

TAB 4

Getting an Early “Read” From the Bench and Where It Should  
Take Your Case

**The Children’s Aid Society 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**



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## **Getting an Early “Read” From the Bench and Where it Should Take Your Case**

### **The Children’s Aid Society Perspective**

**By: Robin D. McDonald**

#### **Part I: Overview**

This paper is a companion paper to “Reading the Judicial Tealeaves-Getting an Early View of the Merits of your Case” by Ian Mang. Mr. Mang has written his paper giving guidance to legal counsel representing parents, while also setting out much of the legal framework for all parties at this stage of the proceedings. This paper is designed to supplement the aforementioned paper by offering the Children’s Aid Society perspective. This paper offers steps that can be taken by Children’s Aid Society legal counsel to assist them at this stage of the proceedings. While most experienced Society legal counsel already employ most of these strategies and steps, this paper will offer practical assistance to our newer Society colleagues.

#### **Part II: The Statutory Framework – The Family Law Rules**

Rule 33(1) sets out the steps in a child protection proceeding and the timelines for those steps.

The steps and timelines are as follows:

|  |          |
|--|----------|
| First Hearing, if child apprehended                | 5 days   |
| Service and filing of Answers and<br>Plans of Care | 30 days  |
| Temporary Care and Custody<br>Hearing              | 35 days  |
| Settlement Conference                              | 80 days  |
| Hearing  | 120 days |

All parties are obligated to adhere to the statutory timelines. The court may lengthen a time for a step in the proceeding, pursuant to Rule 33(3), only if the best interests of the child require it. Generally, Children's Aid Societies are held to a higher level of accountability in the adherence of the timelines than the other parties, and Society requests to extend the timelines are rarely granted. The other parties will generally be granted extensions of the timelines in order to apply for a Legal Aid Certificate, to retain legal counsel, and to prepare, serve and file an Answer and Plan of Care (33B.1) and affidavit materials. If an extension of the timelines is granted at the request of one of the other parties, the Society should request that a new, detailed timeline be part of the order, expressly outlining the amended date for the serving and filing of materials of the parties. The Society should also request that the fact that the Society is ready to proceed and

the delay is at the request of one of the other parties be placed on the court record and in the judge's endorsement. The Society should avoid causing delay and have all delay noted on the court record and in the judge's endorsements as being attributable to the responsible party. This will assist with many of the strategies and steps outlined in this paper in allowing the Society to move the litigation forward. One of the themes of this paper is that the Rules are for all parties, including Children's Aid Societies, and Society legal counsel should use the Rules to achieve the objectives of the Society, the Rules and, most importantly, the Act.

### **PART III: YOUR OBJECTIVES**

The primary objective at this stage is to achieve the temporary order sought by the client, the Society. This is the first step to achieve the ultimate goal, obtaining a finding that the child is in need of protection and a final disposition. However, there are other objectives that play a part in how you obtain this primary objective. The Child and Family Services Act places importance on permanency planning for children and gives time limits, in Section 70, for the length of time that a child can be in the Society's care without this permanency. Rule 33 also emphasizes the importance of moving child protection litigation forward in a timely and orderly fashion to support this objective of the Act. The Act reinforces the importance of moving the litigation forward in a timely manner as outlined in Section 52 of the Act. As a result, the temporary order should be obtained, either by consent or contested hearing, at the earliest opportunity. The Society's intervention needs to be ratified by court order so that the parties can move through the next steps with purpose and direction.

