

TAB 9

**When all Else Fails: Best Practices for the Conduct
of a Child Protection Trial
(The Perspective of Child's Counsel)**

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**Best Practices For The Conduct Of A Child
Protection File - Part II**
Strategies to Move your Case Forward to Settlement, ADR or Trial



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**WHEN ALL ELSE FAILS:
BEST PRACTICES FOR THE CONDUCT OF A CHILD PROTECTION TRIAL
(The Perspective of Child's Counsel)**

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1. This paper is intended to outline some of the steps that child's counsel may take when preparing for trial.

PRELIMINARY CONSIDERATIONS

2. Is there a role for child's counsel to play at trial? If counsel is acting for a child unable to express views and preferences, *and* if her position happens to coincide with that of one of the other parties, *and* if she is satisfied that all of the evidence relevant to her client's interests will be before the court, it may be that counsel's participation will not contribute meaningfully to the proceedings. Under these circumstances, counsel may wish to withdraw. This is an issue that should be raised as soon as possible, preferably no later than the trial management conference
3. Are there any potential conflicts of interest that may require siblings to be represented by separate counsel? This is an issue that should be considered at an early stage. This situation presents itself most strikingly when child's counsel represents an older child and his much younger siblings, and finds that their interests are divergent.

DEVELOPING A “GAME PLAN”

4. Child’s counsel will begin trial preparation by updating her information about the case.
 - a) Child’s counsel will meet with her client again to discuss his views with respect to the outstanding issues. Depending on the age of the child, this may also be an opportunity for her to explain the trial process and the time frame within which the child can expect a final decision to be made.
 - b) Child’s counsel will speak with both the Family Services Worker and the Children’s Services Worker (if applicable) to make sure that she has the most current information about the child’s progress in care or at home, how access visits are going, what steps the parents have taken recently to address the Society’s concerns, etc.
 - c) If the child is in care, child’s counsel will get updated information from the foster parent or group home staff.
 - d) With the permission of their counsel and where appropriate, child’s counsel will often get updated information from the child’s parents or prospective caregivers. In particular, counsel will clarify details about the plan being proposed for her client’s care and about their perspective on the situation and how the child is managing.
 - e) Child’s counsel will often obtain updated information from other collateral sources, such as the school, counsellors, access supervisors, doctors, therapists, etc

5. After reviewing the information she has collected and formulating the position she will be taking on behalf of the child, child's counsel will consider:
 - a) What evidence is important for the judge to hear?
 - b) Who is going to call this evidence?
 - c) What challenges to this evidence are anticipated, and how will child's counsel respond?

WHAT EVIDENCE SHOULD BE BEFORE THE COURT?

6. The role of child's counsel is to ensure that the court is made aware of the child's views and preferences, any circumstances surrounding those views and preferences, and any other evidence that is relevant to the child's interests.

Evidence of the child's views and preferences

7. Generally, child's counsel will not simply advise the court from counsel table of the child's stated views. One of the primary functions of child's counsel is to encourage the judge to consider the situation and the child protection issues from the perspective of her child client. To achieve this goal, the court needs to be provided

with as much information as possible about the feelings and views that the child has expressed about his family situation and how those may have evolved over time, his demeanor when he has expressed these views, the consistency of his views, and how he has reacted to difficult situations or troubling information about his family. The nuances of child's perspective cannot usually be conveyed by simply advising the court that the child wishes to return home or wants to have regular access to her mother.

8. Thus, in addition to making submissions on behalf of her client, child's counsel will usually take steps to ensure that evidence of his views is placed before the court. This can be achieved through cross-examination of witnesses such as the child's parents, the foster parents, the Society worker, the child's therapist, or an assessor. Naturally, child's counsel will want to speak with these witnesses in advance to clarify the evidence that they will be able to give in this regard.
9. To this end, it is also important that *up-to-date* information about the child's views is put before the court. Child's counsel should check with the worker and/or the foster parent (or other witness) to confirm their understanding of the child's views and preferences. If their information is outdated or does not correspond to what the child is expressing to his counsel, child's counsel may ask these witnesses to speak with the child about his wishes and views once more before testifying.

Circumstances surrounding the child's views and preferences

10. If the child has been inconsistent in the views that he has expressed over time, or if it appears that those views may not have been independently formed, it is important that the court is also made aware of the context within which the child's views have been expressed. If a child has expressed widely varying views, child's counsel may try to lead evidence of the different views the child has expressed at different times along with the circumstances that existed at each point. This gives the court a flavour of the child's ambivalence and his struggle to make sense of his situation, as well as the competing pressures he may be experiencing.
11. Similarly, if there is evidence to suggest that the child has been pressured or influenced to express views that may not reflect his true feelings, child's counsel may bring that evidence to the court's attention.

Other evidence relevant to the child's interests

12. It will also be helpful for the court to have a complete picture of how the child has managed in other areas of his life. To this end, child's counsel may adduce evidence about matters such as the child's academic performance, his social skills and behaviour at school and at home, and his emotional well-being. As well, the court will often be provided with information about the services and resources that may be required to meet the child's needs.

13. In addition to evidence about the child's views and general well-being, child's counsel must also consider what evidence will be required to support the position she intends to take. Child's counsel should not assume that counsel for the party whose position she supports will cover all of the bases. Rather, counsel should review the relevant portions of the CFSA and carefully consider what evidence will be required to support the disposition she is requesting.

