

## REPRESENTING CHILDREN

In High Conflict Custody, Access and Parenting Matters in Alberta

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## LEGAL AID ALBERTA SERVICES

- Legal Aid Alberta ("LAA") will appoint a lawyer to represent a child in a family law (non-child protection) matters including custody, access, parenting, guardianship or contact where a case is deemed to be a high conflict matter and a court order is granted ordering LAA to appoint a lawyer.
- The order appointing counsel can be made at the request of one of the parents, on the consent of both parents or on the Court's own motion.
- In order for Legal Aid Alberta to appoint a lawyer, one of the parent's or a child over the age of 12 must make an application to LAA to appoint a lawyer for the child and provide to LAA a copy of the Court order appointing counsel for the child.
- By way of process, LAA will first send a referral to the Family Law Office ("FLO"), to one of its 5 staff offices, the Family Law Office (FLO), to see if they can accept the file. If FLO has a conflict or does not have the capacity, then the file will be sent to a LAA roster counsel to provide child representation services.
- FLO has a team of lawyers in each office who have experience in representing children. Many parents counsel will contact our office in advance to see if we can take a file prior to the order being granted or in some cases the Bench will call our office to ask if we can be appointed on a file.
- FLO has developed a precedent order appointing counsel with the terms we want to have included and the Court of Queen's Bench often use this order in making the appointment for counsel. A copy of the precedent order will be provided.

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## COSTS OF CHILD'S COUNSEL

- Legal Aid Alberta is a not for profit and does have limited resources, therefore we seek to recover the costs of child's counsel from the parties involved.
- In child representation files, there is no financial eligibility requirements for the parents or any of the parties involved. When ordered to do so, LAA appoints counsel in every court ordered counsel matter. However each Legal Aid certificate where a lawyer is appointed for a child includes a provision the child's counsel must seek reimbursement from the parties.
- Under the Family Law Act s. 95(4), when the Court orders counsel, the Court shall allocate the costs relating to the appointment of counsel among the parties, including the child if appropriate. The Provincial Court is really good at dealing with the costs of child's counsel. Efforts are made at LAA to recover our costs, where reasonable depending on the parties circumstances.
- Be sure to check the Order under which you were appointed for whether the Court made a determination regarding the costs for the children's lawyer.
- Where the appointing order does not specify costs, counsel need to address the issue of costs or seek the Court's permission to be heard as to the apportionment of your costs at the end of trial.

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**JURISDICTION TO APPOINT  
CHILD'S COUNSEL IN ALBERTA**

<p><b>Court of Queen's Bench</b></p> <ul style="list-style-type: none"> <li>• Superior court</li> <li>• <i>Divorce Act</i></li> <li>• <i>Family Law Act</i></li> <li>• <i>Child Youth and Family Enhancement Act</i></li> <li>• <i>Parens patriae</i> <ul style="list-style-type: none"> <li>➢ <i>Parens patriae</i> jurisdiction – available only in the superior courts; namely the court's general inherent power is always available to fill gaps or to supplement the powers of the local authority.</li> </ul> </li> </ul>	<p><b>Provincial Court</b></p> <ul style="list-style-type: none"> <li>• Court of statutory authority</li> <li>• <i>Family Law Act</i></li> <li>• <i>Child, Youth and Family Enhancement Act</i></li> <li>• <i>Protection of Children Abusing Drugs Act</i></li> </ul>
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**INTERNATIONAL LAW**

- **UN Convention on the Rights of Children – 1989**  
United Nations Convention on the Rights of a Child, Ratified by Canada on May 28, 1990. Alberta was a signatory on January 13, 1999.
- Recognizes that children have the capacity to understand their own needs and interest and have an evolving capability to express their needs and interests to the adults charged with making decisions about their future.
- Our domestic laws cannot be in conflict with the Convention.
- Our legal system must have a mechanism to ensure children's views and preferences as to their needs and interest are presented to judges and all decision makers.
  - The principles of natural justice "*demand separate legal representation for children.*"
  - Essentially, that means:
    - A right to be heard in all decisions affecting them – a voice not a choice
    - No bias or impartiality
    - A right to be informed about the proceedings that affect them
- The Legal Aid Society of Alberta may appoint counsel for a child who is the subject of an application under the *International Child Abduction Act*, and *The Hague Convention on the Civil Aspects of International Child Abduction*.

