

TAB 3

Starting The Case Off Right: Your First Appearance

**Starting the Case off Right: The Steps to be Taken
Before the First Court Appearance**

(Child's Counsel Perspective)

Gerri L. Wong
Martini Barile Marusic LLP

**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

BEST PRACTICES FOR THE CONDUCT OF A CHILD PROTECTION FILE
STARTING THE CASE OFF RIGHT: THE STEPS TO BE TAKEN BEFORE THE
FIRST COURT APPEARANCE

THE ROLE OF CHILD'S COUNSEL

Gerri L. Wong
Counsel, Martini Barile Marusic LLP

February 17, 2004

1. Counsel for the subject child or children is appointed pursuant to a court order, made by the Court, generally on motion by the Children's Aid Society, although it is also possible for the order to be made on the initiative of the Court or on motion by parent's counsel.
2. Generally, the order is made, at the time of the first court appearance and, if the child has been apprehended, within the statutory five day period.
3. The Court, after consideration of the criteria set out in Section 38(4) of the **Child and Family Services Act**, makes the order. The court house administration then completes the necessary forms, which are then forwarded to the local Legal Aid office, which assigns the cases based on a panel rotation.
4. As child's counsel will only be appointed pursuant to a court order, child's counsel is never at the actual first court appearance of the matter.

5. The first attendance by child's counsel is therefore not until at least the second attendance, and sometimes later, depending on the time lines set by the court or the urgency of the matter.
6. If the matter is to be argued, on the interim show cause basis, on a quick turn around, it is essential, for counsel for the Society or the parents to request that the Court, expedite the appointment so that child's counsel can attend and advocate a position on behalf of the child client.
7. As indicated, the jurisdiction for the appointment of child's counsel, through the Office of the Children's Lawyer, is set out at Section 38 of the CFSA.
8. The Section sets out the jurisdiction and criteria for the appointment of child's counsel.
9. Section 38(4) criteria reads:

Where,

- (a) the court is of the opinion that there is a difference of views between the child and a parent or a society, and the society proposes that the child be removed from a person's care or be made a society or Crown ward under paragraph 2 or 3 of subsection 57(1);

- (b) the child is in the society's care and,
 - (i) no parent appears before the court, or
 - (ii) it is alleged that the child is in need of protection within the meaning of clause 37(2)(a), (c), (f), (f.1) or (h);
or
- (c) the child is not permitted to be present at the hearing,

legal representation shall be deemed to be desirable to protect the child's interests, unless the court is satisfied, taking into account the child's views and wishes if they can be reasonably ascertained, that the child's interests are otherwise adequately protected.

10. In order to make the appointment, the Court must still be satisfied that the children's needs are not being adequately protected. In my experience, the Court will most commonly appoint child's counsel in cases where:

- a. the subject child is a newborn;
- b. the subject child is a newborn, particularly if the parents' whereabouts are unknown;
- c. there are allegations of sexual abuse by the parent, and as a result the child's needs would be separate than the parent's position;
- d. there are protection grounds which require the child to consent to treatment;

- e. there are issues of sibling access and a future relationship; and
- f. the child is over the age of 12, particularly if Crown wardship is being sought.

MY RESPONSE

- 11. Immediately upon accepting the assignment of the appointment of child's counsel, I direct correspondence to the Society lawyer, asking for a copy of all the court documentation, including the application or status review application, supporting documentation, notice of motion and any affidavit material, as well as copies of any endorsements or court orders.
- 12. I also request any information as relates to the position being taken by parents and, if they have retained counsel, that information. If I am aware that counsel has been retained, I immediately advise counsel and request that I be served with any documents or be provided with any documents that have already been served. I also discuss their position.
- 13. Additionally, I request the name and telephone number of the Family Service worker and take immediate steps to contact that person. While the affidavit material may be fresh or recent, I have, in my experience, found numerous times when, in especially quickly developing matters, there is additional information that is helpful to me, that has not yet reached the stage of affidavits. As well, while I attempt to

do disclosure of the Society file on an early basis, my experience has been that, often, the case notes and recordings are not current in the sense of the steps that are now being taken in the litigation. I therefore find it extremely helpful and beneficial to have a telephone conference or meeting with the Family Service worker.

14. In my view, it is extremely important to obtain as much information as possible from the Society but also from the parents. Frequently, the parents are unavailable for easy contact (often there is not a telephone number or a way to speak to the parents unless they attend at court). Frequently, the position taken by parents' counsel will vary from case to case, some counsel are more than willing to allow you to interview or speak to their client and others require any interviews to be done in their presence, if at all. I certainly do my best to obtain information from "both sides" and not just from the Society's position. It is important to me to understand the Society position and the parents' position, as that provides to me the context necessary for me to meet with the child and understand the child's point of view and the child's issues. This is particularly so with older child clients, teenagers who frequently present their issues from their own point of view. It is important to understand "the bigger picture".
15. It should be noted that the Office of the Children's Lawyer takes the position that child clients never "instruct". Children are minors and, as a result, in law are not in a position to instruct lawyers. It is my job is to insure that the necessary evidence

of their views and preferences is before the Court. It is my job to advocate their views and preferences making sure the context is before the Court. It is the Court's responsibility to determine what is in the best interest of the children, which includes a consideration of their views and preferences.

16. There is a misconception that child's counsel either is advancing a position based on "wishes" or instructions. On numerous occasions I have heard the Court, in case management settings, or other lawyers referencing the role of child's counsel to be "an instructing client". As indicated, that is not correct.
17. I have had a great deal of co-operation from counsel from the Society, who has accommodated my request to ensure that the Family Service worker provides, in reply affidavit material, the views and preferences of the children. This then allows me to advocate, as child's counsel, at the interim show cause argument.
18. In my view, it is important to obtain all the necessary information to be able to advance a position, on behalf of my client, on the argument of the show cause. Parents do not take the necessary steps to ensure that their affidavit material is in place and their plan is before the Court. This hampers my position on behalf of the children as frequently, at the early stages of the proceeding, the only affidavit material, and only plan before the Court, is that of the Society. It restricts my ability to advance an alternative plan (alternative to the Society plan) if there is not evidence before the Court.

19. In my jurisdiction, Essex County, we are extremely fortunate to have Ontario Court of Justice Judges who appreciate the role of child's counsel and who will accommodate, to the best of their ability, the request of child's counsel to alter time lines so as to insure that child's counsel has a meaningful role.