Discussion Paper:
Guardianship Issues under the *Family Law Act*

August 2016

Introduction:

The *Family Law Act* (FLA), enacted on March 18, 2013, significantly changed the way guardianship and parenting arrangements are conceptualized within family law in BC. The FLA replaced emotionally-laden terminology (i.e. "custody" and "access") with the more neutral terms "guardianship", "parenting responsibilities", "parenting time" and "contact". The new framework for guardianship and parenting arrangements is more than just the use of different terms, however; it represents a fundamental rethinking of parents' responsibilities towards their children.

Under the FLA, guardianship signifies responsibility for a child. Only guardians have parental responsibilities for a child, and the time they spend with a child is referred to as parenting time. "Contact" is used to describe the time that a non-guardian spends with a child, including a parent who is not a guardian. The FLA introduced a default guardianship provision in section 39 of the Act. With few exceptions, the parents of a child who reside with the child are automatically the child's guardians and they do not lose those parental responsibilities if the parents separate. Parents who are not guardians under the provisions of section 39 may apply under section 51 of the FLA for an order appointing them as a child's guardian.

When new legislation is enacted, it is anticipated that over time, case law will provide guidance on how the new provisions are to be interpreted. The ministry has recently heard concerns about the way case law has developed regarding aspects of the guardianship provisions in the FLA. While the ministry has identified the need for a comprehensive review of the Act as a whole when resources permit, it has received feedback that some of the guardianship provisions may require a more immediate review and response.

The following paper discusses:

- the default guardianship provisions in the FLA;
- the intention underlying those provisions;
- how the default guardianship provisions have been interpreted in recent case law; and
- potential guardianship models suggested in response to concerned feedback.

The ministry invites you to consider the questions raised in the following discussion paper and submit your comments by regular mail or email until September 30, 2016.

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Discussion:

Issue #1: Concerns related to section 39 of the FLA

Section 39(1) of the FLA [see Appendix A] indicates that each parent is the guardian of his or her child "While a child's parents are living together and after the child's parents separate". The primary intent of the subsection is to establish a general rule that a child's parents are the guardians of their child, and that this guardianship relationship continues notwithstanding a separation of the parents. Section 39(1) of the FLA was intended to reflect a conscious change from the *Family Relations Act* (FRA). Sections 27 and 35 of the FRA granted sole guardianship (of the person) and sole custody of a child only to the parent who continued to live with the child after the parents separated (absent an agreement or court order to the contrary). In other words, the default guardianship regime under the FRA was to remove guardianship and custody responsibilities from one of the child's parents based on the ending of the spousal relationship.

Section 39 of the FLA attempts to use the relationship between the parent and the child as the basis for guardianship rather than the spousal relationship between the child's parents. However, there has been criticism that a literal reading of section 39(1) of the FLA also focusses on the relationship between the parents and requires the parents to have lived together. This raises questions about the guardianship status of single parents, as well as the basis for guardianship more generally.

The guardianship provisions are silent as to the guardianship status of a parent who has lived with the child but never with the other parent.

Because section 39(1) of the *FLA* refers only to a scenario in which the parents have lived together, a literal reading of the section could suggest that a single parent cannot be considered the guardian of his or her child if they never lived together with the child's other parent. This concern is bolstered by the section's additional reference to parents being guardians "after [they] separate". A single parent who never lived with the child's other parent

also cannot establish a separation. The same concern may be extended to situations where the parents lived together but separated before their child was born.

Although the ministry is not aware of any cases where the court has found that neither parent is a guardian because they did not live with each other, there is case law that points out the potential gap in the legislation. In a case where a child was born to parents that had not lived together in a marriage-like relationship prior to the child's birth or after the birth, the court found that the father was not a guardian under section 39(1) because that section was clearly "intended to apply to parents who live together and with their child, both while they live together and after they separate".[1] In other cases with similar fact patterns, the court has found that the parent whom has never lived with the child must establish guardianship under section 39(3) or section 51, while the parent with whom the child lives is presumed to be a guardian. Section 39(3), which is discussed in detail below, provides that a parent who has never resided with their child is a guardian if they regularly care for the child. Section 51 establishes a process for parents who are not guardians under section 39, as well as non-parents, to apply for an order appointing them as a child's guardian.

