January 7, 2021

Ms. Jane Mallen
Assistant Deputy Attorney General
Ministry of the Attorney General
Office of the Assistant Deputy Attorney General, Policy Division
McMurtry-Scott Building
720 Bay Street, 7th Floor
Toronto, ON
M7A 2S9

Dear Ms. Mallen:

RE: Definition of "child" in the *Children's Law Reform Act*

As you know, The Advocates' Society, established in 1963, is a not-for-profit association of around 6,000 members throughout Canada. The mandate of The Advocates' Society includes making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. The majority of our members practise law in Ontario, and a number of our members practise family law.

We received your letter of December 9, 2020 regarding a proposed amendment to the definition of "child" in the *Children's Law Reform Act* ("CLRA"). As you note, the current definition of "child" in Part III of the CLRA refers to a "child while a minor". Specifically, you ask our views on whether the definition should be expanded to include a person who is the age of majority or over and remains in the charge of their parents or other caregiver because of disability, medical condition or other reasons that make them unable to obtain the necessaries of life.

The Advocates' Society supports this proposed amendment to the definition of "child" under the CLRA.

This amendment to the definition of "child" would harmonize the definition under the CLRA with the Federal *Divorce Act*, which defines "child of the marriage" as follows (*Divorce Act*, s. 2(1)):

> *child of the marriage* means 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 (a) is under the age of majority and who has not withdrawn from their charge, or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

"Spouse" is defined under the *Divorce Act* as "either of two persons who are married to each other" (*Divorce Act*, s. 2(1)). The CLRA defines "spouse" as "the person to whom a person is married or with whom the person is living in a conjugal relationship outside marriage" (CLRA, s. 1(1)). As a result, the CLRA applies to either married or unmarried spouses who have a child, while the *Divorce Act* applies only to married spouses who have a child.

The current definition of "child" under the CLRA may create unequal treatment between unmarried and married spouses where there is a child who is at or over the age of majority and unable to withdraw from the charge of their parents for various reasons, including due to serious disability. In cases involving children of unmarried spouses (or married spouses where the case is not brought under the *Divorce Act*), where the children are the age of majority or older and unable to withdraw from the charge of their parents, issues involving parenting and decision-making will be governed by a different statutory regime, the *Substitute Decisions Act* ("SDA"). The SDA establishes the legal criteria to determine when a person can make decisions fundamental to his or her well-being. It includes specific legal tests for capacity that vary according to the types of decisions that must be made. While there may be similarities to the "best interests" tests governing parenting decisions under the *Divorce Act* and the CLRA, the SDA is not a family law statute and may not adequately address all aspects of a parenting dispute, including where there are issues of joint or shared parenting. There is some risk that adult children who are unable to withdraw from parental charge may be treated differently depending on the applicable legislative scheme.

There is a further jurisdictional issue in that the Family Court Branch of the Superior Court of Justice may currently only hear an application under the SDA if it is properly consolidated with an action for which the Family Court has exclusive jurisdiction (see *Simons v. Crow*, 2020 ONSC 5940 at para. 40). Consolidation, however, is not required under the *Divorce Act* which governs parenting and decision-making for adult children who are unable to withdraw from their parents' charge. Revising the definition of "child" in the CLRA would eliminate these potential differences and administrative hurdles, while also ensuring that family law disputes are addressed by specific legislation tailored to the needs of parents and children.

A child cannot choose whether his or her parents are married or not. The current regime in Ontario represents differential treatment that could result in a discriminatory disadvantage for a vulnerable population, *i.e.* adult children with disabilities whose parents are unmarried.

In our past submissions to this Ministry on proposed amendments to the *Family Law Act* and the CLRA, The Advocates' Society has consistently emphasized the importance for Ontario to mirror, as closely as possible, relevant provisions of the Federal *Divorce Act* in provincial legislation to ensure that a two-tiered system is not inadvertently created between children of parents who are married and children of parents who are unmarried. The Advocates' Society submits that harmonization of Federal and provincial legislation is necessary to ensure that Ontario does not have two different regimes affecting families.

Thank you for providing The Advocates' Society with the opportunity to make submissions on this important issue. I would be pleased to speak with you at your convenience to discuss our position.

Yours truly,

Guy J. Pratte, Ad. E., LSM
President

C: Vicki White, Chief Executive Officer