

TAB 6

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

**The Early Stages of a Child Protection Case from the  
Perspective of Child's Counsel**  
(Child's 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



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# **THE EARLY STAGES OF A CHILD PROTECTION CASE FROM THE PERSPECTIVE OF CHILD'S COUNSEL**

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## **OVERVIEW**

The Office of the Children's Lawyer is a law office within the Ministry of the Attorney General. It is part of the Family Justice Services Division, which also includes the Public Guardian and Trustee and the Supervised Access Program. There are approximately 80 people employed within the Office, including 23 in-house lawyers and 3 articling students. Of the 23 lawyers, 13 work in the Personal Rights Department, representing children in a variety of child protection and custody/access matters.

The Office of the Children's Lawyer also has over 400 lawyers throughout the province who assist in representing children in both child protection and custody/access cases. In Toronto, cases are handled either by one of the lawyers or articling students in the Office, or by a lawyer on the Personal Rights Panel. Outside Toronto, cases are handled by lawyers on the panel.

## **AREAS OF MANDATE**

The Office of the Children's Lawyer represents children in certain property rights matters, as well as in custody/access matters. The focus of this paper, however, will be the role of child's counsel in child protection proceedings.

In addition to representing children pursuant to Part III of the *CFSA*, R.S.O. 1990, c. C.11, as amended, ("*CFSA*"), the Office of the Children's Lawyer provides representation to children:

- a) who are being admitted to a secure treatment facility pursuant to sections 117 or 124 of the *CFSA* (Part IV – Extraordinary Measures);
- b) who are 7 years of age or more and are being adopted. Pursuant to s. 137(6) of the *CFSA* (Part VII – Adoption), an Order for the adoption of a child who is 7 or older shall not be made without the child's consent. The Office of the Children's Lawyer provides independent legal advice to children in this context;
- c) who are minor parents (less than 18 years old) and intend to place their children for adoption. The written consent of the minor parent is necessary pursuant to s. 137(2) of the *CFSA* (Part VII – Adoption) before an Order for the adoption of the child may be made. The Office provides independent legal advice to minor parents in this context. Although provisions for the involvement of the Office exist in the *CFSA*, a Court Order appointing child's counsel is not necessary; and
- d) who are subject to placement reviews by the Residential Placement Advisory Committee (RPAC) pursuant to sections 34 through 36 of the *CFSA* (Part II – Voluntary Access to Services), if the Office has also been representing these child(ren) in child protection proceedings pursuant to Part III of the *CFSA*. In the context of RPAC's, child's counsel may request a review or re-review of an existing or proposed placement for the child.

Although child's counsel will attempt to direct the child to the appropriate resources, the Office of the Children's Lawyer does not represent children:

- a) who are charged with offences under the *Youth Criminal Justice Act*;

- b) who are victim witnesses in criminal court; or
- c) who are the subject of immigration / refugee hearings or cases.

## **ROLE OF THE OFFICE OF THE CHILDREN'S LAWYER IN CHILD PROTECTION PROCEEDINGS UNDER PART III OF THE *CFSA***

### **Court-Ordered Involvement**

The Office of the Children's Lawyer will only become involved in child protection proceedings when the Court has made an order under section 38 of the *CFSA*. The Office has no discretion to accept or reject cases once the section 38 Order has been made, but child's counsel may, at some later stage in the proceedings, seek to have the section 38 Order set aside if it appears that there is no further role. For example, in a case where the Office has been appointed to represent an infant who is incapable of expressing views and preferences, where child's counsel has looked into the circumstances of the case and has no concerns that all the relevant evidence will be presented to the Court and takes a position that is identical to that of the Society or a parent, child's counsel may seek to have the Order appointing the Office set aside.

Section 38(4) sets out the criteria in which legal representation shall be deemed to be desirable to protect a 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.

Pursuant to section 38(5) of the *CFSA*, where a child's parent is a minor (less than 18 years old), the Children's Lawyer shall represent the parent in a child protection proceeding unless the Court orders otherwise.

There are some important distinctions between the role of child's counsel in representing a child who is the subject of a child protection proceeding and in representing a minor parent. Those differences stem primarily from the fact that the minor parent is a party to the proceedings. This will be discussed in greater detail later in the paper.

