Child Protection in British Columbia

Child protection proceedings in British Columbia are governed by the following legislation:

1. ***Child, Family and Community Service Act*** R.S.B.C. 1996, Chapter 46 ("CFCSA")

2. ***Child, Family and Community Service Act Regulation***, BC Reg 527/95 ("CFCSA Reg")*;* and

3. ***Provincial Court (Child, Family and Community Service Act) Rules*** ("CFCSA Rules")

Other Relevant Statutes:

Infants Act R.S.B.C. 1996, Chapter 223***.***

Adoption Act R.S.B.C. 1996, Chapter 5

Family Law Act S.B.C. 2011, Chapter 25

INTRODUCTION:

The CFCSA applies to persons who are "under 19 years of age and includes a youth". A youth "means a person who is 16 years of age or over but is under 19 years of age"(s. 1; definition of "child" and "youth").

The CFCSA is legislation designed to assist with the care of children if necessary (non-protection) and protect children from various forms of harm while with parents or caregivers or, if necessarily, involuntarily through state intervention.

Section 2 of the CFCSA sets out the Guiding Principles of the legislation and clearly provides that the overarching considerations when interpreting and administering the CFCSA are the safety and well-being of children.

The principles are described in terms of what children are "entitled to", what should be "preferred" and "preserved" for children, and identify that children's views should be considered when decisions relating to a child are made.

The Guiding Principles set out in s. 2 can be interpreted to say, either explicitly or implicitly, that children have the following "rights":

a. be protected from abuse, neglect or harm or threat of harm;

b. preservation of their family environment;

c. preservation of kinship ties and attachments;

d. preservation of cultural identity and

e. have their views considered when decisions about them are being made; and

f. have decisions about them made and implemented in a timely manner

The “rights” set out in s. 2(a)-(g) are viewed in light of the paramount principle that the safety and well-being of children must be preserved.

The “rights” set out in s. 2 are strewn throughout the various sections of the CFCSA and, for the most part, are factors to be considered in determining most decisions under the CFCSA.

For instance, section 3 of the CFCSA relates to services to be provided to families and children; services are to be “planned and provided” in ways sensitive to the “needs and the cultural, racial and religious heritage” of all of those receiving the services, including children.

And s. 4 of the CFCSA sets out examples of factors to be considered when making decisions founded on the “best interests” of children. Section 4(1)(f) specifically directs that a child’s views must be considered. In addition, when a child is an aboriginal child, preservation of the child’s cultural identity becomes a relevant factor.

Under the CFCSA, the State, referred to as the “director”, as well as the court must make decisions founded on the “best interests” of children while ensuring that the “safety” and “well-being” of children are preserved (s. 2).

When services are provided to families by the director, children have the right to be informed about what services are available to them and to participate in decisions affecting them (s. 3).

PART 2: VOLUNTARY AGREEMENTS (NON-PROTECTION) :

Part 2 (sections 6 – 8) of the CFCSA deals with how children come into the director’s care on a voluntary basis and the children do not “need protection”.

Parents or persons who have a relationship with, or who have been given care of a child by a parent, may enter into written agreements with the director relating to the care of a child. These agreements are Voluntary Care Agreements (s. 6),

Special Needs Agreements (s. 7), and Agreements with Child's Kin and Others (s. 8).

Sections 6 and 7 set out the rights of children when such agreements are considered. In the case of both Voluntary Care Agreements and Special Needs Agreements, the director **must**, **if possible**, "find out the child's views about the agreement and take them into account" and "explain the effect of the agreement to the child before the agreement is signed".

The director is obliged to consider whether such an agreement is in the child's best interests (s. 6(4)(b) and s. 7(3)) and a parent must promise to maintain contact with the child when in the director's care voluntarily (s. 6(5)(c) and s. 7(3)).

A parent who is under the age of 19, and therefore falls within the definition of a "child" under the CFCSA, has the capacity to enter into agreements with the director under ss. 6 and 7 of the CFCSA (s. 11).

There are certain rights or entitlements available to children who are between the ages of 16 – 18 years of age ("Youth" under the CFCSA).

Part 2.1 (ss. 12.1 – 12.3) deals with "Youth Transitional Support Services and Agreements" and allows for the director to provide services to youth and to enter into written agreements with youth.

Section 12.1 speaks to the director's ability to enter into written agreements with youth who cannot, in the director's opinion, be re-established with family or do not have a parent who is willing or able to care for them. In such cases, the director's agreement with the youth must include a plan for the youth's independence. Such agreements are known as "Youth Agreements".

