

Collaborative Family Law

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Welcome to our 2nd newsletter. We plan to continue to present articles and viewpoints on various aspects of the new family law act and the relevance of collaborative process. If you would like us to address specific aspects of the new law, please address your comments to Beatriz Contreras (bc@contrerasmclennan.com) or Marnie Olchowecki (marnieo@shaw.ca)

Training Announcement

Our group is sponsoring an advanced training open to all collaborative professionals who have met the basic collaborative law training requirements. For further information about this event, please contact Devlin Farmer – dfarmer@brownhenerson.bc.ca

The New Child-Centric Family Law Act: A Lawyer's Reflections

In the 1970's, divorce was a pejorative word. The children of divorced families came from "broken homes" and the polite way to refer to the children of unmarried parents was to call them illegitimate.

It was in 1975 that the Supreme Court of Canada confirmed that while Irene Murdoch might have been married to a rancher for 25 years and certainly did contribute to the running and maintenance of the farm, this was expected of any ranch wife and did not entitle her to an interest in the ranch.

It is against this back drop that the ***Family Relations Act R.S.B.C., 1996***, c. 128 emerged.

While cutting edge legislation at the time, despite amendments over the last 33 years, the *Family Relations Act* has not kept up with the changes in Canadian society. Current Stats Canada information confirms that not all family law clients are married and those who are, aren't staying that way.

The ***Family Law Act, S.B.C. 2011***, c. 25 ("the new Act") which came into force on March 18, 2013 is long overdue. Changing social attitudes towards marriage, separation and divorce have been paired with a changing view of children. Just as human rights legislation has developed over the last 40 years, the concept of children's rights, separate and distinct from their families, has also taken root. As the care of children is a central part of most marriages, the care of children at the end of the relationship is an area that is ripe for disagreements between separating parents. At a time that marital trust and harmony is usually at an all time low, parents are expected to work together in "the best interests" of their children. And, the previous *Family Relations Act* offered no clear definitions on how and what was to be done.

The new Act's use of one word, that being "guardianship", to describe what parents do is not only consistent with legislation in other provinces, it is reflective of a parent's responsibility for children. The parents of a child are his or her guardians and separation does not change a parent's responsibility for the child. Parental responsibilities are outlined at section 41 and like the best interest considerations, the list is not exhaustive, it is inclusive. In making agreements or orders with respect to guardianship, the people responsible, the parties and the court, must consider only the best interest of the children.

Section 37 of the new Act confirms that the best interests test is not the paramount consideration – it is the only consideration.

Section 37 (2) offers a lengthy and not exhaustive list of considerations. Family violence is specifically addressed and must be considered.

To facilitate the priority of "best interest", the courts are also authorized to make orders to implement actions that are in children's best interests.

The Court can appoint a children's lawyer if it "necessary to protect the best interest of the child (section 203(1)).

The court can make orders requiring parents to participate in family dispute resolution or to attend counselling (section 224).

In addition to reflecting current social norms and values, the underlying fundamental purpose of the new Act is to give families options beyond the courtroom.

Part 2, "Resolution of Family Law Disputes" at section 4 reads:

The purposes of this Part are as follows:

- (a) to ensure that parties to a family law dispute are informed of the various methods available to resolve the dispute;
- (b) to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court;
- (c) to encourage parents and guardians to
 - (i) resolve conflict other than through court intervention, and
 - (ii) create parenting arrangements and arrangements respecting contact with a child that is in the best interests of the child."

While the intention of the new Act is to have families resolve as much of their dispute as possible outside of the court room, there is also recognition that litigating clients need to be able to access the right court process at the right time

The new Act is not neutral and overtly reflects social values in a number of places. That lack of neutrality can be seen as being reflective of a child-centric approach.

While the community property regime in the *Family Relations Act* was an attempt to change culture, the new Act is more reflective; it attempts to give lawyers, the courts and families the necessary tools to resolve family disputes in a more holistic and child-centred way.

Mary Mouat, QC

The above is an excerpt; Mary's complete article is posted under Articles.

How Collaborative Process Keeps Children's Interests at the Heart of Agreements

In the new family law act, we are introduced to some new terminology that represents a significant shift in social consciousness. We have finally moved away from the concept of children as chattel over which custody battles ensued, to parental responsibilities and children's rights, to guardianship and parenting time, and to hearing the voice of children in decisions affecting them. The new act offers families more tools and resources for resolving disputes regarding parenting and the best interests of their children. Collaborative process is uniquely equipped to provide separating parents with the support they require in the form of their collaborative team. This means that lawyers and financial specialists can work together to solve what can be complex challenges of property division and financial support, within a financial plan that upholds the well-being of the family as a whole. The mental health professionals on the team can work with parents and children to make a successful transition to a healthy post-divorce family. While it may seem overwhelming to have so many professionals involved, everyone plays a unique and vital role, including the separating couple. It is like completing sections of a puzzle which all come together in the end. And where children are present, the success of the whole picture – the separation agreement - must be measured against whether the best interests of the children are being served on all levels. The mental health professionals on the team keep this as their central focus in the collaborative process, and they are the divorce coaches and the neutral child specialist.

It has always been our role to support families going through this difficult transition. Divorce coaches teach parents the skills to be effective co-parents in the business of raising their children; child specialists listen to the concerns of children, and give them a voice in decisions which impact them. With the new family law act in effect, these are now legal expectations: that separated parents must learn to take on their responsibilities in this new context, which often means not only learning new parenting skills, but tools for communication, decision-making, emotional self-regulation and conflict resolution, so that their children can thrive. Now, children have the right to be heard and have their interests represented. There are lists of items to be considered in creating parenting plans that respect their needs. Collaborative law as well as other dispute resolution processes outside of court will now be encouraged as the norm for separating families.

These are exciting times, not only because of the protection offered children in strengthening families undergoing this transition, but because of the potential for growth as a society. There is no place for ongoing, often debilitating, conflict in families, and the new family law act seeks in good faith to remedy this too-frequent outcome of separation in offering alternative processes

Marnie Olchowecki, MSW, RCSW

Coach and Child Specialist.