In certain cases, it is possible to have different counsel appointed in the same matter. For example, separate counsel may be assigned for a minor parent and the child who is the subject of the proceedings, or for different siblings within the same family in a situation where one sibling is alleged to have been abusive towards the other.

The Office of the Children's Lawyer ceases to provide legal representation to children and minor parents when they reach the age of 18.

## **THE ROLE OF CHILD'S COUNSEL IN THE EARLY STAGES OF A CHILD PROTECTION CASE, INCLUDING THE TEMPORARY CARE AND CUSTODY MOTION**

In the early stages of their involvement, child's counsel will make contact with counsel for the parties and obtain and review the information contained in the pleadings. At the beginning, this usually includes the Protection Application and the Society's Notice of Motion and supporting affidavit. If the matter proceeds to a contested temporary care and custody motion, there may be further updating affidavits from the Society, as well as responding affidavits from the parents and/or other possible caregivers. If the temporary care and custody motion takes place within the timelines contemplated by Rule 33(1) of the *Family Law Rules*, that is within 35 days, it is possible that the parents' Answer and Plan of Care may not yet be available.

There are times when child's counsel is overlooked in regard to the service of Court documents. It is therefore important for child's counsel to be proactive in this regard, reminding all counsel that they must serve them with any materials on which a party intends to rely at a motion.

## **Disclosure**

In addition to reviewing the pleadings, child's counsel will request disclosure of the Children's Aid Society file on an on-going basis. It is preferable, where possible, for child's counsel to attend in person at the Society's offices to review the file and then tag the relevant documents for copying. It is important for child's counsel to review the entire file, including the family file, the child's file and the legal file, subject to any documents vetted by the Children's Aid Society on the basis of privilege. Relevant information may be found in such documents as the case notes of the various Society workers involved with the family, notes from Plan of Care meetings, medical reports and assessments, risk assessments and notes and reports relating to previous openings.

The importance of arranging for on-going disclosure cannot be over-emphasized. There may be minimal information in the Society's files at the beginning of a case, especially if there has been no prior involvement with the family. By the time a date is set to argue a temporary care and custody motion, many events may have transpired which may impact on the Court's determination on the motion. These events may be documented in observation notes of visits between children and their parents, the results of a home study or the results of a psychological assessment. If child's counsel is unaware of the existence of such documents, they will not be in a position to advocate for their inclusion into evidence.

Therefore, there is a need to obtain on-going disclosure at different times during the course of a child protection proceeding, including prior to a temporary care and custody motion.

## **Information from Collateral Sources**

By obtaining disclosure on an on-going basis, as well as by speaking to the parties, child's counsel will become aware of relevant third parties involved in a child's life, including foster parents / group home staff, school officials, therapists, assessors and medical professionals. In providing independent representation to children, child's counsel makes direct contact with these collateral sources regarding the children. It will be necessary to obtain consents for the release of information to communicate with these collateral sources from either the Society or the parents, depending on where the children are residing.

In making direct contact with collateral sources, rather than relying on information contained in the Society's disclosure or the pleadings, child's counsel is often able to obtain more specific and detailed information relevant to a child's needs and interests, which may impact on the position taken on behalf of the child, as well as the information presented to the Court at the different stages of the proceedings, including the temporary care and custody motion.

## **Interviews**

In addition to reviewing the pleadings, obtaining disclosure from the Society and contacting relevant collateral sources directly, child's counsel will attempt to make contact with the parties themselves, with the permission of counsel. This would include the family services worker, the children's services worker if the child is in care, as well as the parents.

As would be expected, in order for the Office of the Children's Lawyer to properly advocate on behalf of child-clients, it is necessary for child's counsel to meet with the children. This includes meeting pre- or non-verbal children so that counsel has a sense of who they are representing and the environment the children are living in, as well as to obtain information from the caregivers regarding the day-to-day functioning of the

children, including any special needs they may have. Child's counsel will meet with their child-clients as often as is necessary to determine a position to be taken on their behalf.

In addition to discussing the positions of the different parties (as appropriate taking into account the age and stage of development of the particular child), child's counsel may canvass with the child the possibility of other caregivers within the extended family or community, as well as access to significant persons in the child's life, including siblings.

In the context of a temporary care and custody motion, it is important to obtain this information as early as possible in the process so that if an alternate caregiver is being considered, the Society has the opportunity to make the necessary inquiries and conduct a home study, if appropriate.

