

TAB 2

Starting The Case Off Right: Your First Appearance

**Starting the Case off Right: Missed Opportunities Prior
to First Court Appearance**

(Parents' Counsel Perspective)

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**Best Practices For The Conduct of a Child
Protection File - Part I**
Enhancing Your Effectiveness at the Early Stages of Representation



The Law Society of
Upper Canada | Barreau
du Haut-Canada

Continuing Legal Education

Starting the Case off Right:

Best Practices For The Conduct Of A Child Protection File – Part I

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Missed Opportunities Prior to First Court Appearance

(Parents' Counsel Perspective)

1. This paper is not intended to be a comprehensive substantive review of the *Child and Family Services Act* (CFSA) legislation, or the current jurisprudence, but rather as a checklist for lawyers who have not previously represented parents in CFSA matters, or as a refresher, (best practises checklist) to counsel representing parents in CFSA matters prior to the first appearance at Court, when a child has been apprehended by a Children's Aid Society in Ontario.
2. With the apprehension of a child/children, a Children's Aid Society has 5 days, pursuant to the *Child and Family Service Act* (CFSA), to bring the matter before the Court for an initial adjudication of its apprehension.
3. An apprehension can either be brought by a Children's Aid Society as an initial Protection Application or Early Status Review of an ongoing Protection Application. It is important to recognize this distinction from the outset. An initial Protection Application is one in which the legal onus rests on the Society to prove that a child is "in need of protection". There is no "finding" that the child is in need of protection at this stage of a proceeding. In a paper that follows entitled "Getting an Early Read from the Bench", there is substantive information dealing with evidentiary issues at this stage in the proceedings.

4. A Status Review Application presents a lawyer with a completely different evidentiary and historical profile of a case. An apprehension document that is entitled “Early Status Review”, or “Status Review”, means that there has been a finding of a child in need of protection and that a Society was monitoring the placement of the child, either with the parents, or a third party community placement that has been proposed by the parents. At the time of Status Review, the Society alleges that there has been a serious contravention of the conditions of supervision, causing them to re-apprehend or request that the child/children come into care. The legal test at the Early Status Review or at a Status Review is one of the child’s “best interests”. This is a shift on the legal onus that both the Society and the parents’ counsel must meet.

5. When a lawyer is presented with a Status Review document, it will usually show the history of the initial Protection Application and how this was resolved either after a hearing or on consent. If it is on consent, a document is prepared called “Statement of Agreed Facts”. In the Statement of Agreed Facts, factual evidence is presented to the Court, which, if accepted, supports the finding “in need of protection” and outlines the supervision conditions of the family. At this stage, it is important that a lawyer representing the family understands the evidentiary onus that the parents’ counsel must recognize in beginning to prepare the Answer and Plan of Care on behalf of the parents.

6. It is incorrect for counsel to approach the Status Review by requesting that the Court overturn the earlier finding that a child is in need of protection that was made at the original Protection Application. (More on this later in the seminar section “Early Read from the Bench”).

Initial Steps

7. At this early stage, either the initial Protection Application or Status Review, you will normally receive a telephone call from the parents informing you that their child was brought into the care of a Society. They will probably have an idea of when the next Court date is going to be, having been given a tentative idea by the Social Worker who carried out the apprehension. If it is an initial Protection Application, a Society Worker is part of the intake team of the Society. On a Status Review, the ongoing Family Service Worker who has been assigned to the family, usually after the first or second appearance at Court, is usually the person to carries out the apprehension.

Missed Opportunities

8. Often it might be considered that there is not much that can be done prior to the first Court appearance. There might, however, be many missed opportunities at this point in time in preparing for the eventual appearance before the Court.

Conflicts Between Parents

9. If you have both parents before you at your office, begin to assess whether it is possible for you to represent them both. I routinely do not represent both parents, as I have found over the years that there are just too many conflicts that arise in families that are involved in child welfare matters. The obvious one is a file that presents with a profile of domestic violence. However, even with files that present with substance abuse issues and/or mental health issues, or parenting capacity, no one individual is the same. Both sides of the family might have, at some point, conflicting plans, depending on their level of ability to cooperate, or the level of discord. It is always best to inform the family of this potential for conflict that would cause you to be completely removed as their

solicitor of record, delaying the process in that they would have to find two other counsel, obtain new legal aid or a retainer, causing a delay in the new lawyer's coming up to speed on the file.

Criminal Charges

10. Ask the clients if there are bars to contact family members and/or the children from criminal charges that were laid, conditions of probation, or bail that exists. Get copies of these documents as this might cause serious delay in how a parent can reconnect with a child even under direct supervision of the Society, if the wording of the criminal bail condition is not properly worded, and there is a ban of contact.

