
**EIGHT GOOD REASONS TO BRING IN A LAWYER:
REFLECTIONS ON THE ROLE OF CHILD’S COUNSEL
IN CHILD PROTECTION ADR¹**

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Prepared for *Children’s Participation in Justice Processes:
Finding the Best Ways Forward*,
Sept 15-16, 2017, Calgary

Alternative dispute resolution (ADR) has been used in child protection cases in Ontario for over twenty years, both formally and informally. However, until recently, the use of ADR was not widespread, nor was it an entrenched part of child welfare practice in most regions. Then, in 2006, the *Child and Family Services Act* was amended to specifically provide for the use of ADR in child protection cases. These amendments, combined with the launch of a formal, government funded child protection ADR program through the Ministry of Children and Youth Services, have had a dramatic impact on the use of ADR in child protection cases across Ontario.

There is a legislated role for child’s counsel in the ADR process, as the *Child and Family Services Act* stipulates that the Ontario Office of the Children’s Lawyer may provide legal representation for a child in an ADR process if appropriate.

This paper will outline the structure of the child protection ADR program in Ontario, and then discuss the involvement of counsel for children in the ADR process.

LEGISLATION AND REGULATIONS

Section 20.2(1) of the *CFSA* imposes a positive obligation on all children’s aid societies to consider using a form of ADR whenever they are working with a

¹ This paper draws heavily on two earlier papers: “The Goldilocks Dilemma: Finding a Role for Child’s Counsel In Child Protection ADR That is “Just Right””, by Carolyn Leach, Martha Heder, and Silvia Novak, presented to 5th World Congress on Family Law and Children’s Rights, Halifax, Nova Scotia, August 2009 ; and “Alternative Dispute Resolution in Child Protection Cases”, by Carolyn Leach, prepared for the Intensive Child Protection Program for Lawyers, June 24-27, 2015, Windsor, Ontario

family, whether or not the matter is in court.² For those cases that are in court, the *CFSA* specifically authorizes the court to adjourn the proceeding to permit an ADR process to take place.³

CHILD PROTECTION ADR IN ONTARIO

ADR services are funded by the Ministry of Children and Youth Services. They are accessed in different ways in different communities. In some areas, children's aid societies make direct referrals to rostered mediators or coordinators. In other areas, referrals are made to an agency, who will then arrange for the assignment of a mediator or coordinator. Some of these agencies provide access to multiple methods of ADR and others provide access to a single approach.

The following "prescribed" methods of ADR are available in Ontario:⁴

A. Child Protection Mediation

This is a process where child protection workers, the family (including the child, where appropriate), the OCL (if appointed) and any other person putting forward to proposing to participate in a plan for the child, work together with the aid of a trained and impartial child protection mediator who has no decision-making power. The mediator assists the participants in reaching an agreement on the issues in dispute, in generating options for resolving their dispute, and in developing a mutually acceptable plan that addresses the child protection concerns identified.⁵ Although practices vary among mediators and from case to case, it is not uncommon for counsel for the parents and the society to participate in child protection mediation.

² Under section 20.2(1) of the *Child and Family Services Act (CFSA)*, if a child is or may be in need of protection, a children's aid society is obligated to consider whether ADR could assist in resolving any issue relating to the child or a plan for the child's care. As this section references both children who have been found to be in need of protection and children who may be in need of protection, ADR can take place either before or after a protection application has been initiated.

³ *CFSA*, section 51.1

⁴ As per Ministry of Children and Youth Services (MCYS), Policy Directive CW 005-06

⁵ MCYS Policy Direction CW 005/06

Child protection mediators must undergo specific Child Protection Mediation Training and be on the provincial roster managed by the Ontario Association for Family Mediation (OAFM).⁶

B. Family Group Conferencing (also known as Family Group Decision-Making)

This is a process that brings together the family (including the child where appropriate), the child's extended family and community, child protection workers, and service providers to develop a plan that addresses the child protection concerns identified. A trained and impartial coordinator, with no decision-making power, assists the participants throughout a three-part process. During the first segment, family and community members, child protection workers, OCL counsel, and service providers meet to share information about the child and family and to discuss goals for the conference. During the second segment, the extended family group is given an opportunity to meet privately, independently of professionals, to develop a plan that will address the child protection concerns. The plan is then presented to the coordinator and the child protection worker during the third part of the process.⁷