The discussions between counsel and the children they represent are confidential and subject to solicitor-client privilege. As a result, notes of any meetings with child-clients are never disclosed.

### **Advocating on Behalf of Children**

Once information has been obtained from the pleadings, the parents, the Society, collateral sources and the children, child's counsel will advocate for the child-client. Child's counsel will ensure that the child's interests are understood by everyone and communicated to the parties and the Court.

As early as possible in the process, child's counsel will also attempt to facilitate the settlement of cases or the narrowing of the issues before the Court. For example, if a child-client wishes to go home, but the Society has concerns, child's counsel may suggest a supervision Order with certain safeguards that will protect the child. As a result, much of what child's counsel does takes place outside the Court room. With the information obtained from parents, the Society, child-clients and collateral sources, child's counsel is



often in a unique position to facilitate discussions and broker resolutions. It may therefore be possible to avoid a contested temporary care and custody motion if there is a temporary solution acceptable to all parties and the children, pending the final determination of the Protection Application.

In advocating for a child, child's counsel will ensure that the child's legal interests are protected. If the child is able to express consistent, independent views and preferences, child's counsel will generally advocate those wishes. If the child does not have capacity to express views and preferences by virtue of his or her age or any special needs he or she may have, the role of child's counsel will be to ensure that all evidence relevant to the child's interests is before the Court.

The role of child's counsel is distinct from the Society's role and the role of the Court in that child's counsel does not necessarily take a position that is based on the child's best interests. When children are able to consistently and independently express views and preferences, particularly older children, the position of child's counsel will generally be based on the wishes of the child, even if, for example, the Society does not feel that these wishes are consistent with the child's best interests. Child's counsel, will ensure, however, that the context for the child's wishes and that all the information relevant to a child's interests is before the Court.

The following examples illustrate the approach of child's counsel in different scenarios:

In the first scenario, a teenage client has come into care due to a physical altercation with a parent, but is adamant that she wants to return home. This is the position child's counsel will likely put forward on behalf of the client even though the Society may not feel that a return home is in the child's best interests. However, child's counsel may also encourage the child and parent to participate in counselling in an effort to address the issues that caused the child to come into care in the first place.

In a different scenario involving an infant or toddler, child's counsel may take a position of Crown wardship without access for the purposes of adoption at a much earlier stage than the Society where the parental history is not promising, as child's counsel is not constrained by the conflict of protecting children while at the same time promoting the preservation of the family unit.

### **The Temporary Care and Custody Motion**

A central aspect of the legal representation of children involves the attendance of child's counsel at Court. Once assigned to a case, child's counsel will attend all scheduled Court appearances, including case conferences, temporary care and custody motions, settlement conferences and trials. The Office of the Children's Lawyer also represents children at the appellate level in child protection matters.

If it appears that no consent resolution of a child's temporary status is possible, child's counsel will attend and make submissions to the Court at a temporary care and custody motion. In the majority of cases, child's counsel will advocate for the hearing of the temporary care and custody motion as soon as possible, that is, within the 35 days contemplated by Rule 33(1) of the *Family Law Rules*.

One of the roles of child's counsel is to seek to minimize the effect of delay on children. Efforts will be made to ensure that the timelines set out in the section 70 of the *CFSA* and section 33(1) of the *Family Law Rules* are complied with to ensure that children are not left in limbo for extended periods of time. Children must be freed for permanency planning or a return to family members, as appropriate, as soon as possible.

A possible exception to the general rule that child's counsel will advocate for the timely hearing of the temporary care and custody motion might arise if there is a critical piece of information missing relevant to the child's interests. For example, if there is a pending psychological assessment of the child which might speak to the degree of emotional risk to

the child if forced to remain in care or return to the care of a parent, child's counsel might consider agreeing to adjourn the temporary care and custody motion until this information becomes available.

However, even in the above-noted circumstances, consideration might be given to the option of proceeding with the motion in a timely manner given the ability of Court to vary or terminate any temporary Order pursuant to section 51(6) of the *CFSA*.

Submissions by child's counsel at the temporary care and custody motion will be based on the evidence properly before the Court, that is, the affidavits of the Society and/or the parents. Therefore, if child's counsel feels that it would be relevant to a child's interests to have certain evidence before the Court, they will contact the Society or parents' counsel as far in advance as possible to discuss the inclusion of such evidence in the affidavit material of the Society and/or the parents.