## **PART IV: EVALUATING YOUR CASE AND INITIAL STRATEGY PRIOR TO THE HEARING**

- a) **Determine all possible parties to the proceedings prior to the temporary care and custody hearing and ensure that they have all been served prior to the temporary care and custody hearing.** The Society will want to have only one temporary care and custody hearing where the rights of all parties opposed to the Society's requested temporary order will be determined. If the Society fails to do so, the Society runs the risk of having future temporary care and custody hearings to deal with the rights of these other parties once they have been identified and served. Rule 10 (1) allows a party 30 days, after being served with the Application, to serve and file a 33B.1. Most courts will not count the 35-day timeline for the temporary care and custody hearing against parties who were not served until after, or shortly before, this 35-day timeline, and will allow those parties to participate in a temporary care and custody hearing at a later date.
- b) **Eliminate non-parties and unavailable parties prior to the temporary care and custody hearing.** Bring motions and/or 14B motions to address the issues of parentage and dispensing with service prior to or, at the very latest, at the temporary care and custody hearing. Prepare an affidavit of non-parentage for the mother to swear, with the assistance of Duty Counsel or her legal counsel, at an earlier court appearance. This will help clarify who the Society will be working with and who might be presenting a plan of care in opposition to the Society's recommended plan of care. It will also eliminate the necessity of dealing with these individuals at the temporary care and custody hearing.

- c) **Ensure that your affidavit materials for the temporary care and custody motion address all of the protection issues regarding each and every person who qualifies as a “parent” or a party within the meaning of the Act.** It is not unusual for child protection workers to have focussed primarily on the protection issues relating to the custodial parent and to have not addressed the protection issues fully regarding a non-custodial parent. Little information may be known about the non-custodial parent at the time of the swearing of the Society’s initial affidavit. As information about the non-custodial parent becomes available, a supplementary affidavit should be prepared, served and filed. Also, child protection workers sometimes forget, when focussing on a parent’s past parenting, to consider whether that parent’s new partner, for example, the father of mother’s latest child, can be the primary caregiver, either alone or with the custodial parent. These issues must be addressed in the Society’s affidavit material prior to the temporary care and custody hearing.
- d) **Request, verbally or by motion, that a party, who has been served with the Society’s Application and motion materials but has failed to serve and file an Answer and responding materials within 30 days, be noted in default.** The Society must be reasonable and evenhanded in this request. It is well recognized that it frequently takes parties more than 30 days to obtain a Legal Aid Certificate, to retain legal counsel, and to prepare, serve and file materials. It may be premature at the 30 day mark to ask for the party to be noted in default, but it is prudent to give notice to the presiding justice and the party that you intend to do so by either the 45 or 60 day mark if they continue to fail to respond. At the 30-day mark, it is also prudent for the Society to request that the court to set a new time line for these parties. If they have failed to fulfill the requirements by the expiry of the new timeline, the

Society will often be successful in having these individuals noted in default. These parties have been offered due process but have not chosen to exercise this right. This may allow the Society to reach agreement with those parties who have responded or at the least, know who the opposing parties will be at the temporary care and custody hearings.

- e) **Have the court make the statutory findings pursuant to Subsection 47(2) at the earliest opportunity and prior to the temporary care and custody hearing.** Prepare and have a Statement of Agree Facts available regarding the statutory findings for the parties to execute at the earlier court appearances, or at the very latest, at the temporary care and custody hearing. In the alternative, prepare an affidavit for the mother to swear with the assistance of Duty Counsel or her legal counsel regarding these statutory findings. This will prepare the Society for later steps in the proceedings such as noting the parent in default or summary judgment. Parents with drug, alcohol and/or transciency issues frequently will not be available to the Society at the end of the litigation leaving these issues unresolved. It will also clarify which children's aid society will be involved in the case in the future, particularly in the jurisdictions were there is a Society serving native and/or specific religious denominations.
  
- f) **Keep preparing for the temporary care and custody hearing up to the date of the hearing.** Keep the Society's evidence fresh by preparing a supplementary affidavit if any new relevant evidence becomes available prior to the temporary care and custody hearing. This is particularly important if there has been an extension of the timelines for other parties

to prepare and serve responding materials and a resulting adjournment of the temporary care and custody hearing.