Section 12.2 authorizes the director to enter into written agreements with, and provide services and financial support to, certain youth who were in the director's permanent care, who were in a Youth Agreement, or were in the director's permanent guardianship on the child's 19'th birthday. In such a case, the director may enter into a written agreement with the youth to provide services and/or financial support until the young adult's 24th birthday provided that the young person is enrolled in an educational or vocational training program, or taking part in a rehabilitative program.

From a reading of these provisions, it appears that the legislation is framed in terms of authorizing or granting the director permission to enter into such agreements and the director has discretion when deciding when to enter into voluntary agreements with children.

There is no legislative right for a child or parent to enter into an agreement with the director under Part 2.

However, it seems that once a child is placed in the director's care, a child does have legislated rights to a level of care as set out in s. 70 of the CFCSA (will be discussed later).

PART 3: CHILD PROTECTION :

Part 3 of the CFCSA (ss 13 – 69) relates to situations where children are alleged or found to "need protection".

In those circumstances the director is not only authorized, but mandated, to respond to reports made that a child 'needs protection'.

Section 13 of the CFCSA sets out an enumerated list of circumstances where children are presumed to need protection. This is not an exhaustive list of circumstances and courts have found that, when determining if a child "needs protection", the court may also rely on the Guiding Principles (s. 2) when making that determination (***S.(B.) v. British Columbia (Director of Child, Family and Community Service***, (1998) CanLII 5958 (BCSC)).

Section 14 of the CFCSA establishes a legal obligation for a person to promptly report to a director if that person has reason to believe that a child "needs protection" . On receiving a report, the director must respond to that report and determine what course of action to take (s. 16). The director must assess the information in the report and respond in one of four ways:

(a) Offer support services and agreements to the child and family ("Support Services");

(b) Refer the child and family to a community agency ("Community Referral");

(c) Conduct an assessment of the child's safety and determine whether or not it is necessary to provide services to the family to support and assist in the child's care and ensure the child's safety within the family ("Assessment"); or

(d) Investigate the child's need for safety ("Investigation").

A child who is the subject of a child protection report does not have a right to know the outcome of the director's assessment of the report and the director is not mandated to inform a child. Rather, the decision to inform a child with the results of the outcome of an assessment rests within the discretion of the director.

Section 16(4) of the CFCSA provides that "…the director may report the result of the assessment of investigation to the child if he or she is capable of understanding the information" and section 16(5) allows for the results of an assessment or investigation to not be shared if there is a concern that reporting the results would, "in the opinion of the director, cause physical or emotional harm to any person or endanger the child' or "if a criminal investigation into the matter is underway or contemplated."

The CFCSA treats children differently based on age. For the most part, throughout the legislative provisions, you find a distinction between children who are "12 years of age or over" and children who are younger than 12 years of age.

If a director receives and assesses a protection report, it may offer the family a family conference during which a plan of care can be developed to ensure the subject child's protection and best interests.

If a plan of care is developed in a family conference a director must, if a child is 12 years of age or over, take the child's views into account when deciding whether or not to agree to a plan of care developed at a family case conference (ss. 20, 21).

Typically, children "12 years of age or over" are entitled to notice of legal proceedings affecting them while younger children do not have that legislative right.

However a child's "capacity" may also be considered in determining whether or not it is in that child's best interests to be notified or served with a legal proceeding and, although there is no legislative requirement to provide notice of proceedings to children under the age of 12 years, a judge may determine that a child should be notified or served in certain circumstances.

Section 28 of the CFCSA authorizes a director to apply to a court for an order which prohibits contact between a person and a child if the director has reasonable grounds to believe contact between the person and the child may cause the child to need protection.("Protective Intervention Order") Children who are 12 years of age or older have a right to notice of such applications (s. 28(2)(b)) and the court must, in determining an application under this section, consider the best interests of the child (s. 28(3)).

Section 29 allows the director to apply to a court for an order mandating health care for a child notwithstanding a parent and/or child's consent or lack of consent to that health care. Children who are "capable of consenting to health care" must be provided notice of such applications. (s. 19(2)(b)).

If a child is aboriginal, a Nisga'a child, a treaty first nation child, or identifies as aboriginal, the child's relevant aboriginal representative or organization must be provided the same notification or service as the child.

A child does not automatically become a party to the legal proceedings or have a right to become a party. A child's parent and a child's aboriginal agency or organization become parties to the proceedings if they appear at the protection hearing (s. 39) or may become parties be appearing at later stages in the proceedings (s. 49(3) and 54.01(4)).

