

## Updates in the Caselaw

The *Family Law Act* made some significant changes to our previous legislation. Some of those affect Child Protection cases. They include:

1. **The removal of the term “Custody”.** The Family Law Act does NOT have the word custody in it. The Child Family and Community Services Act does. When a child is removed from a parent pursuant to the Child Family and Community Services Act, the Judge/Director can only “return” the child to the “parent apparently entitled to custody “ (set out in several sections of the CFCSA Act)

The concept of guardianship now incorporates “custody”, but where does that leave us when determining who a child can be returned to?

Under the old legislation, the *Family Relations Act*, if parents had Joint Custody, the case law was that the parent who had primary care was the parent apparently entitled to custody. Judge Smith ruled in *The Director of Child Family and Community Service and WI and LMR* 2014 BCPC 164 that the Court was required to make an order giving “primary parenting responsibility” to the other parent, before a child could be returned. This was even when the parents were both “presumed guardians”.

What this case means: I would suggest this means that an order specifying primary parenting responsibilities needs to be made before a return is made. So for parties that don’t have any orders, this could mean that no return could be made until there are orders in place.

2. **The *presumption of Guardianship (s39 of the Family law Act)*.** The FRA did not have this presumption, and the concept of guardianship and parenting responsibilities are relevant to MCFD’s ability to return a child to the other parent.
3. **Consideration of the FLA definitions (ie, best interests of the children, family violence etc.)** when it comes the Court making an order under the FLA when there is a corresponding CFCSA hearing. Given the expanded definitions under the FLA, this has impacted to some extent the outcome when a parent is applying for guardianship to be able to have a child returned to them under the CFCSA.

## Intervention by the Ministry when there is no removal

There are some cases that we hear about anecdotally where MCFD directs a parent to withhold access, even where there are existing FLA orders in place. To be clear, **MCFD do not have the power to do this.**

Commonly, you will hear of “safety plans” and requests from a social worker. They are all voluntary, until such time as MCFD legally apprehend the child.

***In MLJ v RDJ 2013 BCDC 1358***

THE FACTS

In this case, the Mother withheld access to Dad, breaching a court order. She was advised to do so, at the request of MCFD, who were investigating a protection report. MCFD did not take any steps under the CFCSA to remove or supervise the children (or under the FLA), but directed mom to deny dad access.

A s211 report was completed 4 months later, and eventually MCFD agreed that the children should go back to the regular schedule with dad.

Dad then sought costs against MCFD and mom, for him having to enforce the order. The Court criticized MCFD and said

*[28] In the case before me, there were two parents entitled to custody, both the respondent and the claimant. The MCFD took no formal action and thereby denying the respondent due process. With no authority, it removed the child from his care. The director counseled the claimant to breach a court order and provided no legal framework for the respondent to challenge its actions. To paraphrase an excerpt in Black's Law Dictionary, fifth edition, at p. 449, due process of the law provides notice to a person and an opportunity to be heard and to enforce and protect his rights before a court having power to hear and determine the case. The respondent was denied this basic procedural fairness.*

AND

*[30] I find nothing in my review of the [CFCSA](#) that gives the director the power to limit contact between a parent and child without removing the child and initiating protection proceeds. The CFCSA does provide jurisdiction for the director to apply for leave to intervene in a proceeding under the [Family Law Act](#) in the Supreme Court under [s. 97.1](#) of the [CFCSA](#), but this was not done.*

***Intervention in [Family Law Act](#) proceedings***

***97.1*** *A director may apply under [section 204 \(2\)](#) of the [Family Law Act](#) to the court, as defined in that Act, for leave to intervene in a proceeding under that Act if the director considers it is in the best interests of a child to do so.*

*In other words: MCFD cannot be intervening or "directing" parents to breach a current family law order without taking action under the CFCSA or FLA. To do so denies the other parent their procedural rights.*

*This is a common problem that other parent's counsel report. This is the first cited case I have seen on this issue.*