- g) **Reply if served with responding materials.** This is an opportunity to show the court that the Society has considered the plan being presented and why the plan is not sufficient to address the risk that the child is likely to suffer harm in the care of the party serving the materials and why the child cannot be protected by a less disruptive order. It is also an opportunity to address the adequacy of the alternative caregiver plan if presented.
- h) **Carefully review the Answer and Plan of Care presented by the parties.** Demand, in writing, particulars of the plan if none are given. If unable to obtain particulars, consider a Motion to Strike the party's Answer pursuant to Rule 14(22) if no plan or a very vague plan is disclosed. The parties cannot rely on blanket denials and statements of love for the child. The court will frequently give the parties an opportunity to amend their Answer and Plan of Care in order to disclose their plan of care in a clear and concrete way. If the parties fail to amend, or the amended documents also fail to disclose a concrete plan, a Motion to strike the pleading of the party should be considered, followed by a request to have the party noted in default. This is a useful strategy to deal with parties who may have filed a very vague Answer and have subsequently disappeared for a period of time (a Motion for Summary Judgment may also be used in this situation). Disclosure is the Society's right and this is one tool to use to demand disclosure and to ensure that there are consequences for failure to deliver the disclosure. Put all requests to counsel for the parents for disclosure in writing. This correspondence will be part of the evidence for a Motion to strike an Answer.



- i) **Serve a Request to Admit, pursuant to Rule 22(2), regarding facts or reports not in dispute and further, facts or reports that the Society wishes to have admitted by the other parties.** When serving a report, request that the facts, findings and opinions contained therein be admitted as true. The other parties have 20 days to respond to a Request to Admit by either denying that the fact is true or the document is not genuine, or refusing to admit the fact is true or the document is genuine and giving reasons for each refusal. This step may assist in narrowing the facts in dispute and allow much of the Society's evidence to be admitted as true for the purposes of the temporary care and custody hearing and subsequent trial. This step will also give the Society useful disclosure as to the position of the parties on each of the facts and reports listed in the Request to Admit.
- j) **Offer disclosure to the other parties as soon as they retain legal counsel.** The Society wishes to avoid receiving a request for Affidavit of Documents. The Affidavit of Documents is a cumbersome disclosure procedure that is more suited to other types of civil litigation. It takes a great deal of time for the Society child protection worker and Society legal counsel to prepare this document. The effort and time are misspent in engaging in this procedure. The Society is under an obligation to provide disclosure and Societies have procedures in place to give disclosure. The disclosure received by counsel for a parent, by making a direct request of the Society and receiving the same, is a fuller, more complete disclosure than the disclosure offered by an Affidavit of Documents. If the party has been offered disclosure and fails to take advantage of this offer, it will be difficult for them to delay the proceedings for the purpose of obtaining disclosure.

- k) **Ensure that both Society legal counsel and the child protection worker understand the legal limitations of disclosure and Society policies and procedures regarding disclosure.**

Ensure that full disclosure is given by ensuring that the family file, child in care file, medical/nurse file, case notes, and computer portion (I.F.R.) of the file are all produced for disclosure. There are statutory limitations to disclosure and these must be considered before any disclosure is given.

- l) **Bring motions for any third (3<sup>rd</sup>) party records that may be relevant to the protection issues.** The earlier the Society obtains these records, the earlier the Society can rely on them as part of its evidence. If the records are obtained prior to the temporary care and custody hearing, the information contained in the records may form part of the Society's evidence in any supplementary affidavit materials prepared by the Society.

- m) **Ensure that the social worker canvasses with the parties as to whether there are alternative caregivers available.** This will assist in avoiding surprises at the temporary care and custody hearing. If an alternative caregiver is suggested, encourage the social worker to devote time to immediately investigate this plan. This will enable the Society to either, agree to that plan prior to the temporary care and custody hearing, or have the necessary evidence to put before the court to oppose the plan at the temporary care and custody hearing.