Children who are 12 years of age or over, and who are entitled to notice and/or service of proceedings under the CFCSA, do not have party status in proceedings under the CFCSA unless they are specifically made parties by court order (see. ss. 39, 49(3), and 54.01(4))

Although courts have, under s. 39(4) of the CFCSA, the legislative authority to make a child a party to a legal proceeding relating to that child, courts have been extremely reluctant to do so. (***Director v. G.M.B. and E.D. and G.W.*** 2016 BCPC 0054).

If a director applies for a permanent order removing a child from the child's parents' care, the director must again serve a child who is 12 years of age or over even though the child is not a party to the proceedings. (s.49: Continuing Custody Order ("CCO") or s. 54.01: Permanent Transfer of Custody Before Continuing Custody Order)

Before making either permanent order, the court is required to consider the "child's best interests", including the child's views. (s. 49(6), s. 54.01(6) and s. 4).

If an order is made, under s. 54.01, permanently transferring custody of a child to a person other than a parent before a continuing custody order, that person becomes, by reason of that order, a guardian of that child under the *Family Law Act.* (s. 54.2(1) of the CFCSA and s. 51(1) and (5) of the FLA).

Once a permanent order is made placing a child in the permanent care of the director ("CCO"), the director shifts its focus from reunification of the family from which the child was removed to finding "permanency" for that child outside of the family home.

A permanent plan for a child often depends on the specific circumstances of that child, such as the child's age, the specific needs of the child, the availability of extended suitable family, to name a few.

Typically, a director's permanent plan for a child includes adoption or permanency through other avenues.

Section 54.1 of the CFCSA allows a director to apply to a court to permanently transfer custody of a child to a person other than a child's parent. This application allows another person to become a child's permanent guardian under the *Family Law Act.* (see s. 54.2(1) of the CFCSA and s. 51(1) and (5) of the FLA).

A child who is 12 years of age or over must be served with notice of a director's application under s. 54.1 (s. 54.1(2)) and a court must consider a child's views and again, the court must be satisfied that the order requested is in the child's best interests (s. 54.1(3) and s. 4).

After a CCO has been made, any party to the hearing at which a CCO was granted may apply to rescind or cancel the CCO under s. 54. If such an application is brought, a child who is 12 years of age or over must be served with notice of the application (s. 54(2)(a)).

CHILD'S ACCESS WITH PARENTS AND OTHER PERSONS (Sections 55, 56. 57.01 and 57.1):

A) BEFORE A PERMENANT ORDER IS MADE:

Section 55: (a) If a child is the temporary care of a director (after removal and prior to the making of a permanent order), a parent or other person may apply to the court for access to that child;

(b) A child, if 12 years or age or over, must be serviced with notice of the hearing of the access application (s.55(3); and

(c) the court must consider the child's "best interests" and therefore, the child's views must be considered.(s. 55(4)(5) and s. 4).

B) AT THE TIME OF, OR AFTER A PERMANENT ORDER IS MADE:

Section 56: (a) If a child is in the permanent care of the director (after a "CCO), a parent or other person may apply for access to that child;

(b) A child, if 12 years of age or over, must be served with notice of the hearing of this application (s. 54(2)); and

(c) the court must determine if access is in the child's best interests, is consistent with the plan of care for the child, and "is consistent with the wishes of the child, if 12 years of age or over". (s. 56(3)).

Section 54.07: (a) An application for access to a child under s. 54.07 can be brought by "a person" or "a party to an order for access to the child under section 55"
(b) the child, if 12 years of age or older, must be served with notice of the hearing on the application; and

(c) the court may make the order for access if it determines that the order Is consistent with the child's best interests; Is consistent with the plan of care, and Is consistent with the wishes of the child, if 12 years of age or over.

Section 57.1 (a) An application for access to a child can be made by a party to an order for access to the child under s. 56 if an application to transfer custody of the child is brought under s. 54.1 (s. 57.1(1));

(b) the child, if 12 years of age or over, must be served with notice of the hearing of the access application (s. 57.1(2)); and

(c) the court may, confirm, vary or cancel the existing order under s. 56, based on determining what order is in the child's best interests (s. 57.1(3))

(NOTE: Read carefully the various sections to determine when access application can be, or must be, made.)