One of the objectives of the FLA was to clearly set out the principles of guardianship and parenting arrangements so that non-legally trained persons can understand their rights and responsibilities under the Act. Retaining language that may constitute a gap in the guardianship provisions or be misinterpreted to those unaware of case law or legal interpretation principles is arguably contrary to that objective.

Discussion Question:

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

What is the meaning of regular care in the context of section 39(3)(c)?

Section 39(3) of the FLA provides that a parent who has never resided with his or her child is not the child's guardian unless that parent can satisfy one of three things:

> (3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:
>
> > (a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section;
> >
> > (b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;
> >
> > (c) the parent regularly cares for the child.

[1] See A.A.A.M. v Director of Adoption, 2014 BCSC 1847, paragraph 130. Referred to in *A.A.A.M. v. British Columbia (Children and Family Development)*, 2015 BCCA 220, ("AAAM"), paragraph 38.

There have been a few cases where the court has considered whether a parent has demonstrated regular care of their child, including a 2015 decision by the BC Court of Appeal.[2] In *AAAM*, the Court of Appeal found that a father was the guardian of his child pursuant to section 39(3)(c) despite never having lived with the child and only having had limited contact with her. The decision was based on the finding that the father had demonstrated a desire to regularly care for his child but was prevented from actually caring for the child because of the actions of the child's mother, social workers with the Ministry of Children and Family Development, and court delays. The Court found that these things collectively prevented him from realizing his intention to "regularly care" for the child and therefore it would be unfair to the father to not recognize him as a guardian. Prior to *AAAM*, lower court decisions which interpreted section 39(3)(c) of the FLA emphasized the importance of a parent providing actual regular care of the child in order to fit within the exception established by section 39(3)(c). [See: *T.C. v. S.C.*, 2013 BCPC 217 (CanLII) at para. 52; *S.J.F. v. R.M.N.*, 2013 BCSC 1812 (CanLII), (at para. 30); *Director and B.*, 2014 BCPC 111 (CanLII) at paras. 22-23.] *AAAM* appears to be a move away from this developing line of authority and towards an interpretation which examines the intention of the parent along with the actual care provided.

The decision in *AAAM* to link intention to regular care raises another scenario. Should a parent who has no actual history of regular care be able to establish guardianship on that basis when the parent with whom the child resides has resisted the child spending time with the other parent? In one case that was decided after *AAAM* but which makes no reference to that case, the mother resisted the father's attempts to spend time with his infant and the court found he was a guardian under 39(3)(c), stating

> "Mother's attitude is best reflected in the fact that she even opposes Father being granted guardianship over this child. Under s. 39(3)(c) of the *Family Law Act*, one basis for awarding guardianship is where, although the parents have not lived together, the father or the other parent has regularly cared for the child. I cannot read that statutory provision, such that a mother's unreasonable refusal to allow a father regular access so as to "regularly care for the child" should be allowed to defeat a biological father's application for guardianship when they meet all other criteria."[3]

If section 39(3)(c) requires actual care as a condition to guardianship, parents who have had only a limited relationship with their child since the child was born do not automatically acquire the same parental responsibilities as the parent who has lived with and cared for the child. Guardianship based on actual regular care is guardianship based on the parent's actual

[2] *A.A.A.M. v. British Columbia (Children and Family Development)*, 2015 BCCA 220, ("AAAM").
[3] F.S. v. C.O. 2015 BCPC 0416 (CanLII), paragraph 19.

relationship and history of caring for the child, a relationship that is presumed to be in the child's best interests. However, if the definition of regular care is expanded to also include the parent's intention to care for the child, guardianship is no longer based just on the actual parent/child relationship. Another element of subjectivity is introduced and outcomes become less certain. A fact pattern involving a parent who has never lived with their child and is not generally a guardian under section 39 could generate different outcomes: either a court will find the parent is a guardian if it finds there is an intention to regularly care for the child; or the court will require the parent to apply for guardianship under section 51; or the parent may exercise contact to build a relationship of regular care and apply again for recognition as a guardian under section 39(3)(c).