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**ROLE OF CHILD'S COUNSEL AND  
REPRESENTATION MODELS**

- Amicus Curiae
- Guardian ad litem
- Direct Advocate

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### AMICUS CURIAE

- "Friend of the Court"
- Maintains neutrality
- Has no obligation to advise the court of the child's wishes
- Not the role to act for the child – see next point
- Takes instructions from the court
- Assists court in its decision making role
- Recommended where child lacks capacity or refuses to instruct counsel

- *Amicus Curiae* assists the court in four distinct ways:
  - Arranging for an investigation of the facts, usually by a professional;
  - Providing the judge with relevant evidence about the facts;
  - Providing the judge with relevant expert opinions about the available custody and access options, and his own recommendations; and
  - Presenting the evidence for the judge's benefit by cross-examination.

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### GUARDIAN AD LITEM

Also known as "Litigation Guardian"

- In family law, known as the "best interests model"
- The lawyer is the child's guardian for the purposes of the litigation
- The lawyer decides what is in the child's best interests and make those submissions to the court
- The lawyer provides his or her opinion to the court supported by relevant and admissible evidence
- The lawyer can act in a manner contrary to the child's views and preferences if he or she does not believe those views and preferences are in child's best interests – must advise the child, the parties and the Court

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### DIRECT ADVOCATE

- This is the representation approach set out by the Law Society of Alberta in its "Guidelines for Representing Children" ([www.lawsociety.ab.ca](http://www.lawsociety.ab.ca))
- Empowered to act in a traditional advocate role and put the views and preferences of the child to the court whether those views and preferences are in the best interests of the child
- The duty of making a decision resides with the Court
- Lawyer must meet with the child and then advocate their views and preferences just as they would an adult client
- A solicitor-client relationship exists

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### DUTIES OF CHILD'S COUNSEL

- Part of your role as children's counsel is to:
  - Address anxieties that a child has about the Court proceedings and dispelling unrealistic fears
  - Provide process information to the subject of the litigation
  - Give the children a voice not a choice
  - Provide an opportunity for children to be heard
  - Make efforts to facilitate settlement which can sometimes take on the "semi/pseudo mediator role". We cannot be the mediator but with our training education and expertise we educate parents re: child development and child psychology to aid them to see the situation from the child's perspective
  - Provide the parents with the child's voice and their reasoning from a neutral perspective
  - Obtain information from professionals involved with the child
  - Have input in the choice of an Assessor and liaise with assessors involved with the case
  - Provide out of the box thinking and creative solutions to help families resolve matters in ways that meet the child's needs and respect their wishes.

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### BEST PRACTICES

- Acquire an understanding of the difference between children and adults and the developmental states of children
- Do not align yourself with one parent or one party
- Advise the parties in writing as to how you will be representing their child – direct advocacy or best interests
- Meet with your client a number of times (at least 3) to ensure consistency of views and preferences and where appropriate rotate the parent taking the child to appointments
- Make submissions to the Court as to what outcome your client is seeking and whether your client possesses capacity to understand their needs in light of their views and preferences
- Support your client's position with evidence
- Do not eagerly provide the Court with your personal opinion – the Court will ask – stand firm and respond as an advocate. Representing children requires excellent advocacy skills as well as the ability to understand children both on an intellectual and an emotional/psychological level. It is hard work that requires a dedication to the client over and above Court work.
- The possibility complaints is high – the child and either or both parents may be disappointed by the outcome and will look for someone to blame.
- Follow the Law Society Guidelines, Best Practices and be TRANSPARENT in your dealings with the parents, their counsel and the Courts.

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### CHALLENGES: GETTING CHILD'S POSITION AND EVIDENCE BEFORE THE COURT

- A challenge we face at Legal Aid is getting the child's evidence properly before the Court for trials and hearings. It is inappropriate in an adversarial system, for counsel for a child to simply stand and articulate the child's wishes or if the child is unable to express those wishes, to articulate what is in counsel's view the best interests of the child.
- Lawyer can make submissions to the Court, but must be careful not to become a witness or state their opinion as fact.
- In presenting the child's views and preferences to the court, the lawyer must bear in mind that they are an advocate. He or she is there to plead his/her client's cause upon the record before the Court and he/she does not in any sense occupy the dual position of advocate and witness.
- Acting for children does not relax the rules of hearsay – you cannot simply repeat what your client has told you.
- As child's counsel at Trial you may have to:
  - Call witnesses and enter the information through other witnesses
  - Where appropriate retain an expert to get the child's views and preferences properly before the Court
  - Cross-examine witnesses including the parents using the information provided to you by your client
  - Legal Aid Alberta has limitations on the amount that we can pay to assessors and psychologists of \$135.00 /per hour. This is a condition of our financing from the Alberta Government
  - Finding professionals who will do this important work for that rate is very difficult
  - In some cases counsel and the Court will seek agreement in advance that counsel can provide information from counsel table without the necessity of calling expert evidence of the child's views and preferences

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