

CHAPTER 1: Guardianship, Parenting Arrangements and Contact

Introduction

Part 4 of the *Family Law Act* (FLA), titled *Care of and Time with a Child*, is about establishing who has responsibility for making decisions in the best interests of a child and how much time parents and others will spend with a child when parents or other caregivers live apart. Under the FLA, a “guardian” has responsibilities towards a child as set out in “parenting arrangements” which includes both “parental responsibilities” as well as “parenting time”. These key concepts are explained in the blue boxes below.

Guardian
A guardian of a child is the only person who may have parental responsibilities for and parenting time with the child. A child’s parents are usually their guardians, but not always. People other than parents may also become a child’s guardian in limited circumstances, if they are appointed by the child’s existing guardian or by court order.
Parental Responsibilities
Parental responsibilities are the day-to-day care, control and supervision of a child as well as responsibility for a list of different types of important decisions concerning the child, which may be made together or allocated amongst the guardians.
Parenting Time
Parenting time is the time each guardian spends with the child.
Contact
Contact is the time or interaction a non-guardian has with a child, as set out in a court order or agreement.

Feedback and analysis indicate that the following changes would benefit families dealing with guardianship and parenting arrangements issues:

- adding consistency in how guardians are appointed and making it easier for families to establish who will have responsibility for their children could help people better understand how to create parenting arrangements for their children.
- creating additional guardianship options would allow people to better tailor guardianship to the circumstances of their family.
- clarifying who a child's guardians are at birth will reduce confusion for people about who has responsibility for a child and who may need to be granted that responsibility through a parenting arrangements agreement or order.

No policy changes are anticipated to the parental responsibilities currently listed in the Act and no policy changes are anticipated to how the Act addresses parenting time or contact with a child.

Key Changes and How They Help Families

Appointing guardians through agreement:

Proposed change: Allow a child's existing guardians, where they agree, to appoint a non-parent to also be a guardian of the child by written agreement.

How this helps families: Eliminates the stress, financial expense and delay associated with having to apply to court for a guardianship order.

Currently under the FLA, most parents become the guardians of their child when the child is born (see blue box below). When a parent is not a guardian, the Act allows that parent to become a guardian through an agreement with the child's other guardian or guardians, which is usually the child's other parent or parents. However, non-parents cannot become a guardian of a child in the same way even if all existing guardians of the child agree that making them a guardian is in the best interests of that child. Instead, non-parents are required to apply for a court order appointing them as guardian.

"Default" guardianship of a child under section 39 of the *Family Law Act*

Under [section 39](#) of the *Family Law Act*, parents of a child who reside together with the child are each a guardian of the child whether they continue to live together or not, but a parent who has never lived with the child is not the child's guardian unless one of the following three things apply:

- **the parent is a parent of a child born using assisted reproduction and there is an agreement signed before the conception of the child which indicates that the person will be the child’s parent when the child is born.**
- **the parent signs an agreement after the child is born with the child’s other guardian(s) which indicates that the parent is also a guardian of the child.**
- **the parent “regularly cares for the child” after the child is born.**

Allowing a non-parent to become a guardian by written agreement aligns with a primary objective of the FLA: to encourage the use of agreements over court process where appropriate. Court applications can require significant effort and expense. This is particularly true of guardianship applications which involve filing an affidavit that includes the applicant’s criminal record check, a check of the protection order registry to disclose whether any protective orders have been made against the applicant and a check of the Ministry of Children and Family Development records to identify whether the applicant has been involved in any child protection proceedings. Obtaining these records checks includes additional expense and takes a significant amount of time. The effort and expense associated with gathering this information can be prohibitive for some people and lead them to decide not to apply for a guardianship order. The necessity of a court order has been questioned when the existing guardians know the person seeking guardianship and all agree that it is in the child’s best interests.

Also, the intended change reflects the Act’s general policy of entrusting a child’s guardians with responsibility for making important decisions about the child. Trusting guardians to make decisions in the best interests of a child regarding the extensive list of parental responsibilities in [section 41](#) yet preventing guardians from deciding that it is in a child’s best interests to have another person share some or all of those responsibilities with them would appear to be inconsistent.

The change is more consistent policy within [Part 4](#) of the Act by better aligning the appointment of a non-parent as a child’s guardian with how a testamentary or standby guardian can be created under the Act. In both cases, any person can be appointed to become a child’s guardian in a document without prior court approval.

The proposed change would not apply when the existing guardians are not in agreement. In that case, the more formal process including checks and court order is important.

Indigenous perspectives:

Feedback received from Indigenous communities emphasized the need to recognize non-parents within their communities who exercise guardianship responsibilities in some cases. Feedback received also suggests that the extra costs associated with court applications were particularly prohibitive. Guardianship agreements may be an effective way to structure parenting arrangements that recognize and facilitate the important role of non-parents in making decisions associated with parental responsibilities.

Temporary guardianship:

Proposed change: Authorize a person to be appointed as the guardian of a child on a temporary basis by either court order or through the agreement of all the existing guardians of the child.

How this helps families: Families will be able to avoid the financial expense and time required when making an application for a court order. Families will be able to appoint someone as a guardian of a child for a defined period of time where there is a need for someone other than a current guardian to exercise some or all of the parental responsibilities for a child.

