

Role of Child’s Counsel in Child Protection ADR matters

**CAROLYN LEACH
MARTHA HEDER**

**COUNSEL
OFFICE OF THE CHILDREN’S LAWYER**

PRESENTED AT “CHILDREN’S PARTICIPATION IN JUSTICE
PROCESSES: FINDING THE BEST WAYS FORWARD”
SEPTEMBER 13, 2017
CALGARY

Structure of the OCL

- Law office within the Ministry of the Attorney-General
- 2 legal departments (“Personal Rights” & “Property Rights” & a clinical department
- Province-wide child representation program
- 13 in-house lawyers; supervise 400+ OCL lawyers in private practice across the province
- Services include: legal representation in child protection cases, legal representation OR Children’s Lawyer Report (by clinician) in custody/access cases, legal representation in ADR cases

Child Protection ADR in Ontario - Background

- Changes were made to the CFSA in 2006 to require the CAS to consider whether ADR would be appropriate to help children who are or who may be in need of protection
- Since children who *may* be in need of protection are included, the CAS could opt for ADR in cases where it was involved voluntarily with families
- The MCYS directive requires the CAS to complete and send the OCL a Notice Form when ADR is proposed and we have discretion under the CFSA to decide whether or not to participate

Child Protection ADR in Ontario: 3 methods

- Child Protection Mediation: child protection workers, the family, the child (if appropriate), OCL (if assigned) and anyone else putting forward a plan work with a trained, impartial CP mediator, who has no decision-making power, to develop a plan
- Family Group Conferencing: same participants including extended family and service providers, in a 3-part process: information sharing, private family time to develop a plan, presentation of plan
- Aboriginal Approaches: traditional methods including circles, wherein models vary between communities - facilitator must be recognized by the First Nations community with whom the child is affiliated

What kinds of cases are suitable for ADR?

- Placement issues
- Terms of supervision orders
- Access issues
- Crown wardship orders or reviews
- Length of time in care and/or conditions for return
- Improving relationships between worker/parents/foster parents
- Parent-teen conflict
- Long-term care issues
- Openness

Development of the OCL ADR program ...

- In CP cases, the court is the gatekeeper. If the judge decides that OCL involvement is needed, a mandatory order is made under s.38 *CFSA*
- In ADR cases, the OCL reviews the Notices, speak to the worker (in some cases), and determine whether OCL involvement is warranted
- If it is, one of our panel lawyers is assigned
- We try to keep continuity of counsel if there has been previous OCL involvement

In what kinds of ADR cases does the OCL usually assign child's counsel?

- older children (at least 7+) capable of expressing views and preferences, where the involvement of the OCL will benefit the child and add value to the ADR process *
- Parent/teen conflict
- Minor parents
- Youth aging out of the system
- Expiring TCAs

*upcoming changes are anticipated to notification requirements for children <7+

In what kinds of ADR cases does the OCL usually assign child's counsel? (cont'd)

- Reviews of CW Orders for older children
- Older children where long term plans are being explored, including kin placement, conditions for return home, and access plans
- Exploring openness contact terms between children about to be adopted and their birth parents and siblings
- High conflict "emotional harm" custody/access type cases where independent support for the child and/or providing views and preferences is central

In what kinds of ADR cases is the OCL likely to refuse involvement?

- Children <7
- Mediation/conference is scheduled shortly and cannot be adjourned – OCL does not have enough time to do the necessary work
- Primary issues are not those on which the OCL can assist in a meaningful way: i.e. managing the relationship between the worker and parent, monitoring hygiene issues in the home, improving communication between the parents, developing a circle of support for the family
- Ongoing or recent OCL s. 112 Report (Children's Lawyer Report in a custody/access matter prepared by clinician)
- Information is otherwise available (i.e. recent assessment)

How child's counsel adds value to the ADR process



By providing an effective and meaningful voice for the child/youth in the ADR process, the involvement of child's counsel is likely to lead to a better, more enduring and child-focused outcome.

Why bring in a lawyer?



