Toronto Lawyers ASSOCIATION TLA

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Sunny Kwon
Ministry of the Attorney General of Ontario, Policy Division
720 Bay Street, 7th Floor
Toronto ON M7A 2S9

Via email: sunny.kwon@ontario.ca

RE: PROPOSAL TO EXPAND THE DEFINITION OF "CHILD" IN THE *CHILDREN'S LAW REFORM ACT*

Overview:

The following is the submission of the Toronto Lawyers Association ("TLA) in response to the interest of the Ministry of the Attorney General ("MAG") in hearing from stakeholders as to their views on whether the definition of "child" in the *Children's Law Reform Act* ("CLRA") should be amended to include "a person who is the age of majority or over and remains in the charge of their parents or other caregiver because of disability, medical condition or other reasons that make them unable to obtain the necessaries of life."

MAG is also interested in hearing view about impact/interaction the proposed expanded amendment of the definition of "child" would have when read with the *Substitute Decisions Act* ("SDA") and what consideration is to be given for any overlap between the two Acts.

The TLA is in favour of this change, but the valid concerns regarding conflict between the CLRA, if amended, and the SDA must be addressed, especially as the CLRA is applied by provincial courts of justice ("OCJ") and the superior courts of justice ("SCJ") and the SDA solely by the SCJ., although both are provincial legislation. This concern is more pronounced in areas where there is no unified family court. Another concern which must be addressed is ensuring that disabled adults who become subject to the CLRA under this amendment are able to have representation in family law proceedings so that their interests are protected and their own views and preferences are heard.

Relevant Legislation:

Children Law Reform Act:

Child is defined under CLRA as:

Section 18 (2):

*"A reference in this Part to a child is a reference to the child while a **minor"***

Section 59(1): Upon application by a child's parent or by any other person, on notice to the Children's Lawyer, the Superior Court of Justice by order may require or approve, or both,

(a) the disposition or encumbrance of all or part of the interest of the child in land;

(b) the sale of the interest of the child in personal property; or

(c) the payment of all or part of any money belonging to the child or of the income from any property belonging to the child, or both.

Family Law Act ("FLA"):

Under the FLA, a parent's financial support obligation to a child in section 31(1) relates to:

"An unmarried child who:

*(a) is a **minor;***

*(b) is enrolled in a full-time program of education; **or***

(c) is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents. 2017, c. 34, Sched. 15, s. 1.

Divorce Act ("DA"):

Under section 2(1) of the DA, a "child of the marriage" is defined as:

"a child of two spouses or former spouses who, at the material time,

*(a) is **under the age of majority** and who has not withdrawn from their charge, or*

*(b) is **the age of majority or over** and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;"*

Further, the "**age of majority"** is defined in subsection 2(1) of the Divorce Act as:

"age of majority, in respect of a child, means the age of majority as determined by the laws of the province where the child ordinarily resides, or, if the child ordinarily resides outside of Canada, eighteen years of age;"

Section 16(1) of the DA states that "[a] court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage;"

Substitute Decisions Act ("SDA"):

The Part I "property" portion of the SDA applies, according to section 6, where "[a] person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

The Part II "person" portion of the SDA applies, according to 45, where "[a] person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision."

Section 59(4)(b) of the SDA states that "[u]nless the order expressly provides otherwise, [a guardian of the person] does not have power to change existing arrangements in respect of custody of or access to a child, or to give consent on the person's behalf to the adoption of a child." Section 59(5) of the SDA states that "[i]f the order provides that the guardian has a power referred to in [section 59(4)(b)], the order may specify that the power may be exercised from time to time as the need arises."

Position of the TLA on the proposed CLRA Amendment:

The question regarding this amendment is what legislation and judicial body should apply where a child is of the age of majority but is unable, by reason of illness, disability or other cause, to withdraw from a parent's charge or to obtain the necessaries of life.

Currently, according to section 21(1) of the CLRA, a "parent of a child or any other person, including a grandparent, may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child."

Based on the present wording of this section of the CLRA and the definition of "child" under section 18 of the Act, an adult child who is disabled and unable to take care of themselves would not be subject to the provisions of the CLRA. This means that any issues regarding decision making on behalf of and the best interests of such a child would have to be dealt with under the SDA, if applicable. This creates a gap when compared to the offspring of married persons under the DA, in which custody orders may be sought for a child over the age of majority if the child has not withdrawn from parental charge and is unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life. As

noted in caselaw, this gap also arises where parties were married but obtained a foreign divorce.[1]

The TLA's position is that family court is the best forum for issues where the interests of disabled children over the age of majority who remain under parental charge are being determined, as the judiciary is familiar with the family issues these types of cases present. Additionally, case management is beneficial in these types of cases, so as to provide continuity and settlement opportunities. As well, family court has made significant efforts to be more accessible to self-represented litigants, a continuous concern in these matters. Additionally, there is concern about the availability of legal aid to litigants under the SDA as compared to the CLRA.

The SDA does not have a judiciary with the same wealth of experience dealing with the best interests of children, and additionally not all disabled children could fall under the SDA, only those "not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision," in accordance with section 45 of the Act. This is a much more restrictive criteria then those in the FLA and DA for children over the age of majority.