What should default guardianship be based on?

As discussed above, the basis for guardianship in the FLA was intended to be the relationship between the parent and the child. Sections 39(1) and 39(3) infer that a relationship with a child is established when a parent lives with their child. If a parent has never lived with their child, the relationship is established on the basis of having regularly cared for their child or an agreement with the child's other guardian(s) that they are also a guardian.

The residency requirement as the basis for guardianship has been the subject of recent judicial comment. In *AAAM* the BC Court of Appeal heard argument from a biological father who never lived with his child that the residency requirement in section 39(1) of the FLA contains an "'inherent bias' against fathers being 'presumed' guardians". In that case, the mother consented to the child's adoption immediately after the child's birth. The evidence suggested that the mother "resided" with the child for only a short time (allegedly two days) in the hospital before care of the child was taken over by the Ministry of Children and Family Development. If the mother, having been with the child in the hospital for two days was presumed to be a guardian while the father was not, then the effect is to treat mothers and fathers differently. It was argued this result is inconsistent with the equality provision in the *Charter*.

There is also the potential for uncertainty in guardianship status where a child has not clearly resided with either parent after birth. For example, a child may be required to remain in hospital after their birth, sometimes for an extended period. Are one or both parents the child's guardians? What if the parents do not have a relationship with each other? In another example, a child may be placed with someone other than a parent after birth (e.g. a grandparent or other extended family member). In this scenario, the child appears to be without a guardian under section 39 of the FLA because no parent ever resided with the child. Under the FLA, guardianship is based on a relationship of residency and care for a child by his or

her parent rather than biology. If no parent has lived with or regularly cared for a child since his or her birth, guardianship is not established under section 39.

Other Canadian jurisdictions identify criteria other than residency that establish parental responsibility for a child. For example, Alberta's *Family Law Act*, which conceptualizes guardianship similar to BC's legislation, provides in section 20(3) that a parent is a guardian if, within one year of becoming aware of the pregnancy or the birth, the parent: 1) acknowledges that he or she is the parent, and 2) has "demonstrated an intention to assume the responsibility of a guardian in respect of the child". The Act lists the things that show a demonstrated intention (see Appendix B).

Discussion questions:

2. Is regular care a useful basis for establishing the guardianship status of a parent that has never lived with their child?
3. If it is a useful basis, does regular care need to be more clearly defined within the FLA?

Alternative proposed models for default guardianship

In light of the issues that have arisen around the current model that determines guardianship based on whether a parent has lived with or regularly cared for their child, the Ministry is consulting on whether an alternative basis for default guardianship may better protect children's interests by making guardianship clearer and preventing situations where a child is without a guardian. Specifically, the ministry is seeking feedback on the following options:

A. A biological parent is their child's guardian, unless there is an order or agreement otherwise. Under this model, parents are guardians by virtue of their biological relationship to the child; they are not required to do anything to maintain guardianship.
B. A biological parent acquires guardianship status for a specified period of time (e.g. 12 months) after the child is born or they learn of the child's birth. If the parent lives with or regularly cares for the child, or seeks an agreement or court order concerning parenting arrangements during that time, the parent remains a guardian. If none of those things occur, guardianship lapses. The parent would be required to apply under section 51 if they subsequently sought guardianship.
C. Unless there is an order or agreement otherwise, a biological parent is only a guardian if they have either resided with or regularly cared for their child. This option retains the status quo, determining a parent's guardianship on the basis of whether they live with or regularly care for their child. But, how is regular care best defined under this option?