- Children often do not participate directly in ADR and therefore do not have the opportunity to speak for themselves as the adult participants do
- Children may be excluded due to concerns about risk of harm, loyalty binds, or child's own resistance - in these cases, children should have the right to have counsel attend to bring their voice to the table and protect their interests
- Child's counsel can advance issues that aren't important to other participants, but very important to the child
- Child's counsel can provide legal information that may shape the settlement reached

Other reasons to bring in a lawyer



- Mediators/coordinators will often meet with a child as part of the process – what child's counsel brings is an enhanced understanding of the child's perspective due to multiple interviews
- Solicitor/client privilege allows the child to discuss options with their counsel in confidence
- Participation of child's counsel can help the mediator maintain neutrality

How child’s counsel adds value to the ADR process

Specifically, child’s counsel can develop a full and nuanced understanding of the child’s views and perspective, and ensure those views are effectively communicated to the other participants by:

1. Preparing the child for involvement in the ADR process
2. Providing the child/youth with active support during the conference or joint session
3. Following up on plans developed in ADR

1. OCL preparation for ADR

- Timelines are compressed – no time to make a lot of inquiries
- Contact the worker to get the background information including CAS “bottom lines”
- Contact the mediator/coordinator to discuss parameters and dates
- Interview the parents/parties
- Meet with child-client several times to discuss the upcoming ADR and assist him/her to articulate views and preferences
- Collaterals – if time
- Identify a support person if the child will be involved in private family time (FGC)
- Ensure the child’s views are communicated to the mediator/coordinator prior to the session and will be further conveyed at the ADR

Preparing the child for the ADR process

- Explaining the process (although mediator/coordinator will as well)
- Determining what aspects of an agreement are important to the child client
- Reviewing possible alternatives
- Sorting through the options/generating options that the child favours
- Determining the message the child would like shared with other participants and “packaging” it to present: How will it be shared if the child is present? Does the child want to speak? Does the child want OCL to speak on his/her behalf? Does the child want to be present when OCL counsel is sharing views?
- For anxious clients: who, where, what, why, how

2. OCL Participation in ADR



- Advance discussion with mediator/coordinator about:
 - the information that will be shared with the parties and how it will be shared,
 - whether and how the child will participate in the joint session/conference
- Counsel may attend with or without the child, determined on a case-by-case basis in consultation with the child and the mediator/coordinator
- In some cases it may be sufficient just to have a call with the mediator/coordinator, or to be involved in only some aspects of the process
- FGC: child's counsel does not participate in Family Private Time

Providing the child with support during ADR



Where child is attending to share their views directly or via counsel, their counsel has an important role to play in:

- Helping the child to frame his or her statement in advance
- Supporting the child in making a statement or expressing views, through prompts or added information
- Offering emotional support
- Reframing statements made by other participants
- Keeping a child engaged with the process
- Monitoring child and assisting him or her to withstand the intensity of the discussion and/or take a break or change the format of the discussion
- Explaining and providing legal advice about the outcome of the ADR process

Focus of counsel is on providing child client with support and assisting in building consensus, as appropriate

3. OCL Follow up to ensure plans are carried out



- Particularly in pre-court ADR, where there is no "safety net" insofar as any plan cannot be reviewed or monitored by the court
- Examples: a) If a kin plan is developed at ADR, OCL may follow up with the worker and proposed kin caregiver to ensure record checks and home studies are being done, and to identify possible barriers b) Ensure that planned referrals to supportive services (counseling, treatment) have taken place
- If a plan has fallen apart, what is the next step?
- If ADR did not result in an agreement, OCL may participate in discussions about the next steps to be taken to address the protection issues and child-client's concerns.
- If the ADR resulted in a partial agreement, OCL may participate in discussions about how the remaining issues will be addressed. Can OCL play a mediative role?

Parting Comments



- No question ADR will be used more routinely in child protection cases
- ADR has to be considered by counsel as an important element of the overall approach to a case
- ADR provides opportunities for managing relationships, improving communication, establishing boundaries, and hammering out detailed arrangements that the court system may not always be equipped to

Contact Information



Carolyn Leach

Counsel, Office of the Children's Lawyer

Tel: (416) 314-8062

Email: carolyn.leach@ontario.ca

Martha Héder

Counsel, Office of the Children's Lawyer

Tel: (416) 314-8061

Email: martha.heder@ontario.ca