WHO WILL CALL THIS EVIDENCE?

14. Once she has determined what evidence needs to be adduced, child's counsel will make sure that someone is going to be calling the witnesses in possession of this evidence. Child's counsel will speak with other counsel to ensure that all the necessary witnesses will be called.
15. If someone with critical information is missing from the list of witnesses, child's counsel will often advise counsel of the information that this person can provide. Child's counsel may very well be the only lawyer aware of the information, particularly if it comes from a collateral source outside the Society. As well, if she has been acting as child's counsel for some time and have seen the case go through changes of both Society workers and counsel, she will be the only trial participant (other than the child's parents) with a really good sense of the history and dynamics of the case. She may therefore have a different (and valuable) perspective on what

evidence will be necessary to give the court a complete picture of the situation.

16. If other counsel are not prepared to call a witness child's counsel feels is necessary, child's counsel may consider calling this person as a witness herself.
17. If child's counsel does call a witness, she will take the time to prepare the witness properly. This includes reviewing the information with the witness and ensuring that counsel has understood it properly, providing an outline of the questions she expects to ask the witness, and trying to give them a sense of what the witness can expect on cross-examination. For inexperienced witnesses, child's counsel may provide basic information about courtroom procedure, how they should conduct themselves on the stand, and the rules that govern the use of notes to refresh their memory. It is important that witnesses feel as comfortable as possible with the process, and that they understand how important their evidence is and how they are helping the child by providing it to the court.

WILL THE EVIDENCE BE CHALLENGED AND HOW?

18. Child's counsel will also try to anticipate challenges to evidence that she wants to go in, particularly evidence that is critical to her position. She will obtain the research necessary to make an effective argument in support of the evidence being adduced. Similarly, child's counsel will try to anticipate the evidence that opposing counsel or parties will be trying to lead and prepare to challenge evidence that she feels should

be not be admitted.

19. In particular, child's counsel will often attend trial prepared to deal with challenges to the admissibility of her client's out-of-court statements. If there is a sense that one of the parties will be challenging this evidence or will be seeking to have the child testify for other reasons, child's counsel will try to clarify this intention at the earliest possible stage – for example, at the trial management conference. It is the strongly-held position of The Children's Lawyer that children (who may have been negatively affected or traumatized by events) should not be compelled to testify in family law proceedings and that alternate means of introducing children's statements into evidence should be employed. These means include the introduction of children's out-of-court statements through the testimony of an adult, or the admission of transcripts or videotapes of children's evidence from criminal proceedings. The case law reveals a general reluctance on the part of the judiciary to allow children to testify in child protection matters, largely due to the potential trauma that could result to the child. However, this consideration must always be balanced against the rights of a party to decide which witnesses to call and to test the evidence through cross-examination. Furthermore, if child's counsel will be seeking to introduce evidence of a child's out-of-court statements, she must consider that these statements may need to meet the threshold criteria of necessity and reliability (as set out in *R. v. Khan*, [1990] 2 S.C.R. 531). It is therefore important that she be prepared to argue the issue should it arise.

OTHER PRACTICE TIPS

20. If the position of child's counsel coincides with that of an unrepresented party, she will be very cautious about delineating her role. Child's counsel should make it clear that she is not acting as that party's counsel and cannot provide legal advice. Nonetheless, child's counsel must prepare for the likelihood that she will be taking on many of the tasks assumed by parent's counsel – for example, objecting to evidence or procedural irregularities.
21. If the position of child's counsel coincides with that of the CAS, it is equally important that she differentiate her role from that of the agency. In particular, child's counsel should be conscious of how her interaction with CAS personnel will be perceived by her client's parents. It is best to keep a professional distance and be equally courteous to Society counsel, parents' counsel and the parties themselves. Even though the matter has reached the trial stage, there may still be a possibility that it can be resolved on consent. Child's counsel's effectiveness as a mediator or deal-maker will be severely compromised if the parents view her as aligned with the Society rather than as an independent spokesperson for their child.
22. If child's counsel seeks an order with specific or complicated terms (for example, a supervision order with particular conditions, or an order for Crown wardship with a specific schedule of access), she may provide the judge and counsel with a draft

when making opening submissions.

23. Where appropriate, child's counsel may encourage the Society to introduce evidence by affidavit rather than through oral testimony – this can reduce the length of trial significantly. As well, child's counsel may take the lead in drafting an agreed statement of facts to expedite the trial process.
24. If a child has attained the appropriate age and level of maturity, his counsel will often review Statements of Agreed Facts with him carefully. While there is no “magic age” at which children should sign Statements of Agreed Facts, age twelve (the age at which a child is entitled to notice of the proceedings and to attend the hearing) is generally a good rule of thumb. In addition to providing her client with a copy of the materials and ensuring that he has read them, counsel will often run through some of the main points to ensure that the child understands what he is agreeing to. If the child does not agree with the way certain events are characterized, child's counsel will discuss some alternate wording that the child is comfortable with or may consider whether the information actually needs to be included. When child's counsel chooses not to have a child under twelve read through a Statement of Agreed Facts and sign it, she may elect instead to summarize the contents for the child before signing it on her behalf. In all cases, child's counsel may need to use discretion in sharing troubling information with her child client.