Children's Counsel

11. Also canvas with the family as to the age of the parents. If one is a minor child, a request to the Office of the Children's Lawyer should be made at the outset of the case, first appearance.

Capacity to Instruct

12. One other possible area that needs to be reviewed initially is whether the individual parent that you will be representing has the mental capacity to fully understand the Children's Aid Society proceedings and provide instructions and participate fully. On rare occasions, I have come across individuals from whom I do not believe I can obtain ongoing and competent instructions. I have represented many individuals with mental health difficulties and intellectual challenges. On a rare occasion, one might have to bring a Motion to the Court for the appointment of a lawyer from the Office of the Public Trustee and Guardian. Again this is something to think about at the beginning of the proceeding.

13. I also attempt to do the following if at all possible before the first appearance:

- a. If you have the time, have a parent, along with family and/or community support individuals come into your office, and get a “quick fix” of the situation from the parent from whom the child was apprehended.
- b. If it is an initial Protection Application, the parents most likely have no pleadings from the Society, at least at this early stage, although they might have previous documents if they have a history with the Society, which would be helpful to review.
- c. Ask the parents to be candid as to their understanding for the reasons of their child/children being apprehended. It is important to have them review with you their understanding of the situation for you to understand initially what your client is thinking, their level of ability to cooperate with the Society, and their recognition of parenting issues that they need to work on.
- d. Ask them for the name of the Social Worker handling the file. They probably would have been given a card with a contact number. Contact the Social Worker and indicate that the family wishes to retain you.
- e. Ask if the parents have arranged for access with their apprehended child. Ask them to do so by contacting the Worker. It is not unusual for Workers at this initial or

early stage to indicate that not much can be done prior to the first Court appearance.

This of course is not the case. Never accept this as an answer, be flexible however when negotiating with the Worker. In particular for infants (newborn), there should be as much contact as possible, which will usually start at the Society's office.

- f. When meeting with parents, it is important to review with them what will happen at the first appearance within the first five days of the apprehension. Emotions are generally running quite high at this point in time. It is important to clarify who might be with them at Court, and the interim Without Prejudice Order that the Society will be seeking. Most important in this is their ability to have contact with the child in care.

14. It is obviously helpful to obtain the Society's pleadings as early as possible, even if it is a draft unsworn Affidavit. I usually would request that the Society forward to my office their pleadings as soon as possible, prior to the first appearance. Usually at this stage I would not have Legal Aid in place. I have never had any difficulty with clients obtaining Legal Aid on an expedited basis. (More on this later).

Voluntary Services

15. You will want to review with your clients in a thorough fashion, the Society's allegations in their pleadings. Most often this cannot be done prior to the first appearance. However, with the combination of your first meeting with the family and any community support, and a review of the Society's pleadings that have led to their Protection Application, or Early Status Review, you might

be in a better position to propose that the matter could be dealt with through a “Voluntary Contract” between the Society and the parents/caregiver, thus avoiding the need for litigation. Parents’ counsel should always explore the possibility of a voluntary working arrangement between the family and the Society from the outset of one’s involvement in these matters. It is obviously better to arrange and negotiate conditions of the Society working with a family while the child remain in the family, and/or the care of extended family, rather than proceed with litigation. If this is not possible, from the very outset the parents’ counsel should begin to assess the evidence and community and family support, with the intention of either negotiating a Supervision Order with the family, and/or prepare evidence that would test the Society’s case through a Temporary Care and Custody Hearing, which should be set on the first appearance date. (More on this in the section “Getting an Early Read from the Bench).

16. If you do not have a retainer, legal aid or otherwise, arrange such with the client so that you can begin to communicate with the Society and spend time preparing with the parents to material evidence and resources. Have clients sign medical and general release forms necessary to speak with professionals working with the family.

Focus Early on Parents’ Plans

17. Delays in child welfare matters harm the children and the family. The new legislation places strict time lines that should never be lost in the process. It is easy for individuals to believe that delays will help parents in finding solutions to the difficulties that have led to apprehensions. It is obvious that some time is required for parents to put in place a plan and execute the elements of a plan to address problems that might exist; however, in dealing in this area of family law you should

not be surprised at how one year can pass from the opening of a file with some individual clients doing very little or nothing to advance their case despite your best efforts to assist them in finding resources to address their needs. It is crucial when working in this area with parents to be as creative with them as possible and marshal as many resources from the community to assist them in addressing the specific issues that the Society has raised regarding concerns to their parenting. Be realistic with parents in developing these plans. The point at this stage in the proceeding however, is to begin to focus with the parent on a plan from day one.

