

ALBERTA JUSTICE WEBINAR
Family Law Act Amendments Training
June 20th and 29th, 2011

QUESTIONS AND ANSWERS

Questions re application to transfer a proceeding to the other Court

Q. When you say that it will now be possible to make an application to the Court in which the proceeding was brought for an order transferring the matter to the other Court, are you referring to the period of time before an order has been granted? In other words, is it correct to say that the Provincial Court still can't vary a Queen's Bench order?

A. That is correct. The application for transfer would be an interlocutory application commenced within the context of the larger application before that application is determined (for example an application for a parenting order). On the other hand, an application to vary an order is a new matter to be commenced by filing a Claim with a supporting Statement or Affidavit, rather than being an interlocutory application.

Questions re parentage

Q. With these amendments will the Provincial Court now be able to make a declaration of parentage?

A. No. Constitutionally, the Provincial Court cannot make declarations of parentage, however the Provincial Court can make a determination of parentage as a factual finding within the context of a guardianship application or a child support application. This is stated in the new section 20(8) re guardianship and in section 50(5) re child support. In section 3(2)(b), the list of matters that the Provincial Court does not have jurisdiction over will include both declarations of parentage under section 8.2 and section 9.

Q. Just to be clear, donated HRM means medically or clinically introduced rather than a one night sexual encounter for the purposes of inducing pregnancy.

A. Yes. Section 5.1(1)(a) defines assisted reproduction as a method of conceiving other than be sexual intercourse.

Q. Is the consent of the spouse or partner, who did not provide HRM, to be a parent of the child at the time of the conception needed in writing?

A. No. Section 8.1(6) states that a person is presumed to have consented if the person was married to or in a conjugal relationship with the person who provided HRM.

Questions re statutory guardianship

Q. How are Court Clerks suppose to assist people at the counter to determine if someone is automatically a guardian? We currently use a cheat sheet for guardianship determination - we would like an updated one.

A. A new “cheat sheet” for statutory guardianship will be distributed through Court Services.

Q. Does the father have to have been charged and/or convicted of sexual assault to lose his ability to become a statutory guardian?

A. No, a father does not have to be charged or convicted of sexual assault under the new section 20. However, as with any other fact under section 20, if it is disputed, it may be necessary for the Court to make a determination as to the facts. Whether or not the matter was reported to police, etc. would probably be relevant evidence that the Court would want to know about.

Q. If a parent has not reached the age of consent, will she/he still automatically be the child's legal guardian or is her/his legal guardian (the grandparent) the guardian?

A. An underage parent would still automatically become a guardian under section 20, and could make an application for a determination of guardianship under section 20(6) if necessary.

Q. If there is a parenting order application in front of the Court and there is no guardianship application, with the new amendments can the Court “deem” the father a guardian during the proceedings now without an application in front of him?

A. Yes – absolutely, although we would say that the Court can “determine” guardianship” rather than “deem” guardianship. Section 20(6) states that the Court can make a determination of guardianship on it's own motion within an *FLA* proceeding. (Note that the Court will also be able to do this in the course of child protection proceedings under the *Child, Youth and Family Enhancement Act*.)

Q. Under the amended legislation, will the Director (Children and Youth Services) be able to commence applications for the determination of guardianship or must the potential guardian commence the application?

A. Section 20(6) states that a court may, on application by a parent of a child, a guardian of a child or a child, or on its own motion in a proceeding under the *FLA* or the *Child, Youth and Family Enhancement Act*, make a determination that a parent meets or does not meet the requirements to be a guardian under subsection (2). Therefore, the Director could ask the Court to make a determination on its own motion within a proceeding under the *CYFEA*.

Q. Currently there is not a consistent practice by Judges as to requiring the sole parent to serve the biological father in a sole guardianship application. Is there a possibility that this can be addressed?

A. Section 17 does address who needs to be served. Pursuant to section 17, only the guardians of the child and the child, if the child is 16 years of age or older, must be served. Therefore, in an application under section 20(6) where one parent is alleging that he or she is the only guardian, the other parent who is not also a guardian would not need to be served. However, remember that the Court has authority under section 17(1)(e) to order that another person be served if the Court considers that to be appropriate.

Q. For sole guardianship applications, would the other parent need to be named in the application?

A. As indicated in the previous answer, a parent who is not also a guardian would not need to be served with an application for a determination of guardianship unless the Court orders otherwise. Therefore a non-guardian parent would not need to be named as a respondent, but it would be necessary for the applicant to advise the Court of the relevant circumstances, including the identity of the other parent in their Affidavit or Statement.