- n) **Ensure that the social worker has identified the protection concerns to the family, suggested services, and offered to assist the parties with those services.** It would be prudent to have the Society's Plan of Care prepared, served and filed prior to the temporary

care and custody hearing. The Plan of Care should detail: what steps the parties will need to take to reduce the risk to the child; why these steps are necessary to reduce the risk; how to measure and assess whether these steps have been taken; and whether the action has resulted in a reduction of risk to an acceptable level. Ensure that the child protection supervisor has reviewed and approved the Society's Plan of Care so that there is no question in the future as to what the Society's expectations are. The Society's Plan of Care can be amended if new information and/or plans of care come to light. The Society's Plan of Care, if listed in the Notice of Motion, can be relied on and referred to in the temporary care and custody hearing. The Society's Plan of Care is useful to highlight the steps that the parties need to take in order to provide adequate protection to the child. The Plan of Care can be used as evidence that the Society has given notice and discussed with the parties the expected steps to be taken at the temporary care and custody hearing. If the parties have failed to take any of the necessary steps at the time of the temporary care and custody hearing, this is useful information for the court to receive. The presiding justice may encourage the family to work on the protection issues by taking some or all of the steps listed in the Society's Plan of Care.

- o) Ensure that access is being offered to the family, if consistent with the protection and best interests of the child.** The court will want to know what the access arrangements are, and will only be content with the Society exercising its discretion if the Society has been fair and evenhanded in making such access arrangements. If access has not been offered, ensure that the Society's affidavit materials speak to why access cannot be offered, supervised or unsupervised.

## **PART V: THE HEARING**

- a) **The temporary care and custody hearing should occur at the earliest opportunity so that the Society can fully meet the child's needs.** The purpose of the temporary care and custody hearing is to review the reason for the Society's intervention and to then decide how to best protect the child while the litigation is ongoing. The Society wishes to have its intervention approved by the court as soon as possible and to have full authority over the child while the child is in the Society's care. Without court ordered full authority over the child, there is the possibility that the Society will be hampered in its ability to meet all of the needs of the child. If there is a "without prejudice" order, there is a lack of certainty about the child's legal status and the Society's authority to sign consents for certain tests, assessments and treatment. Section 51(4) of the Act appears to limit the Society's ability to consent to medical treatment to orders made pursuant to Subsection 51(2)(d). The delay of the temporary care and custody hearing may tie the Society's hands in being able to provide the best care to the child and may expose the Society to possible liability in these areas.
- b) **The intervention of the Society must be justified.** The Society's case should be at its best at the time of apprehension and the bringing of an Application. If the Society obtained a warrant for apprehension, the evidence has already been reviewed by a lower judicial officer and has satisfied that lower judicial officer. If the Society has apprehended without a warrant, the Society will want to have the apprehension ratified by the court. The court order for temporary care and custody will allow the court to take responsibility, in the parents' eyes, for ratifying the correctness of the Society's apprehension decision. The parents will

no longer be able to focus on the Society and their belief that the Society acted without authorization and without justification. The Society should not be hoping that the case will get better with the passage of time. Additional information should impact on the Society's recommendations and not on the timing of the temporary care and custody hearing

- c) **Obtain a consent to the temporary care and custody order prior to the temporary care and custody hearing.** This sounds obvious but often this is forgotten as a planned step in the Society's preparation for the temporary care and custody hearing. In many situations, such as teens, expiry of Temporary Care Agreements, all parties are in agreement with the child being in the Society's care and custody. The parties and child should be encouraged to attend court to put their consent on the Record, or the Society legal counsel should prepare a draft Consent to be executed by the parties and child, with a necessary witness signing as well. In some jurisdictions, a party will be required to sign a waiver of legal advice and to have their signature witnessed. The witness will then need to swear an Affidavit of Execution. This should all be done prior to the temporary care and custody hearing. Even in cases where one party is opposing the Society's request, these documents will constitute evidence of the consent of the other parties. This evidence may assist the court in assigning weight to the appropriateness of a plan put forward by another party, when consideration is given to the fact that all other parties are not in support of that plan but are instead in support of the plan of the Society. Prepare a Statement of Agreed Facts, relating to the issue of finding in need of protection and disposition, to be available to the parties for signature at or before the temporary care and custody hearing.

