meena Dhillon is a practising lawyer called to the bar of British Columbia in 2009 and a practising registered social worker. A sole practitioner, Meena has a practice focused on completing views of the child reports for family-law matters, handling wills-and-estates matters, plaintiff's personal injury, and conducting material damage arbitrations. Meena is a qualified roster member with the BC Hear the Child Society, qualified family-law mediation, and qualified arbitrator with the ADR Institute of British Columbia. Meena has worked in the area of child protection with the Ministry of Children and Family Development for 18 years. Meena's child protection work experience is focused on emergency child protection with the After Hours Program at MCFD. In addition, Meena is a sessional professor at the University of the Fraser Valley School of Social Work and Human Service, where she teaches course work on child-welfare intersections with the law and child-welfare policy. Meena is passionate about ensuring children's voices are heard in matters involving them and access to justice. Meena is a regular volunteer with Access Pro Bono, a board member with the BC Trial Lawyers Association, a founding member of the South Asian Legal Clinic of British Columbia, and an executive board member with the Indian Summer Festival Society.

Robert Evans (committee member July 2019–present) is a partner with RWE Family Law and a lawyer who has appeared before all levels of court in British Columbia.

Robert practises law because he is committed to the principles of fundamental justice and due process. He crafts solutions to legal problems by listening carefully to his clients, without jumping to conclusions. Focusing on family law, Robert aims to make a positive difference in the community by representing clients from all cultural and economic backgrounds. Robert believes that legal representation means striving to advance the legal position of his clients with sound legal advice and with strong advocacy on their behalf.

In 2011 Robert was called to the bar in British Columbia and in the State of New York, 3rd appellate division.

Meghan Felbel is the Director, Legislation and Legal Support with the Ministry of Children and Family Development for British Columbia, with responsibility for the development and implementation of statutes under MCFD's purview, including the *Child, Family and Community Service Act*, *Adoption Act*, *Social Workers Act*, and child care legislation, among others.

Meghan has a master's degree in public administration from the University of Victoria, and has led legislative and regulatory development projects for the BC government since 2012.

Carly Hyman is currently the Chief Investigator of the Reviews and Investigations team with the Representative for Children and Youth for British Columbia. She has a bachelor of arts degree from the University of Manitoba, a law degree from the University of Victoria, and was called to the bar in British Columbia in 2002. From 2004 to 2008, Carly worked as an investigator with the Office of the Ombudsperson where she investigated hundreds of complaints concerning a variety of government programs. From 2008 to 2013, Carly worked as the first manager of the Ombudsperson's systemic investigations team where she managed confidential, complex, and high-profile investigations. In 2014, Carly went to work at the Ministry of Health as the Manager of Seniors Policy. Carly then worked as the Director of Policy, Legislation and Issues Management with the Court Services Branch of the Ministry of Attorney General where she was responsible for major projects aimed at reforming the court system and improving citizens' experiences.

Serena Kullar (committee member May 2019–May 2020) is currently employed by Vancouver Coastal Health as a Program Coordinator for two pregnancy outreach programs, Youth Pregnancy and Parenting Program (YPPP) and Healthiest Babies Possible. Prior to this, she worked as the Perinatal Substance Use Social Worker at BC Women's Hospital, Fir Square. Serena Kullar also has over 10 years of child protection experience through her work at the Ministry of Children and Family Development as well as Vancouver Aboriginal Child and Family Services Society. The views and opinions expressed through the BCLI Child Protection Project Committee are my own and do not necessarily represent those of my employer.

Claudia Liddle (committee member August 2019–present) is the Family Service Child Protection Practice Manager with Vancouver Aboriginal Child and Family Services Society. Her responsibilities include general and complex case consultation, clinical and restorative supervision of both Team Leaders and Child Protection Social Workers in addition to liaising with the Ministry of Children and Family Development and other Delegated Aboriginal Agencies within the Province. Claudia has a bachelor's of arts in Psychology with a minor in Family Studies from the University of British Columbia where she was awarded a member of the Golden Key Interna-

tional Honors Society. She has gained more than 17 years of experience working with children and families across various contexts with a strong emphasis on supporting Indigenous communities. She currently sits on two committees in partnership with the Ministry of Children and Family Development and Vancouver Coastal Health and has also been an invited presenter for both her Agency's 2019 conference and the Child Welfare League of America's annual conference on topics around Restorative Child Welfare and Restorative Supervision.

Crystal Reeves (committee member July 2019–present) has devoted her scholarship and legal practice to advancing the interests of Indigenous peoples in Canada and internationally. She joined Mandell Pinder LLP in 2010 and focuses her litigation and advocacy on Aboriginal title and rights and regulatory matters for Indigenous clients. She has appeared at all levels of court in British Columbia as well as the Federal Court and Federal Court of Appeal. Most recently, Crystal was co-counsel representing Upper Nicola Band on the Trans Mountain Pipeline Expansion Project at the Federal Court of Appeal. She also appears in provincial court on criminal, child protection, and family matters for Aboriginal clients, including on the Bella Bella and Bella Coola circuit courts. Crystal has also been involved in research projects involving the application of Indigenous laws in child protection matters, marine-use planning, and governance. She is also an Adjunct Professor in the Indigenous Community Planning stream at the School of Community and Regional Planning at the University of British Columbia.

Brandi Stocks is in-house legal counsel to the Public Guardian and Trustee of British Columbia (PGT), in Child and Youth Services. In that capacity, Brandi helps to protect the legal and property interests of youth in the province, advising the PGT when acting in her role as property guardian of minors in provincial care under the authority of the *Child, Family and Community Service Act*. Brandi initially gained experience in child protection while practising in the Vancouver office of a large international law firm, where her litigation practice included family law. Brandi enjoys being active in the legal community, including speaking and writing for the Continuing Legal Education Society of British Columbia. Brandi has a law degree from the University of British Columbia.

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