

Representing Children in Family Law & Child Protection Cases: Ethical & Practical Dilemmas

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The Office of the Children's Lawyer ("OCL")

- An independent law office operating within Ontario's Ministry of the Attorney General
- Investigates, advocates, protects and represents the personal and property rights and obligations of children in proceedings before the courts and tribunals of Ontario

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Areas of Law

OCL Lawyers and social workers represent and assist children primarily in the following areas:

- Child protection proceedings
- Custody and access disputes
- Estates and civil litigation

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Personal Rights – Child Protection

- OCL only becomes involved and assigns counsel for a child when the Court has made an order under s. 38 of Ontario's *Child and Family Services Act*
- The Office has no discretion to refuse these cases, however we may seek to have the s.38 order set aside at a later stage

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Personal Rights – Custody/Access

- Pursuant to s.89 of Ontario's *Courts of Justice Act* ("CJA") we may at the request of the court provide legal representation for children involved in a custody/access dispute
- The Office has the discretion to determine whether to accept the case, and, to decide what type of service to provide.

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Custody and Access Intake

- Most cases we accept are high conflict and involve multiple family issues, such as:
 - Mental health challenges
 - Allegations of domestic violence/sexual abuse
 - Significant substance abuse
 - Young parents with challenges
 - Mobility
 - Alienation
 - Children with special needs

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Dilemmas around representing children

- * In litigation, every client has desired outcomes and goals for representation
- * When is a child client able to set the goals of the representation?
- * When should the lawyer decide the goals (rather than deferring to what the child has identified)?
- * How should a lawyer determine a child's capacity to direct the representation?
- * What are a lawyer's obligations to the court when representing a child?

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OCL program

- * Delivered across the province by lawyers and clinicians, retained on a fee for service basis
 - * 377 lawyers
 - * 271 clinicians (social work professionals)
- * Trained, supervised and supported by in-house lawyers (13) and clinical supervisors (10)

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Model 1: AMICUS CURIAE

- "Friend of the Court"
- Provides facts in an impartial way; advises court about the state of the law; advises court about the interests of non-participants involved in the proceedings
- Neutral
- Inquisitorial, not adversarial
- When representing a child, not obliged to ascertain wishes
- Acts as a court appointed expert

CONSIDER: is an amicus appropriate for a child if he or she is capable of expressing views and preferences?

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Model 2: GUARDIAN AD LITEM

- * Independently investigates, assesses and advocates for child's best interests
- * Adversarial: presents evidence and examines/cross-examines witnesses
- * Will find out child's views and preferences, but may take another position if those are not consistent with the child's best interests

CONSIDER: why is a lawyer in a better position than a judge to make the best interests assessment?

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Model 3: TRADITIONAL ADVOCATE

- * Solicitor client relationship: gives the child client a direct voice in the proceedings and advocates for child's views
- * Acts as "legal architect who constructs a case based on the child's views"
- * Presents child client with options, advises, but leaves ultimate decision to client

CONSIDER: are there situations in which children lack the capacity to articulate views and instruct counsel?

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Fact Situations

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“Travis” – age 11

- * Travis has lived with Mom since parents separated 6 years ago, with alternate weekend access to Dad.
- * Diagnosed with ADHD and learning disability.
- * Travis tells you he wants to try living with dad now. He and dad have many shared interests, and Travis wants more time with him. Views are independent, strong, consistent.
- * Travis has thrived in Mom’s care. Mom has good handle on his learning issues; communicates well with school and doctor
- * Dad does not “believe in” ADHD or meds.
- * Travis will have to change schools if he lives with Dad.

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“Travis” – age 11 – take 2

- * What if Travis has diabetes instead of ADHD, and dad believes that it can be managed with diet/exercise rather than insulin?
- * Does this change things? Why?

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Trial re “Travis” – age 11

- * The case does not settle and matter is scheduled for trial
- * Mother is self-represented; father has aggressive counsel
- * Mother overwhelmed by prospect of trial. She tells you that she is not planning to call any witnesses.

