OBA Submission on the Definition of "Child" in the *Children's Law Reform Act*

Submitted to: Office of the Assistant Deputy Attorney General
Ministry of the Attorney General

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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Introduction

The Ontario Bar Association ("**OBA**") appreciates the opportunity to provide this submission in response to the Assistant Deputy Attorney General's letter of December 9, 2020 on the definition of "child" in the *Children's Law Reform Act* (*CLRA*) (the "Consultation Letter").

The Ontario Bar Association

Established in 1907, the OBA is the largest volunteer lawyer association in Ontario, with over 16,000 members who practice on the frontlines of the justice system and who provide services to people and businesses in virtually every area of law in every part of the province.

Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and delivers over 325 in-person and on-line professional development programs to an audience of over 12,000 lawyers, judges, students and professors.

This submission was prepared by members of the OBA Family Law, and Trusts and Estates Law Sections, who together represent a wide range of clients in family law, estate planning and estate litigation matters.

Overview

Amending the definition of "child" in the *CLRA* to align with the *Divorce Act* would resolve a variety of problems, including most importantly a lack of equal treatment under federal and provincial family law legislation. However, such an amendment would not correct the existing narrow but problematic interaction between the *Substitute Decisions Act* (*SDA*) and the *Divorce Act* with respect to adult children and any potential interference with their autonomy. Instead, the proposed amendment would extend the same problematic

interaction to adult children under the *CLRA* (mostly children of parents who are not married).

A more fulsome review and consultation is required to consider how the fundamental autonomy rights of individuals can be fully respected under family law legislation.

Background

In 2020, the Government of Ontario introduced and passed Bill 207, *Moving Family Law Forward Act, 2020*. A significant goal of this bill, which received Royal Assent on November 20, 2020, was to align provincial legislation with the federal *Divorce Act*. In a submission[1] to the Standing Committee on Justice Policy in respect of Bill 207, the OBA proposed an amendment to the definition of "child" in the *CLRA* to align with the definition in the *Divorce Act.*

The OBA has and continues to advocate for consistency between provincial and federal legislation in order to ensure that the same laws apply to children of married spouses (generally guided by federal law) and to children of non-married spouses (guided by provincial law), and to create clarity for the public, the legal profession, and third parties who are involved in and affected by family law. However, such consistency ought not to come at the cost of the autonomy rights of adults.

A Note on Terminology

Given the impending changes to both the *Divorce Act* and the *CLRA*, we refer primarily to parenting orders, decision-making authority (formerly custody) and parenting time (formerly access) to align with the language that will be coming into force later this year.

[1] OBA Submission on Bill 207, *Moving Ontario Family Law Forward Act, 2020*.

Additionally, for ease of reference, we use the term "adult child" to refer to a person who is at the age of majority or over, but unable to withdraw from parental charge by reason of illness, disability of other cause.

Impacts of Differing Definitions of "Child" in Family Law Legislation

The definition of "child" in section 18(3) of the *CLRA* includes only minors. This definition does not align with the definition of "child" in the *Divorce Act* and the provincial *Family Law Act* (*FLA*) for child support purposes. The *Divorce Act* defines a "child of the marriage" 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

For the purposes of child support, the *FLA* applies in respect of a 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.

In fact, this *FLA* provision was amended after a Constitutional challenge was brought alleging the *FLA* discriminated against children with disabilities of unmarried spouses since it did not provide for support for these children when they are no longer minors, as is the case with the *Divorce Act*.

The current limited definition of "child" in the *CLRA* results in a similar distinction and unequal treatment between children of unmarried compared to married spouses, where the child is at or over the age of majority and unable to withdraw from parental control. This

distinction has been recognized by the Courts in cases including *Simons v. Crow*[2], and *Perino v. Perino*[3].

Since the Court does not have jurisdiction under the *CLRA* to make parenting orders once the child reaches the age of majority, parties who cannot access the *Divorce Act* (being unmarried spouses, or in some cases married spouses who have been divorced outside of Canada, who do not yet qualify for a divorce, or who have decided not to bring divorce proceedings before the court) can turn to the *Substitute Decisions Act* to seek decision-making authority for the adult child. This is a completely different legal regime than obtaining a parenting order under the *Divorce Act* (which can be sought by a married spouse where a divorce is being sought). There are also types of parenting orders that would be available were the definition of "child" amended that may not be available under the *SDA* or otherwise as they do not engage the capacity of the adult child[4]. The court ought to have the same jurisdictional authority to make a parenting order, where appropriate, regardless of whether the application for a parenting order is made under the *CLRA* or the *Divorce Act.*