Q. How will the transition work between the current section 20 and the amended section 20?

A. To understand how the transition will work, it is useful to consider scenarios.

Situation just PRIOR to August 1st	Status ON or after August 1 st	Notes
Parent IS a guardian under section 20(2) because he or she was in one of the specified relationships with the other parent.	Parent WILL continue to be a statutory guardian when the amendments come into force, no matter what his or her actions are after that date.	In the amendments, the transitional provision, section 20(9), says that anyone who is a guardian immediately before the amendments come into force will continue to be a guardian.
Parent IS a guardian under section 20(3) because the child has not yet established usual residence with one parent to the exclusion of the other.	Parent WILL continue to be a statutory guardian when the amendments come into force, no matter what his or her actions are after that date. Parent WILL NOT LOSE their statutory guardianship status	Section 20(9) will operate so that the parent will continue to be a guardian. The current section 20(3) will no longer be in force, and therefore the parent will not lose guardianship status if the child

Situation just PRIOR to August 1st	Status ON or after August 1 st	Notes
	even if child establishes usual residence with the other parent.	establishes usual residence with the other parent.
Parent IS a guardian under section 20(3) because the child has established usual residence with that parent or with both parents equally.	Parent WILL continue to be a statutory guardian when the amendments come into force, no matter what his or her actions are after that date.	Section 20(9) will operate so that the parent will continue to be a guardian.
Parent IS a guardian under section 20(4) because the child has usually resided with that parent for one year, even if the child lives with the other parent.	Parent WILL continue to be a statutory guardian when the amendments come into force, no matter what his or her actions are after that date.	Section 20(9) will operate so that the parent will continue to be a guardian.
Parent IS a guardian under section 20(5) because the parents have entered into an agreement that both parents will continue to be the guardians.	Parent WILL continue to be a statutory guardian when the amendments come into force, no matter what his or her actions are after that date.	Section 20(9) will operate so that the parent will continue to be a guardian.
Parent IS NOT a guardian because the parents did not have a specified relationship under section 20(2) and the child has established usual residence with the other parent under section 20(3)(a) AND it has been more than a year since the parent learned of the pregnancy or birth of the child.	Parent WILL NOT be a statutory guardian when the amendments come into force, no matter what his or her actions are.	<p>Rules of statutory interpretation say there is a strong presumption against retroactive application of legislation unless there is an express provision saying otherwise. Therefore, the amendments CAN NOT operate to establish guardianship status in the past.</p> <p>Since the one year time limit has passed, the amended section 20 cannot now operate to make this parent a statutory guardian.</p>
Parent IS NOT a guardian because the parents did not have a specified relationship under section 20(2) and the child has established usual residence with the other parent under section	Parent WILL NOT be a statutory guardian when the amendments come into force, no matter what his or her actions are.	Section 20(1) says that this section is subject to any order of the Court regarding the guardianship of the child. Therefore, section 20(2) cannot operate to make someone an

Situation just PRIOR to August 1st	Status ON or after August 1 st	Notes
20(3) AND a Court Order has been granted saying that the parent is not a guardian.		automatic guardian in the face of an order that says otherwise.
Parent IS NOT a guardian because the parents did not have a specified relationship under section 20(2) and the child has established usual residence with the other parent under section 20(3)(a).	Parent CAN have their statutory guardianship spring up ONLY IF: <ul style="list-style-type: none"> • The one year time limit from the time the parent learned of the pregnancy or birth of the child is still running when the amendments come into force; and • The parent demonstrates an intention to assume responsibility of the child within the time limit. 	Rules of statutory interpretation tell us that, although legislation cannot act retroactively, it can be retrospective – that is it can look back in time to establish guardianship status now.

Q. Scenario: Although it has been two years since the birth of his child, a father finds out a few months before the amendments come into force that he has a child and he has been trying to be part of the child's life but the birth mother will not let him. Will he automatically be a guardian of the child? I am confused with the "within one year of becoming aware of the birth of the child". If he just found out and was trying to demonstrate intention but the mother won't hear of it does he have to apply for guardianship?

A. If his actions are sufficient to demonstrate the required intention in the amended section 20(2)(b), he would automatically be a guardian under the amended provisions. However, he would likely want to apply for a determination of guardianship under the new section 20(6) because it appears the mother is contesting his status. His one year time limit would not have started running until he found out about the birth of the child. Based on the scenario presented, the one year time limit would not have run out when the amendments come into force, so it would be possible for his actions to result in his guardianship springing up. It would then be up to the Court to determine whether or not he has demonstrated an intention, but the list in section 20 does include attempting to provide support (financial or other).

Q. Same scenario as the above question (he has been out of the picture for several years because he just found out about the child) but the birth mother agrees that he can be involved in the child's life. Would the father automatically be a guardian if he now is trying to demonstrate intention?