- d) **Carefully assess requests to adjourn the temporary care and custody hearing.** There are times when adjourning or agreeing to adjourn the temporary care and custody hearing may be appropriate and necessary. The reality of a contested temporary care and custody hearing is that the argument of such a hearing may lead to difficult feelings by the family towards the Society, and any work that may be done to address the protections concerns may be inhibited or thwarted by these feelings. If the family has turned the corner on their “denial” of the protection concerns and is now working co-operatively with the Society, it may be that a contested hearing is not consistent with the best interests of the child and the social work goals of the case at that time. However, do not delay in obtaining the temporary care and custody order, either by consent or hearing, beyond a reasonable period of time (remember the consent and liability issues).
- e) **Consider whether the passage of time without a temporary care and custody hearing can be construed by the court as acquiescence by the parties that the Society has satisfied the legal test and that the parties have acquiesced to the requested temporary care and custody order.** If the delays have been caused by the other parties, consider making the following submission to court: that by allowing the timeline for a temporary care and custody hearing to elapse, the parties have acknowledged that the Society has satisfied the legal test and that they have acquiesced to the temporary care and custody order that the Society has requested. If, for any reason, a case has been on adjournment for a lengthy period of time without the issue of temporary care and custody being resolved, consider this strategy to have the temporary care and custody order made.

- f) **Use the Answer and Plan of Care and the affidavit materials of the parties to demonstrate the inadequacies of the plan and how it does not address the risk to the child.** Address why the plan presented in the Plan of Care and affidavits fails to protect the child and further, refer to the Society's Plan of Care to demonstrate what is needed to address the protection of the child. (see above)
- g) **If successful at the temporary care and custody hearing, have a prepared Statement of Agreed Facts available for signature.** The parties may agree to a final order given the court's decision and the comments of the presiding justice. Hold the matter down so that the parties can review the Statement of Agreed Facts and possibly execute the document. Even if the parties are not ready to agree at that time, their legal counsel will be meeting with them in the immediate future and the Statement of Agreed Facts will be part of that discussion. This is the time for settlement discussions and negotiations. This will provide an opportunity for a possible settlement and agreement to a finding in need of protection and the final disposition.
- h) **Have the child protection worker available to investigate alternative caregivers.** Have consents to release of information available for the proposed alternative caregivers to sign in order to start the assessment at court. The child protection worker should get as much information from and about the proposed alternative caregivers while at court. If the alternative caregivers are not forthcoming or co-operative, the other party's legal counsel is there to assist and the presiding justice may also be available to help them understand the Society's role.

## **PART VI: AFTER THE HEARING**

- a) **Evaluate the Society's position whether successful or unsuccessful at the temporary care and custody hearing.** This is a time to review the comments of the presiding justice regarding the positions and plans presented by all parties, including the Society. It is usual for the presiding justice to give suggestions and guidance to all parties at this stage of the proceedings. Review the comments with the child protection worker and their supervisor to assist them in incorporating the suggestions from the presiding justice into their social work plan. What have you learned from the hearing? How can it help the child protection worker in their work with the family? How can it help you as legal counsel plan your legal case? Is there someone who has come forward that, with support, may be a viable alternative caregiver for the child? It is a good time to look forward and determine if the Society's case is still headed in the same direction and how it might get there. Lastly, what messages were given to the family and the Society regarding the necessary steps to be taken to have the child returned to the parties or another person, to have the Society exit their lives, etc.? Does the Society's Plan of Care address the issues identified by the court and the services necessary to address the issues? It may be a time to amend the Society's Plan of Care to reflect the current state of affairs. The temporary care and custody hearing is the first opportunity to test the case in front of a judge and to receive feedback regarding the merits of the case. This feedback, if well delivered, will be powerful and has the ability to impact not only the positions of the parties, but also the attitudes and behaviours of all the parties. The temporary care and custody hearing is often the "dose of reality" needed by the parties to help them to turn the corner past "denial" and to begin to work co-operatively towards the



goal of the protection and best interests of the child. These statements apply equally to the Society as they do the other parties.