While the options above set out different bases for determining guardianship, there is a related issue that should also be considered. Status as a child's guardian establishes the relationship of

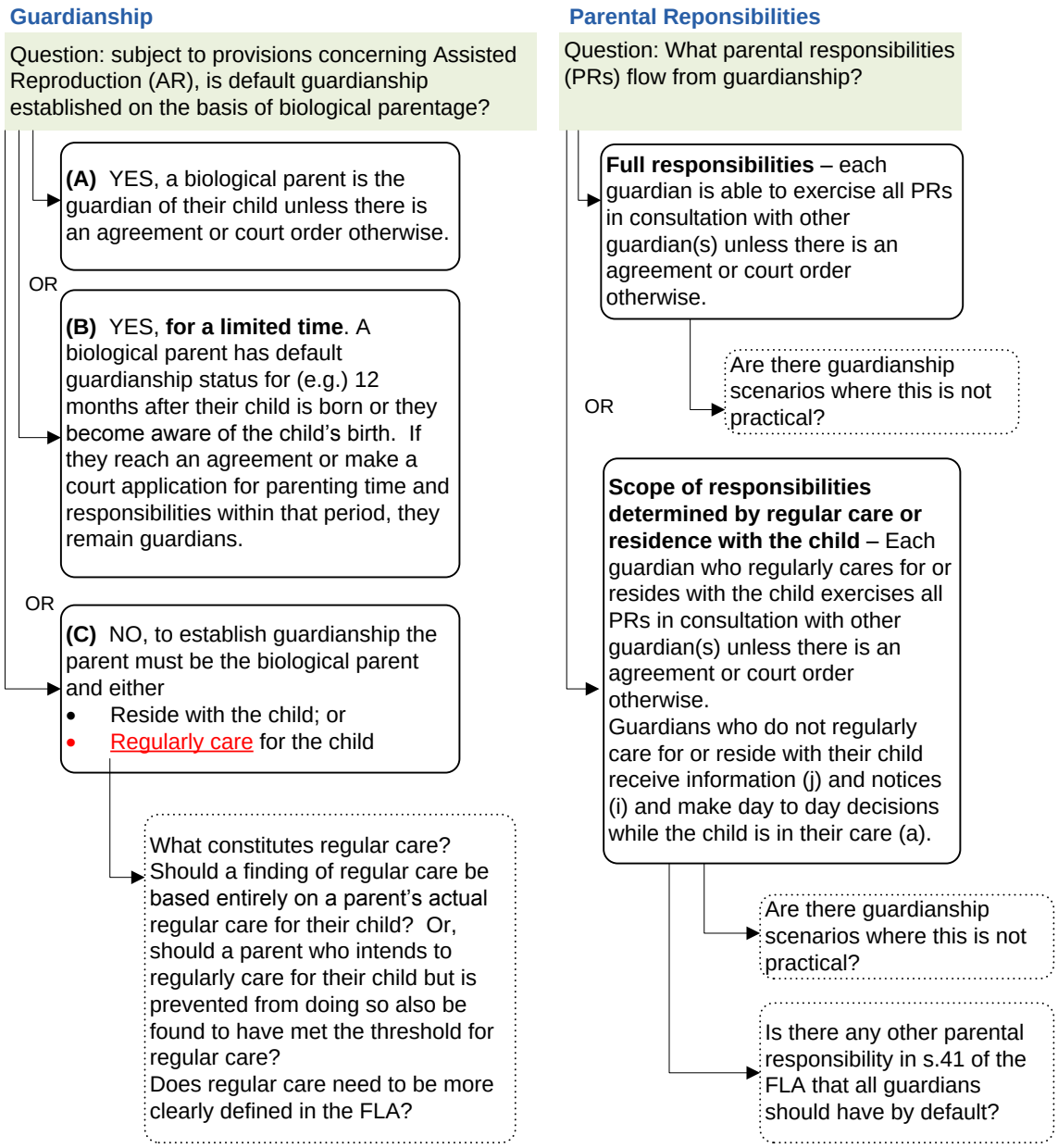
responsibility towards the child. Pursuant to section 40(1) of the FLA, only a guardian may have parental responsibilities with respect to a child. Subsections (2) and (3) further explain that unless an order or agreement makes a different allocation, each guardian may exercise all parenting responsibilities in consultation with the child's other guardian(s) unless consultation would be unreasonable or inappropriate.