Family Group Conference coordinators must undergo training and mentorship in the principles and practice of family group conference provided by the George Hull Centre for Children and Families. They must also be on the provincial roster managed by the George Hull Centre.⁸

C. Aboriginal Approaches

These are traditional methods of dispute resolution, including circle processes, which have been established by First Nations communities or Indigenous organizations. Impartial facilitators who have no decision-making power, and who are skilled in First Nation traditional methods, assist the participants in developing a plan that is supported by the participants and/or

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

the First Nation community and addresses protection concerns identified.⁹ The model employed varies from community to community: from talking circles formats, to formats that resemble family group conferencing, to community council models in which a council of elders renders a decision after hearing from family members and other participants.

Facilitators must be recognized by the First Nations community with whom the child is affiliated (or by an Indigenous organization) as qualified to engage in an Aboriginal approach to ADR.¹⁰

All child protection ADR processes are confidential or “closed”. This is subject to very limited exceptions, such as the consent of the participants or information giving rise to a duty to report a child protection concern. Aside from these exceptions, none of the participants, including the mediator, are compellable to give testimony or produce disclosure in court, and no representations, statements or admissions made during the mediation can be used as evidence.¹¹

WHAT KINDS OF CASES ARE SUITABLE FOR ADR?

The widespread use of ADR has many potential benefits for the child welfare system, including cost-effectiveness, time savings, high settlement rates, greater compliance rates, participant empowerment, and improved relations between agencies and families.¹² ADR also provides parents, children, and societies with an opportunity to address a much broader range of issues than can be addressed in court, with a wider set of possible solutions. For example:

- Placement issues: For example, a parent or child may have concerns about the appropriateness of a child’s placement in care (distance from home community, suitability to meet child’s needs, etc). Alternatively, a placement with kin may be on the verge of breaking down and an ADR

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ “Methods and Procedures Regarding Alternative Dispute Resolution”, O.Reg. 496/06

¹² L.Crush, “When Mediation Fails Child Protection: Lessons for the Future” (2007) 23 Can.J Fam.L.55 at 55-56

process may identify ways to shore it up – by addressing communication issues between a parent and a kin caregiver, by identifying family members who could offer respite or support, and so forth. ADR may also be an effective way of finding family placements for children so that they need not come into care.

- Terms of supervision orders: ADR can be a much more productive way of developing mutually agreeable, pragmatic, and workable terms of supervision, as opposed to trying to negotiate these terms outside a court room door or via correspondence.
- Access issues: ADR can be a way to develop creative and detailed terms of access to Crown wards, for example, or addressing issues around access for children who are temporarily in Society care. It is also very useful for developing access plans in those cases where the Society is involved due to concerns about high conflict between separated parents.
- Crown wardship orders or reviews: If a parent or child has initiated a status review of a Crown wardship order (or wishes to do so), ADR can be a useful way to explore the viability of a return home or to negotiate the terms on which a return might take place.
- Issues in the relationship between the parent and the child protection worker/foster parents/kin caregiver: ADR offers an opportunity to clear the air, set boundaries, and establish better communication patterns.
- Length of time in care or conditions for return: If children have been in care for a period approaching the legislated maximum (12 months for children under six; 24 months for children 6 and over), ADR may help “kickstart” the case. It is not uncommon for cases to drift for months, without any progress towards the children’s return. ADR can offer an opportunity to develop a structured and focused plan for re-integrating the child into the parents’ care, including clear expectations for the parent to meet, services to be provided by the Society, and a graduated access plan.
- Parent-teen conflict: Mediation can be a useful way for parents and teens to develop some mutually acceptable house rules, for example. Or, family group conferencing may lead to a concrete plan whereby extended family can offer temporary respite when things become too heated between

parent and teen.