SERVICE AND DISPENSING WITH SERVICE

As one can see from the review of **some** of the sections of the CFCSA above, provisions of the CFCSA generally require that if a child is 12 years of age or over, the child must be notified of proceedings or hearing and served with documentation with the date, time and place of hearing of an application.

The list above is not an exhaustive list of all sections in the CFCSA setting out notice requirements. It is very important to review the specific sections of the CFCSA when determining a child's right to notification or service of proceedings or considering dispensing with service on a child if it could be harmful and not in that child's best interests.

Rule 6(8) of the CFCSA Rules outlines how a document is to be served on a child 12 years of age or older and further provides the ability for a judge to make orders on how a child is to be served.

Rule 6(9) allows for the service of documents on children younger than 12 if a judge so orders thereby expanding the ability to inform children impacted by child protection proceedings.

Section 69 of the CFCSA, however, also allows for the court to dispense with the requirement of notice of a proceeding or all proceedings on a party or other person, which would include a child.

Presumably, such an order would be made if the court determined that it was not in a child's "best interests" to be served with documents or receive notification of a hearing. (Eg. *Re. W. (M), [1997] BCJ No. 3058 (QL)(Prov. Ct --- check).*

WRITTEN CONSENTS (s. 60)

Pursuant to s. 60 of the CFCSA, a court may, after a presentation hearing, make most custody or supervision orders, under Part 3 of the CFCSA, on the written consent of the parties and a child, if 12 years of age of over and without a finding that a child "needs protection"(s. 60(1) and 60(4)).

The court retains the ability to dispense with a consent if to do so is in a child's best interests (s. 60(3)).

A Written Consent is a specific form, (Form 11: CFCSA Rules) and requires the author of that Written Consent to confirm that:

1. "I have been advised by the director to consult with independent legal counsel before signing this consent."

2. "I understand the nature and consequences of this consent." and

3. "My consent to the order is voluntary".

Children, especially older children, often sign Written Consents to orders requested by the director, including permanent orders.

Both sections 54.01 and s. 54.1 of the CFCSA provide that a court may rely on the written consent of a child if it is satisfied that the child has been advised to consult with independent legal advice, the child understands the nature and consequences of the consent, and the consent is voluntarily given.(ss. 54.01(7) and 54.1(4)).

This is the only reference in the CFCSA to an obligation on the director, or any other party, to advise a child involved in child protection proceedings to consult with independent legal advice. Inherent in this reference is a child's right to consult with independent legal counsel prior to executing a Written Consent to an order requested.

PART 4: CHILDREN IN CARE (s. 70, 71)

Children in the care of the director have legislated rights as set out in s. 70 of the CFCSA.

Section 70 states:

"**70** (1) Children in care have the following rights:

(a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement;

(b) to be informed about their plans of care;

(c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them;

(d) to reasonable privacy and to possession of their personal belongings;

(e) to be free from corporal punishment;

(f) to be informed of the standard of behaviour expected by their caregivers or prospective adoptive parents and of the consequences of not meeting the expectations of their caregivers or prospective adoptive parents, as applicable;

(g) to receive medical and dental care when required;

(h) to participate in social and recreational activities if available and appropriate and according to their abilities and interests;

(i) to receive the religious instruction and to participate in the religious activities of their choice;

(j) to receive guidance and encouragement to maintain their cultural heritage;

(k) to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care;

(l) to privacy during discussions with members of their families, subject to subsection (2);

(m) to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the *Representative for Children and Youth Act*, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament;

(n) to be informed about and to be assisted in contacting the representative under the *Representative for Children and Youth Act*, or the Ombudsperson;

(o) to be informed of their rights, and the procedures available for enforcing their rights, under

(i) this Act, or

(ii) the *Freedom of Information and Protection of Privacy Act*.

(2) A child who is removed under Part 3 is entitled to exercise the right in subsection (1) (l), subject to any court order made after the court has had an opportunity to consider the question of access to the child.

(3) This section, except with respect to the Representative for Children and Youth as set out in subsection (1) (m) and (n), does not apply to a child who is in a place of confinement."

With some exceptions, these rights of children in care do not apply to a child who is in a "place of confinement" notably, a child who is in a correctional or youth facility or who is confined under the *Mental Health Act* (s. 1, s.70(3)).(see s. 70(3) for exceptions).

Section 71 obligates the director, when determining the placement of a child in its care, to consider the child's best interests.

The director is mandated to make it a priority to place a child with family if possible and, if a child is aboriginal, with family or an aboriginal home. In all cases, any placement must be consistent with a child's best interests which is the ultimate determining factor in a child's placement.