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“Sarina” – age 10

- * Sarina lives with her dad and sees her mom every Saturday overnight
- * Sarina tells you that she wants to live with her mom. The main reason is that she really does not like her dad’s new wife, or the fact that she has to share a room with her new younger step-sister. The other reasons are that mom is nice & fun, and Sarina loves mom’s new puppy.
- * Dad’s new wife is very critical of mom’s parenting and lifestyle choices. Sarina knows this.
- * Sarina does not want her dad and stepmother to know what she has told you, especially the stuff about her stepmother. She would like you to tell her mom and the judge, though.

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“Sarina” – age 10 – Take 2

- * Same situation as before, but Sarina also tells you that her new stepmother hits her and her stepsister with a wooden spoon when they are bad.
- * She does not want you to tell anyone this.

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“Bennett” – age 13

- * Bennett has lived with Mom since separation 3 years ago. Dad had regular access until 6 months ago, when Bennett suddenly refused to continue visits
- * Mom and Dad have a very high conflict relationship, with virtually no communication.
- * Mom says Bennett was exposed to Dad’s violence during and after the marriage, and is frightened of him. She does not feel he should be forced.
- * Dad says Mom has brainwashed Bennett, and that everything was fine until Mom lost the trial for spousal support. He denies that the relationship was violent, and there are no criminal/medical records
- * Bennett says he never wants to see his father ever again, and that Mom’s boyfriend of eight months is the father he never had. He cannot really explain why he does not want to see dad, other than to repeat Mom’s claims (often using the same phrases: eg describes his father as “abusive” and “manipulative”).

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“Nevaeh” – age 4

- * Nevaeh has been in care for 6 months as a result of concerns about neglect and inappropriate discipline
- * The parents have completed the courses recommended by the CAS, and now the CAS plans to reintegrate Nevaeh into the home
- * Mother’s 17 year old daughter from a previous relationship has recently alleged sexual abuse by Nevaeh’s father. He and mother both deny this. No charges have been laid.
- * CAS tells you that they are still planning to return Nevaeh, but will impose a condition that the father cannot be alone with her at bedtime or bathtime.
- * Nevaeh tells you that she loves Mommy & Daddy, and wishes she was home.

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“Amber” – age 9

- * Amber has been in foster care for 3 months. Her Mom appears to be addicted to prescription drugs. Mom says that she takes drugs appropriately to manage chronic pain.
- * At your first few meetings, Amber tells you that she thinks it’s better for her to stay in care until her Mom is better (ie not sleeping all the time). With Amber’s consent, you share these views at the next court date.
- * The next time you see Amber, she tells you that actually she wants to go home. She says “someone” told her Mom that Amber wanted to stay in care, and this was a mistake. Amber is much less talkative and open at this interview, and seems worried.
- * What do you say at the next court date?

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“Stella” (13) and “Bruce” (11)

- * Stella & Bruce are Indigenous children, registered with a First Nation on the James Bay coast. They are Crown wards and have been in care for over 8 years.
- * The children have been living in a non-indigenous foster home in London, Ontario for 2 years. Their foster parents would like to adopt them.
- * They have a supervised visit with their mother and siblings once a year at a Northern Ontario hotel. They have not been to their home community since coming into care. Their mother has addressed the protection concerns and has applied to have Stella & Bruce returned to her care.
- * Stella and Bruce want to be adopted. They do not want to continue their visits with their birth family.

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When developing standards for children’s lawyers, consider...

What are the implications of “blending” models of child representation?

Any standards/guidelines should address:

- * Client relations
- * Information/evidence gathering – scope, parameters
- * Presenting evidence & taking positions in court – obligations to the court vs. obligations to client

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References and further reading

- * Office of the Children’s Lawyer:
<https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/>
- * American Bar Association:
<http://www.naccchildlaw.org/?page=StandardsOfPractice>
- * Legal Representation of Children in Canada:
<http://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/lrc-rje.pdf>

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