- Long term care issues: If a parent is unable to resume care of a child, the ADR may assist in identifying an alternative long term placement for a child with a family member, or in developing a plan for what Crown wardship might look like (what will the long term access plan be, where will the child be placed, what involvement will the parent have in decision-making about the child's care, etc)
- Openness: ADR is an extremely useful tool for negotiating openness or post-adoption contact. Openness agreements and orders are the starting point for long term relationships between biological family members and adoptive parents. ADR allows terms of openness to be developed on a consensual basis, while sowing the seeds for a positive and trusting relationship between biological and adoptive families, to the benefit of the child.

INVOLVEMENT OF THE OFFICE OF THE CHILDREN'S LAWYER

As noted above, children may be provided with legal representation in an ADR process through the Office of the Children's Lawyer (OCL). Section 20.2(3) of the *CFSA* states that the OCL may provide legal representation for a child in a proposed ADR process, if the Children's Lawyer is of the opinion that legal representation would be appropriate.¹³

If a case that is before the court proceeds to ADR, the OCL may already be representing the child in the court process. In such cases, the assigned OCL lawyer will also represent the child client in the ADR process. However, in cases where the OCL is not already involved (either because it is not yet before the court, or because the OCL has not been appointed to represent the child in the court process), the children's aid society must notify the OCL of the referral to ADR. The Ministry of Children and Youth Services has developed a Notice Form for children's aid societies to forward to the OCL in such situations. Upon receiving the Notice, a decision is made by the OCL ADR Intake Coordinator as to whether a lawyer will be assigned for the child(ren) in the ADR process.

¹³ *CFSA*, section 20.2(3)

For the most part, OCL lawyers are assigned only for older children who are capable of expressing views and preferences, and only in situations where the involvement of the OCL will be of benefit to the child or otherwise add value to the process.

DIFFERING PERSPECTIVES ON THE ROLE OF CHILD'S COUNSEL

How child's counsel "fits" into the different models of ADR has not always been an easy issue to navigate. In the early stages of implementation, ADR service providers expressed concerns that the participation of child's counsel would upset the delicate power dynamic that exists in these cases, and open the door for other lawyers to attend, thereby reducing the effectiveness of the ADR process. As well, given that both the family group conference and child protection mediation models include mechanisms for bringing a child's voice to the table¹⁴, there was uncertainty about the value that the involvement of child's counsel would bring to the process. For their part, counsel for children, unfamiliar with ADR models, had difficulty trusting that the process would adequately protect the interest of their clients. Counsel also struggled with how to advocate effectively for their clients (who are in a unique and often vulnerable position vis a vis the other ADR participants) without "taking over".

EIGHT GOOD REASONS TO BRING IN A CHILDREN'S LAWYER

Over 10 years have now elapsed since the 2006 amendments were introduced to the *CFSA*. In that period of time, the movement towards ADR has been gathering steam at a steady rate across the province. And, through experience, the different roles that child's counsel can usefully play in ADR have become more clear. What has also become clear is that, while the active participation of child's counsel is not required in all cases, in many circumstances, that

¹⁴ In family group conferencing, children are invited and encouraged to attend the conference. The reasons provided for encouraging the attendance of children are: they are affected by the decision; it helps them to see the circle of support; secrets come into the open; children need to hear their family circle develop a safe plan; and the child's presence helps the family focus. *Family Group Conference Manual*, (Toronto: the Family Group Conferencing Project of Toronto, 2006) at page 69. In mediation, children may be included in the process if it is appropriate to do so. In some cases, the mediator might meet privately with the child in advance of the joint session; in others, the child (usually an older child) might participate in the joint session. J. Wildgoose & J. Maresca, *Mediating Child Protection Cases*, (Waterloo: Fund for Dispute Resolution, 1994) at p. 6

involvement can add a great deal of value both to the process and to the outcomes achieved for the child. To that end, eight good reasons to “bring in a lawyer” are offered:

(1) It may not be sufficient for the mediator/coordinator to speak with child’s counsel over the phone.

Prior to the 2006 amendments to the *CFSA* and the consequent formalization of the OCL’s involvement in ADR, it was fairly typical for child’s counsel’s role to be limited to a telephone discussion with the mediator/coordinator during the initial stages of the ADR process. In many such instances, the child would not actively participate in the ADR process.