18. The Court is mandated under the CFSA to proceed to trial and adjudication within one year, if the child is less than 8 years old, and has 2 years to adjudicate the matter if the child is greater than 8 years. One has to also understand that the calculation of this year is cumulative within the Protection Application. For example, if a child is brought into care under an initial Protection Application, remains in care for 2 months prior to a Temporary Care and Custody Hearing or negotiated settlement, and is then placed with the family and re-apprehended, the periods of the initial apprehension and the second apprehension are added together to accumulate the limitation period in which a Judge must move the matter to adjudication. It is important that at this very initial stage to underline the time lines with your clients.

19. If clients have pleadings, which on occasion are done in a planned apprehension leading from a pregnancy in which the Society was working with a family, take a copy for your file and have the client attend Legal Aid (more on this later). Also have the client begin to write out their version of events, which will assist you in further interviews. Many clients these days, despite their difficulties, have the ability to use word processors and are more than happy to address the contents of the Application in writing, or have an individual assist in presenting their version of events, which can

be used in further interviews to at least begin a skeleton of an Answer and Plan of Care. Almost from the initial telephone call from the client (either a new client, or a current client whose child was re-apprehended), I begin to discuss with them alternate plans i.e. community or family placements/supports and their plan of care.

20. Have clients begin to prepare a list of resources:

- a. Doctor's names and addresses;
- b. School names, addresses and contact individuals;
- c. Daycare names and addresses;
- d. Community resources;
- e. Drug and alcohol counselling;
- f. Family domestic relations and counselling resources for children;
- g. Remedial special-ed and religious contacts;
- h. Names and addresses of potential family placements or community placements.

21. In presenting a family or community placement for a child, contact the proposed caregiver. Have them come into your office prior to the first appearance if possible, and request that they attend Court. Obviously, it is very difficult, although sometimes not impossible, to present a plan of care in which a family community placement is available for the Society to begin investigating if it is going to take some time for your parent/caregiver to address the concerns of the Society.

22. In speaking with these potential caregivers as a family plan, it is important to ask them if they have had any previous involvement with the Children's Aid Society, if they themselves have children, if they have any criminal charges, and if they are prepared to undergo criminal record and

background checks regarding how they have handled their children, such as contacts with schools and doctors. If they are serious, ask them to follow up on a community placement with reference letters, and attend at a police station to obtain criminal record checks. Ask the potential caregivers what the physical structure of the home is and where the children will reside within the home given their ages, needs, and stages of development. All of this information is important and can move a file along, placing the onus and responsibility on the Society to seriously address the plan.

23. The community/family caregiver should also clearly understand the allegations raised by the Society and/or the established concerns. Your client should be aware that the Society will most likely discuss the issues with the proposed caregiver and in particular, if the Society has concerns about their ability to “protect the child” from your client if the child is placed with them. Will they be prepared to co-operate with the Children’s Aid Society regarding access arrangements and contact between your client and the child if there are concerns in this regard, and are they prepared to supervise access, or have access at the Society’s office.

24. I also discuss with individuals how they should communicate with the Society. Many lawyers have different points of view on how much information clients should be willing to provide to the Society. My position and philosophy is that we should engage in frank and open discussions with the Society. What better resource to have before the Court than a Social Worker indicating that the family has been cooperative, although there might be ongoing concerns; what better resource to have than the Society’s notes and Social Worker indicating that the parents have been making progress on issues that the Society had concerns around; and what better resources to have before the Court than a Society Worker indicating that the parents recognize some of their limitations and have indicated, at least initially, that they are prepared to address these. (More on this later).

25. Note that generally the initial intake worker that has worked with the family to bring the matter to the Court at the initial protection stage, is not going to be the worker that works with the family on an ongoing basis. The file is transferred from intake to service and a Family Service Worker and Children's Service Worker is assigned. The latter worker is assigned of course if the child continues to remain in care. The Family Service Worker is assigned to a family either way. It is the Family Service worker that has the front line responsibilities of communicating with the family and usually with counsel.

First attendance at Court

26. Often, most of the meaningful negotiations are done outside of the Courtroom with the Family Service Worker and counsel for the Society. At times, one needs to address the issue of initial access even if there is no formal Motion before the Court. Depending on the local practise, the Court may consider suggesting to the Society what access can be arranged, or apply some pressure on the Society to maximize access, or suggest to the Society the appropriateness of the access, based on the information that is usually presented at this stage, which is usually only from the Society. The Society will always ask for an initial "Without Prejudice Order". It is here that one can ask for the access and other issues to be addressed. Please note that at a Status Review, as there has been a finding of need of protection, a Court could order assessments at this initial first appearance date, given the history of the file and the time lines, in order to move the file along. Be aware of this and prepare to address this issue. Again, this could be on consent, or ordered by the Court.