In addition to this differential treatment and the confusion that may be caused by it, the current definition of "child" under the *CLRA* also creates a number of practical challenges. These include:

- Under section 9 of the *Child Support Guidelines*, parenting time is relevant for the determination of child support. This is reflected in section 47 of the *FLA*, which authorizes the court to stand over an application for support until an application under the *CLRA* for a parenting order has been determined. While under the *Family Law Act*, child support may be ordered for an adult child, the inability of the Court to

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[2] *Simons v. Crow*, 2020 ONSC 5940 at paras. 33-36.
[3] *Perino v. Perino*, 2009 CanLII 41900 at para. 8.
[4] For example, under section 28(1)(c) of the *CLRA*, the Court may make an order "prohibiting a party or other person from engaging in specified conduct in the presence of the child" or "requiring a party to facilitate communication by the child with another party or other person".

make a corresponding parenting order may prove problematic for the application of section 9 of the *Child Support Guidelines.*

- If parents are already engaged in family law proceedings and a child attains the age of majority, the parties would be required to delay the proceedings by amending their pleadings to include an application under the *SDA*, which also requires notice to the Public Guardian and Trustee.

- Further, while an application under the *CLRA* (for parenting orders) and the *FLA* (for support orders) may be brought in the Ontario Court of Justice (OCJ), an application under the *Substitute Decisions Act* must be brought in the Superior Court of Justice (SCJ). If parents are already engaged in family law proceedings before the OCJ and a child attains the age of majority, there would be further delay in that proceedings would need to be moved to the SCJ. In *Simons v. Crow*, the Court also recognized the jurisdictional limitations of the Family Court with respect to *SDA* claims:

> The jurisdiction of the Family Court does not include stand alone applications under the *Substitute Decisions Act*: *Courts of Justice Act*, R.S.O. 1990, c. C.43 at s. 21.1(3) and s. 21.8. This court does not have subject matter jurisdiction over such a claim unless consolidated with an action for which the Family Court has exclusive jurisdiction: *Rules of Civil Procedure*, R.R.O. 1990, reg. 194, Rule 6. [5]

Intersection with Capacity Law and the *Substitute Decisions Act*

Amending the *CLRA* definition of child would expand the Court's jurisdiction to make parenting orders to any child over the age of majority who is unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents. This may include adult children who are fully capable of making decisions regarding their property and personal care (but are otherwise unable to withdraw from parental charge, for example,

[5] *Supra* note 2 at para. 40.

given physical disabilities), and adult children with mental health-related disabilities who may or may not be capable of making some or all decisions regarding their property and personal care.

A review of the caselaw reveals little judicial consideration of the intersection between the *Substitute Decisions Act* (*SDA*) and family law legislation[6]; however, members of the Estates bar have raised concerns about expanding the Courts' jurisdiction to make parenting orders, particularly with respect to decision-making, for an adult child who is presumed to be capable by law under the *SDA* and for an incapable adult child without the protections afforded by the *SDA*.

The *SDA* includes procedural, evidentiary, and substantive safeguards to ensure that declarations of incapacity and the resulting delegation of substitute decision-making authority are made only in proper circumstances. These safeguards include clearly defined standards for incapacity to manage property and incapacity to manage personal care. Even where an adult is found to be incapable in respect of particular decisions, the *SDA* requires restraint in intervening in their affairs. Also important is the right of an adult who is capable of granting a continuing power of attorney for property and a power of attorney for personal care to choose to whom to delegate those decisions.

The autonomy of adults to make decisions for themselves is a fundamental right. As recognized by the Divisional Court in *Abrams v. Abrams*:

> An application for a declaration of incapacity under the SDA is an attack on the citizen's autonomy and, in the event of a finding of incapacity, which is a judgment *in rem*, results in the abrogation of one or more of the most fundamental of her rights: the right to sovereignty over her person and the right to dominion over her property.

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[6] The case of *Schleifer v. Schleifer*, 2009 CanLII 63958 is one of the few decisions identified where the *Divorce Act* and *SDA* were considered by the court in respect of an adult child. However, the Court ultimately held that the adult child was not a "child of the marriage" under the *Divorce Act* and as such, did not analyze any overlap between the two regimes.

> That these rights should not be lightly interfered with … is reflected in the statutory presumption of capacity…[7]

A parenting order authorizing a parent to make decisions on behalf of an adult child may raise the same concerns.