This approach may still be appropriate in cases where the child’s perspective will add little to the discussion, or where the child’s interests will clearly be protected without active participation by her counsel. Such cases might include: cases in which the child is very young and child’s counsel is confident that the one of the other parties (for example, the child protection worker) will ensure that the child’s interests are adequately protected; disputes that are concerned largely with issues such as poor housekeeping or hygiene, or where the focus of the process is on developing a plan of supports and services for a caregiver, and where the child’s views will thus have little bearing on the outcome; or disputes that do not really include the child and are more focused on the relationship between the parent and child protection worker.

However, there are cases where this would be a most unsatisfactory means of ensuring that the child’s position and interests form part of the decision-making process. One example would be a case in which the child’s position is not shared by any of the other participants. Consider the situation of the older child who is adamant that she wishes to remain in her foster home permanently, whose parents wish to have her returned, and whose child protection worker feels that the family can be successfully re-united if adequate supports are put in place. It is difficult to see how either the child or her counsel could feel confident about an ADR process that did not actively include either of them, nor is such a process likely to produce a result that will be acceptable to the child. A similar situation arises in cases involving chronic parent-teen conflict or a parent’s inability to manage an older child’s behaviour. In such cases, the child will need to “buy in” to the terms of any agreement reached, whether these be mutually acceptable house rules or participation in services designed to strengthen and

support the family unit. An older child's participation is critical in developing a plan with staying power, because at that age, children will "vote with their feet" if they are not in agreement with a plan to which they have had no input.¹⁵

While it would certainly be possible for the children in these situations to participate in ADR without their counsel, this practice presents its own difficulties. Some of these challenges will be explored further below.

(2) Child's counsel can speak for a child who can't participate in the process, but whose voice needs to be heard

One of the more common rationales offered for excluding child's counsel from an ADR process is that other lawyers (for example, counsel for the children's aid society or counsel for the parents) are not included in the process. In family group conferencing, "lawyers are not invited to conferences, as one wants to avoid both an adversarial situation and one where the needs of one individual are focused on".¹⁶ In mediation, the concern is that it is essential for the parties themselves to discuss the issues and develop options for resolution and that adding lawyers to the discussion insulates the parties from the concerns affecting them.¹⁷ Why should it be any different for child's counsel?

One significant difference is that many children do not participate actively in ADR and thus do not have the opportunity to speak for themselves in the way that adult clients do. Even older children (with defined views about the issue on the table) may be excluded from the process for a variety of reasons. If the child is emotionally fragile or struggling with mental health issues or, simply, quite young, active participation in ADR may be very damaging to the child. ADR discussions are generally adult-oriented, frank, and revealing and this may be too much for an already vulnerable child to manage.

¹⁵ Arlene H. Henry, "Mediating Child Protection Disputes – A Canadian Perspective: Are We Leaving Room for the Child at the Table?" (Paper Presented at the 4th World Congress on Family Law and Children's Rights, Capetown, South Africa, 2005) at p. 7.

¹⁶ *Family Group Conference Manual*, (Toronto: the Family Group Conferencing Project of Toronto, 2006) at page 68

¹⁷ J. Wildgoose & J. Maresca, *Mediating Child Protection Cases*, (Waterloo: Fund for Dispute Resolution, 1994) at p. 6

In other cases, a child may be in jeopardy of being wedged into a loyalty conflict between caregivers. For example, a child may feel very guilty about her wish to remain in care and not want to make that statement in front of her parents.¹⁸ Or, the primary issue for ADR may be the Society's concern that the children are being emotionally harmed by conflict between separated parents. In such cases, the parents may be heavily invested in their perspectives of what the child's "true wishes" are, and it may be unconscionable to put the child in the position of having to "choose" between her parents.

Finally, some children may simply be resistant to participating in the process.

All of these children should have the right to have their counsel attend in their stead to ensure that their interests are advanced and protected.