A. Yes - the one year time period starts running when he finds out about the child, so if he demonstrates an intention in that time period, he will automatically become a guardian of the child. He could still apply for a determination of guardianship under section 20(6), but would only need to if the mother is disputing it.

Q. Scenario: A birth mother conceives from a one night relationship with the biological father. She then meets a new significant other (but does not marry him) when she is 4 weeks pregnant. He is aware that he is not the biological father of the child. Birth mother gives birth to the child. This couple stays together for a period of 10 years, never marrying. The couple is now separating. The common-law/adult interdependent partner is not a parent but wishes to stand “in loco parentis” to the child and he wishes to be a guardian. The biological father has never seen the child, does not pay child support and is not on the birth certificate. Could the in loco parentis man bring his application for guardianship under section 20 (6) or would he have to apply under section 23 because he was not a parent?

A. The “in loco parentis” person would have to bring his application for guardianship under section 23. He could not bring the application under section 20(6) because he is not a parent - only parents can become guardians under section 20.

Q. Scenario: A 12 year common-law relationship ended approximately 5 years ago. Since that time, the 3 children are all living with dad pursuant to a separation agreement draw up by lawyers. There are no Court Orders in place re guardianship or parenting. Father no longer knows where Mom is, but wants to take children on a vacation outside of Canada. Dad has been told by Passport Canada that he needs guardianship and consent of Mom to travel. It would appear to me that he may need to make application to be appointed guardian under two different sections of the amended act if he was to wait to make his application.

The details regarding the children are as follows:

- *Child #1 is 16 years old, not the biological child of the dad, however has only know this male individual to be his father.*
- *Child #2 is a biological child of the relationship.*
- *Child #3 is not the biological child of the dad (the child is the product of mom's affair that ends the relationship) and the biological father is unknown.*

A. The guardianship status of the children prior to any applications being made would be as follows:

- *Child #1 - the man would not automatically be a guardian because he is not a parent. Presumably the birth mother would be the only guardian under the current section 20, as the child would have established usual residence with her and his biological father would have lost his guardianship status. Under the amended section 20, the birth mother would be the only guardian as the biological father's time to demonstrate an intention has run out.*

- Child #2 - both parents would likely be guardians under the current provisions - assuming the parents would fit under section 20(2) re being adult interdependent partners. They would definitely both be guardians under the amended section 20 as they are both parents and have both demonstrated an intention to take care of the child.
- Child #3 - the man would not automatically be a guardian because he is not a parent. Under the current section 20, the birth mother would be the only guardian if the child lived with mom long enough to establish usual residence with her. However, if the child had not lived with the mom long enough to establish usual residence, the biological father would be a guardian. Under the amended section 20, the birth mother would be the only guardian of the child (unless and until the biological father demonstrates an intention to be involved in the child's life).

Yes, Dad needs a guardianship order re all the children. Under the amendments, he could make an application re child #2 under s. 20(6) but it wouldn't be wrong for him to make it under s. 23. In any event, the issues could be heard together. He will need to ask the Court to dispense with service on Mom and to grant the guardianship order in her absence, but that shouldn't be problematic if he provides the separation agreement as evidence for the Court.

Q. If a mother has a court order that says she is the only legal guardian of the child, does this order stand after the amendments are implemented even though the father is a guardian under the new rules?

A. Yes, the court order would still be valid - there is nothing in the amendments that would invalidate a court order. Remember that both under the current section 20 and the amended section 20, the section is subject to an order of the Court.

Q. If previously a bio father was found not to be a guardian, can they reapply now under the new provisions?

A. Yes they could.

Support Questions

Q. If an application is made to vary an agreement to allow an estate to be wound up, can that be filed in provincial court?

A. There is no restriction on which court the application can be commenced in therefore, yes that application could be commenced in Provincial Court. Of course, this may very well be a situation where the application will need to be moved to the Court of Queen's Bench to take into consideration what is happening with the estate proceedings.

Procedural Questions

Q. As a Centre helping individuals access forms we would be most appreciative of a change to the on-line forms that would accommodate an application under Section 20(6)? It is my view that just having the forms on line would create an awareness of the changes to the legislation, this is a significant change, again in my view, to the many parents in common-law/adult interdependent relationships, most especially male individuals.

A. Yes a form for a section 20(6) application for a determination of guardianship will be prepared and presented to the Family Law Rules Advisory Committee for their consideration. If the form receives the necessary approvals, it will be posted online with the other forms.

Q. Is there any plan to add the respondent's address back on to the claim and move the children's names to the first page? The judiciary is not happy with the current format.

A. The Family Law Rules Advisory Committee is aware of these concerns and the forms are being worked on for their further consideration. However, note that the Applicant cannot give an address for service for the Respondent, only the Respondent can do so, but the Applicant will be asked to provide the Respondent's last known address.