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

Discussion question:

4. The diagram on the next page is a visual depiction of the options and some of the questions that flow from them. Does one of these options represent a clearer, more effective way to understand and apply guardianship in the absence of an agreement or order?

Options Map: The basis of guardianship & the corresponding parental responsibilities



Appendix A

BC Family Law Act, Section 39:

Parents are generally guardians

39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

(2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.

(3) A parent who has never resided with his or her child is not the child's guardian unless one of the following applies:

(a) section 30 *[parentage if other arrangement]* applies and the person is a parent under that section;

(b) the parent and all of the child's guardians make an agreement providing that the parent is also a guardian;

(c) the parent regularly cares for the child.

(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.

Orders respecting guardianship

51 (1) On application, a court may

(a) appoint a person as a child's guardian, or

(b) except in the case of a director who is a child's guardian under the *Adoption Act* or the *Child, Family and Community Service Act* , terminate a person's guardianship of a child.

(2) An applicant under subsection (1) (a) of this section must provide evidence to the court, in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules, respecting the best interests of the child as described in section 37 *[best interests of child]* of this Act.

(3) Subsection (2) of this section applies regardless of whether there is consent to the application under section 219 *[persons may consent to order being made]*.

(4) If a child is 12 years of age or older, a court must not appoint a person other than a parent as the child's guardian without the child's written approval, unless satisfied that the appointment is in the best interests of the child.

(5) A person who has custody of a child under section 54.01 (5) or 54.1 of the *Child, Family and Community Service Act* is deemed, for the purposes of this Act, to be a guardian appointed under subsection (1) of this section.

Appendix B

AB Family Law Act, Section 20(3):

20(1) This section is subject to any order of the court regarding the guardianship of a child.

(2) Subject to this section, a parent of a child is a guardian of the child if the parent

(a) has acknowledged that he or she is a parent of the child, and

(b) has demonstrated an intention to assume the responsibility of a guardian in respect of the child

within one year from either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier.

(3) For the purposes of this section, a parent has demonstrated an intention to assume the responsibility of a guardian in respect of a child by

(a) being married to the other parent at the time of the birth of the child,

(b) being the adult interdependent partner of the other parent at the time of the birth of the child or becoming the adult interdependent partner of the other parent after the birth of the child,

(c) entering into an agreement that meets the requirements of the regulations with the other parent to be a guardian of the child,

(d) marrying the other parent after the birth of the child,

(e) cohabiting with the other parent for at least 12 consecutive months during which time the child was born,

(f) with respect to a female parent, carrying the pregnancy to term,

(g) with respect to a child born as a result of assisted reproduction, being a parent of the child under section 8.1,

(h) being married to the other parent by a marriage that, within 300 days before the birth of the child, ended by

(i) death,

(ii) a decree of nullity, or

(iii) a judgment of divorce,

(i) where the other parent is the birth mother of the child, voluntarily providing or offering to provide reasonable direct or indirect financial or other support, other than pursuant to a court order, for the birth mother during or after her pregnancy,

(j) voluntarily providing or offering to provide reasonable direct or indirect financial or other support, other than pursuant to a court order, for the child, or

(k) any other circumstance that a court, on application under subsection (6), finds demonstrates the parent's intention to assume the responsibility of a guardian in respect of the child.