(3) In some cases, it may not be sufficient for the mediator/coordinator to speak with the child and then share the child's views with the group

Both the FGC and CPM models offer opportunities for a child to meet privately with the mediator or coordinator to discuss their views. Inclusion of the child's voice is an essential part of the family group conference process, and coordinators will almost always meet with children to prepare them for the conference and to determine what they would like their family members to know on their behalf. Similarly, child protection mediators will often meet with children to discuss their views.

In some cases, this will be the most satisfactory way of bringing the child's voice into the process – particularly if the child's views are straightforward and not in themselves the subject of dispute. This may even be the case if child's counsel is actually involved in the case. For example, if the relationship between child's counsel and one of the other participants to the ADR has broken down, it may be more helpful to the process if the child's voice is brought to the table via the mediator/coordinator.

However, there are also limitations to this approach. Child's counsel typically has an opportunity to meet with a child on a number of occasions over a period of time, which improves the quality of the information obtained from the child. The child has a chance to become comfortable with her lawyer, there are several

¹⁸Arlene H. Henry, *supra* at pp. 8-9.

opportunities to explore difficult issues, and the lawyer is able to assess issues such as the consistency and strength of the child's views over time. The same opportunity is unlikely to be available to the mediator/coordinator. As well, the confidential nature of the solicitor-client relationship allows the child to discuss her views and concerns in complete confidence. The assurance that information will not be shared with others may encourage a child to be open with her counsel, allowing for a free and frank discussion about the pros and cons of the various available options.

There are also advantages to the process to having child's counsel participate in the joint sessions or conference even if the child does not. The "quality" of a child's voice is generally enhanced if it is conveyed by a person who has had the opportunity to develop a relationship with the child over multiple interviews, who can convey the nuances of the child's views, and who can speak to their strength and consistency over time. For example, a child's long-standing yearning to return to a parent's care will likely be conveyed with more impact through counsel who has known her for many months. A single interview with the mediator/coordinator may not yield the complexities or depth of the child's feelings – for example, the stigma and loneliness she feels as a foster child, the mundane but meaningful routines of family life that she misses, her sadness that her mother has missed significant events in her life, her anxiety in relation to the ongoing uncertainty about her future, and so forth. These rich details can be highly motivating to the other participants in the ADR process, and may significantly affect both the tenor of the discussions and the resolution achieved.

(4) The participation of child's counsel can help the mediator maintain neutrality in some situations

In the eyes of some participants, the neutrality of the mediator/coordinator may be compromised if she is the means by which a child's views or position is brought to the table. A mediator/coordinator may find it very challenging to preserve his or her neutrality in a situation where the child's "true" wishes are in dispute, or if there is a concern that a child's views are the result of pressure or influence by one of the parties.

Similarly, a child may have a "message" for a participant that is going to be difficult to swallow. Consider the example of the child who has lost confidence that her mother will ever stop drinking and who has made the choice to remain in care permanently. If the mediator/coordinator is the one to deliver that painful

message, it may be very difficult for the mother to maintain confidence in the mediator/coordinator's ability to deal with her fairly.

(5) Child's counsel can provide support to a child who does come to a mediation or conference

Even where the child is able to participate in the joint sessions or conference, there are situations in which he or she should be accompanied by counsel. The child may very much wish to attend, but there may be concerns about whether she will be able to withstand the intensity of the discussion. Although part of the mediator/coordinator's role would be to ensure that the child is protected in this regard, child's counsel may be better placed to take on the role of identifying when the child is becoming overly anxious and arranging for her to leave the session. In a mediation context, it may be that the child could then spend the remainder of the joint session in a separate room, with child's counsel shuttling back and forth to explore various options with her.

As well, many children have difficulty expressing their views and feelings coherently and in a manner that fully conveys how they are feeling. If child's counsel participates in the session, he or she will be able to support the child in getting across the most important points – possibly more effectively than the mediator/coordinator, who has a much more limited relationship with the child, would be able to do. If the child leaves out important information or it does not seem that the true sense of it is being conveyed, counsel can assist the child in providing the information, either through prompting or questions. If necessary, counsel can then summarize the issues of concern to the child and propose matters that need to be included on the agenda for discussion.