Q. Is there any plans of adjusting the Response form to include a place for signature, particularly when the respondent is in agreement with the applicants request for Order?

A. This concern will be brought to the attention of the Family Law Rules Advisory Committee for consideration.

Q. A common problem I have experienced in filing a Family Law Act response in Queen's Bench, essentially a cross-application, is that it is not being added to the Court list as a cross-application. Should it be or not?

A. If the Respondent is just responding to the Claim in the Response, then that is not a cross-application and wouldn't be added to the list. But, if the Respondent is asking that the Court grant additional orders in the Response (has something "checked off" in the table on the second page) that is a cross-application and should be added to the list as a separate application.

Q. Are you working on an amalgamated form when application for Guardianship and parenting is at the same time. One statement?

A. Yes, we plan to create a form for the Family Law Rules Advisory Committee's consideration.

Q. When there is a statement filed on for a contact, guardianship, etc. application, and there are joint applicants such as an aunt and uncle or a grandma and grandpa, do both parties have to fill out the statement if the body is identical? Lots of times the male gets the female to fill it all out and then he just signs it.

A. The Claim provides for more than one applicant to be listed, but there is really only a requirement for one statement. One person can provide the evidence and the other can then just say at court "I'm in agreement". It is also possible for two people to swear the same statement. (However, note that there might be a need for each party's evidence on a particular point - such as their desire to be a guardian).

Q. If a surrogate mother gave up her rights to the child to the parents (a declaration of parentage was granted), if the parents later have a dispute and they needed a Parenting Order could they file it with the Provincial Court or does it have to stay in Queen's Bench because of the parentage order granted there initially?

A. From a strictly legal perspective, no, they could apply in either court. The "one family one file" is a Court Services concept rather than a legal concept. Since an application for a Parenting Order is a new matter, it could be commenced in either Court. Of course, the surrogate would NOT be a party to that application as she would no longer be a parent or a guardian.

Q. Does the Family Law Rules Advisory Committee plan to amend the current guardianship statements, or alternatively, create new statements to assist clients with applications under the new section 20(6)? The current guardianship statements and reply statements ask questions about the child's best interests. If I'm understanding correctly, the child's best interests are not a factor that the court needs to consider for an application under the new section 20(6). I assume the court will want our clients to include information in their statements about: (a) when they learned about the pregnancy or birth of the child; (b) whether the parent has acknowledged that they are the child's parent; and (c) how the parent has demonstrated an intention to assume the responsibility of the child.

A. Yes, we do plan to create a new Statement re the determination of guardianship in the new section 20(6). You are absolutely correct in your analysis of what evidence would be required in such an application.

Q. Has there been any discussion about creating a form for a payor to apply for an initial child support order ... the current form is not really set up for this. I have files where we need an order, the recipient is not really wanting to cooperate, so no MEP agreement, and the payor wants to use MEP.

A. Yes, given the input we have now received, a form for Statement – Child Support (Payor) will be created and provided to the Family Law Rules Advisory Committee for consideration.

Q. Where this comes up most often is when the payor has signed an agreement to pay support and he wants to change that. The agreement has been filed with MEP and is being enforced by them and the payor's income has gone down.

A. The payor needs to make an initial application for child support to change an agreement since there is no order in place. Of course, the agreement should be provided to the Court as part of the evidence. This is in line with section 77(2) which states "The court may, on application by a person referred to in subsection (3), make an order varying, suspending or terminating a support order or any part of that order, prospectively or retroactively."

Q. Is there going to be a form to file to request a transfer between courts?

A. We had thought that there probably wouldn't be a need for such a form, but given our feedback, this issue will be presented to the Family Law Rules Advisory Committee for further discussion.

Q. My co-workers and I have heard that there is to be a "procedural issue of removing regulated forms" I would just like to say that this would be very disappointing from our perspective.

A. Although the new Alberta Rules of Court give parties the ability to choose to either provide evidence through a regulated Statement or an Affidavit in FLA proceedings, there are no plans to get rid of the regulated Statements. This change was done so that lawyers could use Affidavits rather than Statements as they told us that was their preference. The Family Law Rules Advisory Committee fully understands the need to continue to have regulated statements for FLA proceedings to assist self represented litigants and to continue to improve these forms.

Q. I often refer folks to the forms so that they are aware of what documents they should be taking to their lawyers office with them for their first appointment. I have had individuals return indicating that they actually filled out as much as they could on those forms and took the form with them to their appointment with the lawyers. The feedback I received so far has only been positive in this respect.

A. That's great - even if the lawyer decides to use an Affidavit rather than the forms, the information the client would put on the forms would be helpful to the lawyer in understanding the client's situation.