Currently, the authority of a guardian to allow someone else to temporarily make decisions for their child is limited to authorizing another person to temporarily exercise one or more specified parental responsibilities while that guardian is unable to do so. Guardianship always remains with the authorizing guardian who resumes exercising those responsibilities when they are able. The Act does not give the authorized person any parental responsibility of their own. The provision simply provides a way for a guardian to ensure their child is cared for if they are temporarily unable to exercise their responsibilities. A common example that illustrates the rationale for the current section is a military parent who is posted into a situation in which they cannot practically make decisions for their child.

The changes would allow guardianship and the parental responsibilities for a child to be granted to another person temporarily. This could be the “full” suite of parental responsibilities in [section 41](#) of the Act or only some of those responsibilities. Through agreement, guardians of a child will be able to grant this responsibility to someone (as discussed above) by appointing guardians through an agreement with the consent of all existing guardians. The result is that parental responsibilities will be treated the same regardless of whether guardianship is temporary or not.

The example below highlights a situation where this change will be useful. Currently, these situations require a court order and would result in the person becoming a permanent guardian until a further order revoking their guardianship was obtained. This is costly and is unnecessary where the person is known and trusted by the child's existing guardians.

Example

Barb has agreed to care for her grandchild, Shay, for the next two years while Shay's mother finishes a college program at a school several hours away. Shay's other parent left the province before Shay was born and only sees Shay a few days each year. Barb would like to have documentation showing she has authority to take Shay to appointments, communicate with the school, and enrol Shay in extracurricular activities. Barb was told she could apply for a court order appointing her as one of Shay's guardians, but even though Shay's mother was in agreement, the process was complicated and she couldn't afford a lawyer. Barb and Shay's mother wish they could just use a written agreement to document that Barb will be one of Shay's guardians until Shay's mother finishes college and describe the responsibilities they agree Barb will have.

Indigenous perspectives:

These changes to appointing a temporary guardian may also add flexibility for creating appropriate parenting arrangements within Indigenous communities. Together with the use of agreements to appoint permanent guardians discussed above, these changes may allow indigenous communities to fashion parental responsibilities that approximate some kinship care or customary adoption arrangements.

A corresponding change would be made to [section 43\(2\)](#) of the FLA which is the section that authorizes the temporary exercise of a guardian's parental responsibilities referred to above. Clarity will be added to the section to reduce confusion between this type of authorization and the newly created grant of temporary guardianship.

Although courts may already have sufficient authority to grant temporary guardianship under the current provision, the intended changes will make that authority explicit to avoid confusion over whether they can make an order.

Verifying existing guardianship:

Proposed change: Add authority for the issuing of a document that will verify that a person is a guardian of a child.

How this helps families: Families will not have to incur the financial expense and delay inherent in obtaining a court order verifying that they are the guardian of a child in order to satisfy a third party without knowledge of the family's circumstances that the guardian can exercise a particular parental responsibility.

These changes are intended to give the court explicit authority to issue a document that verifies existing guardianship of a child. This authority would create a practical way for existing guardians to establish their responsibility to make decisions on behalf of a child to others. It is not about granting guardianship.

Currently, the only way for a child's guardian to obtain a document stating that they are the child's guardian is to apply for a court order that reflects their existing guardianship. As mentioned, the process of obtaining a court order can be time-consuming and costly and, in these circumstances, results in an order they do not need.

Institutions like schools or hospitals often require direction or permission from a child's legal guardian before they can take an action in relation to a child. If a guardian has received their guardianship through a court order, they are able to show that document to the institution. However, many people become the guardian of a child because they are the child's parent at birth and therefore have no document proving this since the child's birth certificate only lists parents and not guardians. Others might become a guardian when the child's original guardian dies and appoints them through a will. Others might become a guardian when a child's original guardian has appointed them in a standby guardian document and the conditions of the document have been met (for example, if the original guardian has been diagnosed with a terminal illness and they are no longer able to care for the child). There are therefore inconsistencies with the type of documentation a person might have or be able to use to demonstrate that they are a child's guardian.

Although it appears that courts do make this type of "declaration" in some instances, amendments would explicitly authorize a court to issue this type of document based on satisfactory proof of existing guardianship without a need to consider anything else.

Guardianship at birth (“default” guardianship):

Proposed change: Clarify that parents who do not live with their child’s other parent(s) or are unable to live with their child immediately after their birth are nonetheless guardians of their child.

How this helps families: Eliminates confusion regarding whether a single parent of a child is that child’s guardian at the birth. The change would prevent the Act from being interpreted as meaning that a parent whose child cannot come home to live with them immediately after their birth is not the child’s guardian.

The intended changes would clarify the Act’s current provisions which describe who a child’s guardians are when the child is born.

Current wording of [section 39](#) indicates that a parent of a child is their guardian if they reside with the child or have provided “regular care” for that child. However, the wording also allows for an interpretation that a parent’s guardianship of their child is dependent on the parent living with child’s other parent. That was never the intent as it could mean that some children are born without anyone having parental responsibilities for them.

This change ensures that single parents are recognized as the guardians of their child at birth and that the original intent of the provision to make guardianship dependent on the relationship between the child and parent is better represented. This change brings the Act in line with the original intent as well as case law.

Wording will be clarified to ensure a parent who cannot immediately reside with their child after their birth due to medical or other reasons are also recognized as the child’s guardian. For example, sometimes a child needs to remain in hospital following their birth and cannot go home with their parents until some time has passed. In that case, the parents may need to make some important medical decisions regarding the child even if they technically might not be the child’s guardian because they have not lived together. The intention of this change is to remove any doubt about the parents’ authority to make decisions about the child in those cases.