Section 2 of the *SDA* outlines the presumption of capacity as follows:

> **Presumption of capacity**
> 2 (1) A person who is eighteen years of age or more is presumed to be capable of entering into a contract.
>
> **Same**
> (2) A person who is sixteen years of age or more is presumed to be capable of giving or refusing consent in connection with his or her own personal care.

Correspondingly, Part I of the SDA provides for substitute decision making with respect to property for "decisions on behalf of persons who are at least eighteen years old" (section 4), and Part II of the SDA provides for substitute decision making with respect to personal care for "decisions on behalf of persons who are at least sixteen years old" (section 43).

To be clear, the Court does already have jurisdiction to make parenting orders for individuals subject to the *SDA* in at least two circumstances:

1. In respect of an incapable adult child of divorcing parents: a parenting order may be made under the *Divorce Act*; and

2. In respect of a 16 or 17 year old child: a parenting order may be made either under the *CLRA* or the *Divorce Act.*

Amending the *CLRA* definition of "child" would not create a new overlap, but would extend the application of 1 above to those who cannot access the *Divorce Act*.

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[7] *Abrams v. Abrams*, 2009 CanLII 12798 at paras. 56-57.

Where capacity is not at issue (for example in the case of minors approaching the age of majority or capable adult children) but a child is still unable to withdraw from the charge of his or her parents, family courts have approached parenting orders carefully as the child matures. The court has rejected a specific cut-off age for exercising its discretion to make a parenting order. Instead, the court is required to carefully consider not only the child's age, but also their maturity.[8] This is consistent with the recent amendments to the *Divorce Act* and the *CLRA*, which refer to assessing "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained". There is a rich body of case law on how the best interests of the child – the ultimate test in making a parenting order – "must be interpreted in a way that reflects and addresses an adolescent's evolving capacities for autonomous decision-making".[9]

Further, the courts are not *required* to make a parenting order. The legislation is permissive and not mandatory, and the court may decline to make the parenting order sought.[10] There are numerous examples where this is done for children approaching the age of majority.[11] In *Ross v. Ross*[12], the British Columbia Court of Appeal considered the question of whether it should decline to exercise jurisdiction under the *Divorce Act* because the adult child was "an adult capable of a degree of decision making"[13]. After considering the guiding principles and presumptions of capability in various pieces of legislation[14], the Court found that:

> … these sections are entirely compatible with the provisions of the *Divorce Act*. The starting point is that an adult child of the marriage is presumed

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[8] See, e.g., *Roloson v. Clyde*, 2017 ONSC 3642 (CanLII), at para. 56, and *A.M. v. C.H.*, 2019 ONCA 764 (CanLII), at para. 68.
[9] *A.M. v. C.H.*, *ibid.*, at para. 67, citing from *A.C. v. Manitoba (Director of Child and Family Services),* 2009 SCC 30, at para. 88.
[10] *M. v. F.,* 2015 ONCA 277 (CanLII), at para. 38; *N.L. v. R.R.M.*, 2016 ONCA 915 (CanLII), at para. 46.
[11] See e.g. *N.L. v. R.R.M.*, *ibid*, at paras. 23 & 24 [Appeal court affirmed decision not to make a custody order with respect to both a 16- and 18-year old and that access to information from providers of medical or educational services was entirely in the 16 and 18-year old's control].
[12] *Ross v. Ross*, 2004 BCCA 131.
[13] *Ibid* at para. 20.
[14] Including *Age of Majority Act*, *Adult Guardianship Act*, *Patients Property Act* and *Representation Agreement Act*.

> capable of decision making. That presumption can be rebutted but only on sufficient evidence. However, the presumption does not nullify the court's obligation to seek the best interests of the child under the *Divorce Act*. The child's own decisions will be very important in that assessment.[15]

Despite the foregoing, given the importance of the autonomy of adult children, it would be appropriate to consider whether the presumptions, underlying principles and protections of the *SDA* ought to be more formally incorporated into family law legislation, rather than leaving this to judicial discretion. A more fulsome consultation, with a longer time period to consult more broadly with interested stakeholders, would be required to consider this further.

Conclusion

Once again, the OBA appreciates the opportunity to provide this submission to response to the Assistant Deputy Attorney General's Consultation Paper. We would be happy to meet with you to discuss this matter further and to answer any questions you might have.

[15] *Supra* note 12 at para. 22.