Counsel for children may also be able to effectively support the mediator's role to benefit the child client. This could include reframing the heated remarks of the child client so that they can be more easily accepted by other participants, ensuring that an important part of the child's message is not lost or forgotten if the child becomes upset, or suggesting a caucus or a break if it is clear that the child cannot manage the discussion any further. This frees up the mediator to continue working with the other participants and to maintain a neutral stance without being perceived as siding with the child over the other participants. It allows the child to be an active participant in the process and ensures that the other participants hear the child's story in his own words, while protecting both the child and the process. Thus, the support of counsel may enable a volatile child to participate in an agreement that needs his or her input.

(6) The involvement of child's counsel increases the likelihood that agreements reached through ADR will be supported by child's counsel at court.

In many cases, court proceedings are adjourned to allow ADR to take place. If successful, steps may be taken to incorporate the agreement reached at ADR into a court order. If child's counsel is appointed in the court proceedings, the consent of child's counsel will be required for such an order to be made. Child's counsel may in fact stand in the way of a resolution that is agreeable to all other parties, if child's counsel is of the view that the agreement does not adequately protect the child's interests.

It can be very challenging for child's counsel to be expected to endorse an agreement reached when he or she was not part of the process in any respect. It must be considered that when ADR is being conducted in a case that is already before the court and in which counsel has been appointed for the child, any proposed resolution must also be endorsed by child's counsel if it is to proceed in court on consent. Child's counsel may in fact stand in the way of a resolution that is agreeable to all other parties. Counsel may be reticent to approve agreements when he or she was not witness to the "give and take" that resulted in them.¹⁹ Counsel may lack confidence that the agreement provides appropriate safeguards for the child's interests or represents the best option for the child. There may have been information provided at the session to which counsel was not privy that would be reassuring in this regard. Or, alternatively, the settlement may have been based on information or assumptions that counsel would have rebutted if present at the joint session. Thus, there are two risks: (1) that counsel will endorse an agreement that does not adequately protect a child-client, or which does not protect the child as well as another option that may have been equally acceptable to the other participants; or (2) that counsel will decline to approve an agreement whose terms are actually quite appropriate, simply because of uncertainty based on lack of information. In the latter case, all the cost and effort that went into the ADR may be lost if child's counsel does not participate.

¹⁹ Craig E. McEwen, Nancy H. Rogers, and Michard J. Maiman, "Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation" (1995) 79 Minn. L.Rev. 1317 at 1346.

(7) Child's counsel can advance issues that aren't important to anyone else at the table

There may be situations in which a child has concerns that are unlikely to be as significant to the other parties, and there is some worry that they will be lost in the shuffle. For example, a child may be deeply unhappy with a current placement, an issue that needs to be addressed before the child will commit to remaining in care. In other cases, maintaining ongoing and meaningful contact with siblings may be particularly important to a child but less of a priority for the adults in the case.

In still other cases, the child may have a perspective that needs to be heard in the child's own voice, particularly where parents, social workers or both appear not to be hearing the child's expressed desires and needs. This could arise, for example, in the case of a teenage girl brought into care after disclosing sexual abuse by her stepfather and whose mother disbelieves her. The child may be in agreement with staying in care but may desperately want her mother to acknowledge the trauma she has experienced and seek counseling with her mother as a component of any plan.

(9) Child's counsel is able to provide the group with legal information that may shape the settlement reached

Anecdotal information suggests that this has been an unexpected advantage to the participation of child's counsel. Often child's counsel is the only lawyer present and is called upon to provide legal information to the group. Certainly, both child protection mediators and family group conference coordinators receive training about the legislative framework of child welfare proceedings. However, the *Child and Family Services Act* is complex, as is the litigation process. Child's counsel may be better placed to respond to the concerns and questions of participants. They may be able to clarify the legal options that are open in the case or about the procedural steps that might have to be taken. This avoids situations where the group comes up with an alternative that is not legally possible, and thus cannot be incorporated into a court order.