Often, the child will have articulated their views and preferences to someone other than child's counsel, for example, a Society worker, a foster parent or a parent. Therefore, this information may be included in the affidavit evidence filed on behalf of the Society or the parents. Pursuant to section 51(7) of the *CFSA*, the Court is able to admit and act on evidence that it considers "credible and trustworthy in the circumstances" at the temporary care and custody stage. As a result, there is no need to engage in a "Khan application" or voir dire at this stage of the proceedings in regard to the children's out-of-Court statements.

As indicated earlier, the Children's Lawyer is also mandated to represent minor parents pursuant to section 38(5) of the *CFSA*. As minor parents are parties in child protection matters, they are entitled to notice of all proceedings and service of all Court documents. As suggested earlier, there are important distinctions in the role of child counsel in representing minor parents as compared to representing children who are the subject of protection proceedings. Perhaps the most important difference is that unless the minor

parent is not contesting the Society's Protection Application, child's counsel must file an Answer and Plan of Care, as well as responding materials to a temporary care and custody motion or any other motion initiated by the Society or any other party. In addition, child's counsel may initiate a motion on behalf of the minor parent. In other words, the role of child's counsel in this instance is closer to the role of a lawyer representing an adult client.

An important distinction, however, is that minor parents often do not have the maturity of adult parties. As a result, they frequently need more support and guidance than adult clients. Often, the most significant assistance child's counsel can offer to a minor parent is to direct them to appropriate resources in the community such as parenting programs, day-care services and housing resources, to assist them in addressing the protection concerns before the Court.

### **Getting an Early Read from the Bench / What Works and What Does Not Work**

As is the case for any party at any stage of a proceeding, the importance of being well-prepared cannot be over-stated. For child's counsel, this means ensuring that all the evidence relevant to the position that will be advanced on behalf of the child is before the Court.

Referring to case law in submissions at the temporary care and custody motion can also be helpful. Although child protection cases often turn on the particular facts of the case before the Court, the case law may be relied upon in regard to the interpretation of "reasonable grounds to believe that there is a risk that a child is likely to suffer harm", the test set out at section 51(3) of the *CFSA*.

Child's counsel will also consider whether the child should be present at the temporary care and custody motion. Pursuant to s. 39(4) and (5) of the *CFSA*, children age 12 or over are entitled to be present at Court, unless the Judge is satisfied that being present at the hearing would cause the child emotional harm and orders that the child not receive notice and not be permitted to be present. Children under 12 are not entitled to be present unless the Court is satisfied that the child is capable of understanding the hearing and will not suffer emotional harm by being present and orders that the child receive notice and be permitted to be present.

Therefore, for children who are 12 or older and have expressed a wish to be present at Court, serious consideration must be given to this issue. The decision must be made in conjunction with the child after child's counsel has canvassed the possible repercussions of the child being present. These may include the child hearing negative information about a parent, the judge being less than pleased about a child missing school and/or the right of the child to hear the decisions that are being made about him.

One of the benefits of proceeding with a temporary care and custody motion is that it provides an "early read from the Bench" about the strengths and weaknesses of each party's case. If the outcome is consistent with the position taken on behalf of the child, child's counsel may be in a stronger position to advocate for and negotiate an early resolution of the case. If the decision is inconsistent with the position taken on behalf of the child, child's counsel may work with the Society or the parent in an attempt to improve the child's situation pending a final resolution of the outstanding Application. This may include advocating for a change of placement if the child is unhappy in care or advocating for particular services for the child.

The outcome of a temporary care and custody motion may be significant in that the Order made at such a motion may represent the status quo pending final determination of the Protection Application, which could take up to two years if the matter proceeds to trial. However, pursuant to section 51(6) of the *CFSA*, if the circumstances relevant to a child's

interests change, the possibility exists to bring the matter back to Court for a variation or termination of a previous temporary Order.

At the outcome of the temporary care and custody motion, child's counsel may request from the Court a road map for the next steps in the case. This may include canvassing whether a summary judgment motion or a finding on consent may be possible, or whether a settlement conference or trial management conference should be scheduled. Reference may be made to sections 51(1), 52 and 70 of the *CFSA*, as well as Rule 33(1) of the *Family Law Rules* to ensure that the timely resolution of the case continues to be a priority following the completion of the temporary care and custody motion.