27. At the first appearance, if I feel the file should be dealt with on a voluntary basis, I sometimes request a meeting with the Society, parents, and all counsel.

Legal Aid and Retainer

28. Obviously a private retainer is a nice thing to come across. The problem with this of course is that the nature and time lines on these files tend to be complicated and unpredictable. I simply indicate when talking to individuals about the cost of these files that in no way can any of this work be done on a block fee and to do so is setting everyone up for failure.

Legal Aid Ontario

29. At the present time, Legal Aid Ontario provides a Certificate for 19 hours and could provide extra authority if a letter is sent indicating that you know immediately that a Temporary Care and Custody Hearing is going to take place and the reasons why. The client applying for Legal Aid in Ontario is requested to bring the following financial information to be assessed. (Please see attached information).

30. In working with Legal Aid, I have always found that they are more than willing to expedite the Certificate in child welfare matters and there is a protocol between the local area offices in Toronto and the respective Courts in processing these Applications on an expedited basis, in order to have counsel in place as soon as possible.

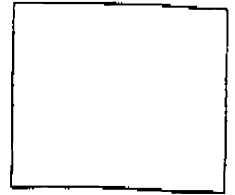
31. The practise in Toronto for extra hours after the initial 19 hours provided by Legal Aid, is to make a request to the Area Office where the Certificate was issued with a letter explaining the reasons why your account is greater than the initial 19 hours, which is of course more than likely. It is my understanding that Legal Aid Ontario has indicated that the Area Office has the authority to grant one extension on these matters. After this, all further requests for payment of your account above and beyond the initial block of time, as well as the additional hours provided by the Area

Director, need to be made at the point of submitting your account to Legal Accounts (discretionary increase). I have found that Legal Aid Ontario has routinely paid accounts, however it takes time and patience to write the necessary letters for a discretionary increase to Legal Accounts.

32. One has to be prepared and willing to do this in managing the financial affairs of your practise in working in this area of the law. It comes with the territory; however, in my experience, this is one of the most challenging and rewarding areas of a family law practise.

William A. Sullivan

LEGAL AID ONTARIO
APPLICANT INFORMATION



PLEASE PRINT:

First Name: _____ Date: _____

Middle Name: _____ Time arrived at
375 University Ave.: _____

Last Name: _____

Address: _____ Apt. # _____

City: _____ Province: _____ Postal Code: _____

Telephone #: _____

Date of Birth: YEAR _____ MONTH _____ DAY _____

Social Insurance #: _____

Are you self-employed?:

YES ☐

NO ☐

Are you receiving Ontario Works/Ontario Disability Benefits?:

YES ☐

NO ☐

Have you ever applied for Legal Aid before?

YES ☐

NO ☐

Are you making a new application today?

YES ☐

NO ☐

If yes, what is your application about?

Family Problem ☐

Criminal Charge ☐

Immigration/Refugee ☐

Change of Lawyer ☐

Other ☐

Please write:

YOUR LAWYER'S NAME: _____

Choose your lawyer carefully. Requests to change lawyers are not always granted.

FOR OFFICE USE ONLY:

SES	AS400	FILE TRACKING

INFORMATION REQUIRED FOR FINANCIAL ASSESSMENT

To avoid delay in completing your application. you may choose to return on another day when you have all of the necessary information with you .

1. **WORKING** - 3-4 most recent payslips for applicant and spouse, including verification of payroll deductions.
2. **UNEMPLOYED** - separation slip or proof of receipt of Employment Insurance Benefits, Disability Benefits, Workers' Compensation Benefits.
3. **ONTARIO WORKS OR ONTARIO DISABILITY BENEFITS** - most recent cheque stub.
4. **DEBTS** - verification and the monthly amount being paid.
5. **SELF-EMPLOYED** - unaudited set of financial statements prepared by an accountant (Notice to Reader, Balance Sheet and Income Statement), Copy of Income Tax return with supporting schedules (Business and Personal) and Up-to-date bank statements (Business and Personal).
6. **BANKRUPT** - proof of trusteeship.
7. **BANK ACCOUNTS** - up-to-date bank book (showing 2-3 months) , credit union statement or RSP statement, GICs and/or other investments.
8. **INCOME TAX RETURN** - copy of most recent return.
9. **SUPPORT PAYMENT** - verification.

Legal Aid is not always free. Legal Aid may request monthly payments, lump sum payments or a lien on interest in property. Legal Aid also has the right to recover the legal costs paid from any monies recovered in legal proceedings.

Allow 5 working days for applications to be processed and 10 working days for the decision on the application to be sent to you or your lawyer by mail.