- b) **If unsuccessful at the hearing, conference with child protection worker and the supervisor to discuss the court's decision and reasons for that decision.** This is the time to reassess the Society's position. Generally, if you are unsuccessful at the temporary care and custody hearing, you will not be successful at trial regarding the requested disposition (Society Wardship or Crown Wardship). This does not mean that you will not be successful at trial regarding the issue of finding in need of protection. If the Society does not appeal the court's decision and does reassess its position, it is a good time to enter into settlement discussions with the other parties and their legal counsel.
- c) **Ensure that the child protection worker continues to offer services to the family and continues to assist the family in addressing the protection issues.** This is true in all situations, even when the Society is recommending Crown Wardship. Children's Aid Societies have frequently been criticized for failing to work with the family and to continue to assess the family and alternatives plans when the recommendation is Crown Wardship. Assist your child protection worker from falling into the trap of believing that, just because they have made a decision regarding the recommendation that, they need not continue to work towards the resolution of the child protection concerns with the family. The child protection worker needs to continue to provide services and assess the results of those services. The child protection worker needs to assist the parties with referrals and to provide assistance in having the family connect with those referral services. The child protection

worker needs to continue to inquire about and assess alternative caregivers. These steps should have begun prior to the temporary care and custody hearing and continue up to and including the trial. The Society cannot be seen as having left the parents or caregivers “high and dry” without support or services.

- d) **Fully prepare for a Settlement Conference and prepare a detailed Settlement Conference Brief.** This is another opportunity to obtain suggestions and comments from the court. It is also an opportunity to update the court about events that have arisen since the temporary care and custody hearing and to gain a judicial opinion on how the events impact on the positions of each of the parties and more importantly, the protection and best interests of the child. This will assist the Society in possibly obtaining a consent from the other parties once they have heard from the court. It is important that the Society present the case in a strong and informed manner. Have a prepared Statement of Agreed Facts available for possible settlement. The comments of the presiding justice will have less impact over time on the parties and the Society will therefore want to be prepared for a settlement at court. Canvass with the presiding justice whether he or she would be prepared to set the matter down for a Motion for Summary Judgment. The willingness of the presiding justice to do this will give the Society some indication as to whether the case is one for summary judgment. Demand a witness list from the other parties, it is the Society’s right. If they are unable to give you one (they should be able to do so), ask the presiding justice to impose a deadline by which they must do so.

e) **Consider a Motion for Summary Judgment for all or some part of the requested order if an Answer is filed or the time for an Answer has elapsed.** Consider each portion of the order requested: finding in need of protection, disposition, conditions, access. Determine if there is a triable issue for any or all of the requests. Refer to Section 70 time limits for children to be in the care of the Society as part of the evidence presented on summary judgment, as often, time runs out before a parent or party has had the ability to address the protection concerns. Review the Plan of Care and Answer presented by the parent or party and determine whether they have been able to do any of the items listed as part of their plan. If a parent has allowed the Section 70 time limits elapse and has not been able to carry out their plan of care, there may be no triable issue. Be very selective of the cases that you put forth to the court for summary judgment as there are possible cost sanctions as outlined in Rule 16(10) and 16(11) if the motion was not justified or there has been bad faith on the part of the moving party. Not every case is appropriate for summary judgment.

## **CONCLUSION**

It is imperative to all parties to get an early “read” from the Bench at the temporary care and custody hearing, settlement conference and, if appropriate, motion for summary judgment. The Rules give all parties the opportunity to receive an early “read” from the Bench. The Rules are for all parties, including the Society, and should be used to assist the Society in moving its cases forward in a timely and orderly fashion. The early read from the Bench is an opportunity for each of the parties to hear a judicial opinion and use those comments and suggestions to further the best interests of the child. The early read will also allow the parties to reassess their positions

and enter into settlement discussions. It will help clients, on all sides, get past “denial” and into action that can lead to a favourable resolution of the litigation. It can assist the child protection worker in focussing their efforts and services on the protection issues that are important to the court. It will assist Society counsel in planning their legal case and will help inform them as to the options available to them and the likelihood of success. Lastly and most importantly, an early read from the Bench will further the important objective of achieving permanency for children through the timely and orderly litigation.

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