Care should be taken, however, to ensure that adults with disabilities are not treated like children with no autonomy in family law proceedings. Adult children should have a right to representation in such applications whether by private counsel, legal aid, or otherwise. The involvement of the Office of the Children's Lawyer ("OCL") could be of crucial importance in alleviating this concern. Allowing the OCL to deal with cases involving disabled adults, including perhaps having a special panel to deal with cases involving disabled adults, would be extremely beneficial. This could be especially so in cases were the disabled adult has siblings who are minors, and there are custody and access issues pertaining to all of the children, which the OCL is called upon to address.

Amending the CLRA also creates a risk of conflict between the amended CLRA and the SDA, leading to a question of which legislation should apply, and/or creating a risk of multiple proceedings. There could be a situation where one parent brings a proceeding in OCJ pursuant to the CLRA, and the other brings a proceeding in SCJ under the SDA. In cases involving adult disabled children of divorced parents, where there is a conflict between the application of the DA and the SDA, a judge in the SCJ is able to make a decision in one solitary proceeding as to which act should apply.[2] This would not be possible for cases which would fall under the amended CLRA and not the DA, unless the parties fell under the jurisdiction of a unified family court.

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[1] *Simon v Crow,* 2020 ONSC 5940 at para 32.
[2] *Schleifer v Schleifer*, 2009 CarswellOnt 7157.

This issue of multiplicity of proceedings is somewhat ameliorated by the fact that only one proceeding would be correctly brought. If the child in question was determined to be a child under the CLRA despite being over the age of majority, then the SDA would not apply, but if the child in question is not a child of the relationship, then the amended CLRA would not apply. This is the task courts have been faced with when dealing with such cases where proceedings are brought under the DA and SDA.[3] Additionally, section 59(4)(b) of the SDA prevents a guardian from being able to change existing custody orders, unless this power is explicitly granted by court order.

Ideally, the SDA could also be amended to avoid such conflicts. The SDA could state that it only applies to persons over 18 for the property part and 16 for the person part who do not remain children under either the CLRA or DA. Alternatively, the SDA could include a provision that in the event of an existing custody order under the amended CLRA, that order will take priority unless otherwise determined by the SCJ. The SDA could have an order confirmation mechanism confirming the "custody" order if needed at the SCJ level under the SDA, similar to the way a provisional order in family court is issued. Again, having a unified family court would assist with many of these issues.

Another potential area of conflict between the amended CLRA and the SDA is regarding property. Section 59(1) of the CLRA allows orders to be made regarding a child's property, which in the case of a disabled adult would raise the question of whether or not this is properly suited for the CLRA or the SDA. The SDA places a fiduciary duty on guardians of property, and guardians of property are liable for breach of this duty. The CLRA does not impose these requirements for orders regarding a child's property. Care would have to be taken to ensure that disabled adults cannot be improperly deprived of their property without their say, and ensuring that they have representation in such proceedings could again assist with these concerns.

Section 59(1) of the CLRA states that orders under this section can only be made by a SCJ, which removes the risk of multiple court proceedings, but the section as drafted requires notice to the Children's Lawyer. The Children's Lawyer would have to be able to participate in cases where a person was a child under the amended CLRA but over the age of majority. It may be preferable to have the PGT continue to act in cases where the property of adult children is at issue, even if proceedings are brought under the amended CLRA. Another option is to limit section 59(1) of the CLRA to only minors, and allow the SDA to continue to operate for cases in which the property of disabled adults is at issue.

Another potential conflict is that under section 15 of the SDA, "[i]f a certificate is issued under the *Mental Health Act* certifying that a person who is a patient of a psychiatric facility is incapable of managing property, the Public Guardian and Trustee is the person's statutory guardian of property." This provision automatically applies. Section 17 of the SDA sets out the

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[3] *Kingdon v Kramer*, 2015 ONSC 119.

persons who are permitted to bring an application to replace the PGT under these circumstances:

1. The incapable person's spouse or partner.
2. relative of the incapable person.
3. The incapable person's attorney under a continuing power of attorney, if the power of attorney was made before the certificate of incapacity was issued and does not give the attorney authority over all of the incapable person's property.
4. A trust corporation within the meaning of the *Loan and Trust Corporations Act*, if the incapable person has a spouse or partner who consents in writing to the application.

The issues this section could lead to under the amended CLRA are twofold. Firstly, SCJ proceedings under the SDA could become necessary even if there isa valid and recent CLRA custody order for a child, as otherwise the PGT would automatically be appointed for the child if section 15 of the SDA ever became applicable. Secondly, having a custody order over a child would not be sufficient to seek to replace the PGT, as section 17 of the SDA does not recognize holding a custody order over a child as one of the classes of enumerated persons who can apply. This could create a situation where one person made the decisions for a child under the CLRA, but then either the PGT or another person made the decisions regarding the child's property.

This is, however, not that much different than the case of a person having a valid and recent custody order under the DA, as the PGT would still automatically be appointed in such a case if section 15 of the SDA became applicable, and holding a custody order under the DA again does not entitle a person to replace the PGT under section 17 of the SDA. It is also not necessarily wrong for decision-making power and property decisions to be made by different persons. Finally, it does not appear that this confluence of events would be all that common.

In any event, it could be considered to amend section 17 of the SDA to allow persons with custody orders to apply to replace the PGT, and section 70 of the SDA could be amended such that applications for guardians of property or person include any known custody orders.

Thank you for considering these comments.

Yours very truly,

Brett Harrison
President
Toronto Lawyers Association