The New Family Law Act: A Lawyer's Reflections by Mary Mouat, QC

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, that 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 will come into force on March 18, 2013 is long over due.

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.

The words "custody" and "guardianship" which are used in the *Family Relations Act* are not defined by that Act.

Custody and guardianship are usually described as a "bundle of rights and responsibilities".

While it is easy to distinguish guardianship of the person and guardianship of the estate, making these responsibilities distinct from custody or care and control of the child is not.

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 *Family Relations Act* offers no clear definitions on how and what is to be done.

Both forms of guardianship orders that are referred to as Master Horne and Master Joyce orders, have attempted streamline the complexities inherent in custody and guardianship, with mixed success.

Many lawyers simply refer to “parenting arrangements” in an effort to avoid the loaded words of custody and primary care.

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.

Separation will trigger a proprietary interest; however, it does not determine parental responsibility.

While informal arrangements can be considered, separation alone does not determine responsibilities.

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.

The *Divorce Act* R.S.C. 1985, c. 3, states at section 16 (8):

> “In making an order under this section, the courts shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.”

The BC Ministry of Attorney General’s July 2010 *White Paper on the Family Relations Act Reform* states at Chapter 4

> “in British Columbia and the rest of Canada, family laws governing parenting arrangement for children are based on the best interests of the children. Some jurisdictions have detail lists of factors to be considered in assessing the best interest of the child. The *Divorce Act* has none, but federal bills C-22 from 2002 would have added a list of 12 factors. That

> bill died on the order paper. The factors listed in Alberta's recently modernized *Family Law Act* are similar to the ones proposed in the federal bill. The British Columbia *Family Relations Act* has a list of factors, but many say these factors need to be updated so the act reflects current social values and research on issues such as the impact of family violence and the views of the children in determining the best interest of the child."

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 then necessary tools to resolve family disputes in a more holistic and child centred way.

Mary Mouat, QC