SPECIAL CONSIDERATIONS WHEN ACTING FOR CHILDREN

There is an extensive body of work devoted to the role that an advocate should play in an ADR process. Features of this role include: assessing whether ADR

is appropriate for the case, helping the client identify and articulate her goals, developing an understanding of the concerns, motivations and interests that lie behind the positions of other participants, developing and evaluating a range of possible options for resolution, and preparing the client for participation in the joint session or conference.²⁰ Certainly, most aspects of this role can be successfully imported into the role that child's counsel plays.

However, there are some additional preparatory steps that counsel for children will need to take, as well as some additional considerations that they will need to keep in mind. For example, adult clients will always participate directly in an ADR process; the variable is whether or not their counsel will attend the conference or joint session with them. For children, the reverse is true. Thus, counsel must carefully consider how their client will be engaged in the process. This is a decision to be made in consultation with the child client and with the mediator, having regard to the age and maturity of the child, nature of the issues to be discussed, the dynamics between the parties, and the positions of all participants. It is our view that the child's wishes about their level of participation should be determinative, although certainly a child should be given full and frank information about the pros and cons of attending a particular conference or joint session.

Another important distinction is that counsel for children will rarely be able to glean the background information that they require from their clients in order to provide them with effective representation. More extensive preparatory work will be required, including interviews with the child's parents/caregivers, with the children's aid society staff, and often with professional collateral sources or extended family members and kin. It is also incumbent on child's counsel to make some assessment of how open the other participants (particularly the child's parents) to hearing the child's views and preferences. This is also an area to explore with the child client. Children can be made quite vulnerable when their views and preferences are shared with family members who find those views completely unacceptable – vulnerable to ruptures in important personal relationships, and vulnerable to being placed under intolerable pressure.

²⁰ See for example: C. Noble, L. Dizgun & P. Emond, *Mediation Advocacy: Effective Client Representation in Mediation Proceedings* (Toronto: Emond Montgomery Publications, 1998); M. Keet & T.B. Salamone, "From Litigation to Mediation: Using Advocacy Skills for Success in Mandatory or Court-Connected Mediation" (2001), 64 Sask.L.Rev. 57-98

Consideration must be given to this issue in advance, both in terms of framing the message to be delivered on behalf of the child and in determining whether there is actually benefit to proceeding with the ADR process.

Finally, care must be taken to ensure that the child has reasonable expectations in regard to the outcome of the ADR process. There are often situations where the other participants will arrive an agreement that does not align with the child's preferred outcome. Although there are certainly exceptions²¹, in many cases, the child's opposition will not scuttle an agreement. In this sense, the child client is in a different position than the other participants to the ADR, as is child's counsel. This possibility must be discussed in advance with the child client so that he or she has a clear sense of how her views and preferences fit into the mediation process.

Finally, there is a key role for child's counsel in following up to ensure that agreements are implemented as anticipated. Adult parties are able to take these steps themselves (or engage their counsel to do so on their behalf), but child clients are not in the same position. If an ADR process did not resolve an important issue for a child client, then a plan should be made for how that issue will be addressed instead. For example, if the focus of the ADR was to come up with a new visiting schedule between a parent and a child in care, and no agreement resulted, will someone be taking steps to proceed with litigation around this issue? Again, child's counsel may need to follow up with the relevant individual or their counsel to make sure that there is forward movement on the issue.

PARTING COMMENTS

There is no question that ADR will be used more routinely in child protection cases in the future. As such, it is essential that all children's counsel practising in this field familiarize themselves with ADR processes and with their role as advocates within these processes. It is also critical for children's counsel to recognize ADR as a potentially important element of their overall approach to a case. The successful, long term resolution of a child protection case is often heavily dependent on the existence of positive relationships between parents and a variety of other individuals: their children, their child protection workers, their

²¹ For example, the mediated outcome of a parent-teen conflict situation will clearly require the teen's consent. Similarly, in many openness mediation cases, children are parties (often the applicant) to the affiliated openness court proceeding, and must consent to any terms contained in the Memorandum of Understanding.

extended family members, foster parents, and so forth. ADR often provides opportunities to address issues in these relationships: by “clearing the air”, improving communication, establishing ground rules or boundaries, or developing the structure for future relationships. Certainly, there will always be cases that must be litigated. But ADR should never be dismissed as an option for exploring resolution, even in factually complex or highly contested cases.