

The Voices of Lawyers that Represent Children in Custody and Access Disputes¹

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Introduction

Legal representation for children in family law proceedings is a relatively new concept. The perception that children are persons with independent rights, interests and preferences and not mere possessions to be allocated as "prizes" in family proceedings² came along in the 1970's and 1980's and along with this perception arose the idea that children should be afforded the opportunity to obtain independent legal representation to assert those rights. The very notion that children should have independent legal representation though has been the subject of debate (and at times intense debate) for the past three decades.

Office of the Children's Lawyer

The Office of the Children's Lawyer (OCL) headquartered in Toronto, Ontario has the most comprehensive child representation program in Canada.

The Office is an independent law office operating within the Family Justice Services Division of the Ministry of the Attorney General. The Children's Lawyer represents the interests of children before the court in custody and access matters, child welfare proceedings, and civil litigation and estate matters. The office has two separate and distinct legal departments. The Property Rights department, which can trace its roots back to 1827, provides representation for children in civil litigation and estate matters, and the Personal Rights department, formally founded in 1980, provides representation in child protection and custody and access matters. The personal rights department is comprised of both lawyers and clinical investigators (mental health professionals). In addition to the in-house professionals, there is a panel of approximately 400 lawyers and 200 clinical agents. These panel members undertake family law matters on behalf of the Children's Lawyer across the entire province on a fee for service basis. As at March 2006, the Office had 11,254 open case files all being litigated in various family courts.

¹ This paper is a revised version of a paper by Birnbaum, R. (2005). Hearing the voices of lawyers and clinical agents who represent children in child custody and access disputes. *Canadian Family Law Quarterly*, 24.3,281-303.

² E. Leeco, (1996) 34 Fam. Con. C. Rev. 303 at 304.

The OCL has defined the role of child's counsel as the legal representative for the child, which includes advocating on behalf of the child client so that the child's interests and wishes are understood and communicated to the parties and to the court. Child's counsel does not represent the best interests of the child, as that is the very issue to be determined by the court.

In custody and access matters, the primary goal of the lawyers is to represent the children's interests before the court and to assist the litigants in resolving their disputes in the interests of their children. They are the voice of the child in family law proceedings. Justice McLaughlin has stated that for a judge to ascertain the best interests of the child "it seems logical to find out what the child thinks."³ The child's views and preferences are important evidence to be weighed by the court and by having legal counsel appointed, a child is assured of having those views expressed and taken into consideration by the presiding judge.

The challenge for lawyers though is determining how to involve the child, provide a sense of empowerment, advocate on behalf of the child, and ensure that their views and preferences are heard, while understanding how competing pressures and influences may affect their stated preferences.⁴ Not only are the lawyers advocating a particular position, but they are also shielding the child from the litigation. Every effort is made to ensure that the child is not directly involved in the court process, including being called by one of the parents to testify. Having independent legal representation allows children to participate in the process in a manner that minimizes harm to them.

Most lawyers identify the representation of children as requiring an additional set of skills because the legal interests of children contain the potential for complex and diverse issues especially in parental separation cases.⁵ The lawyers who undertake work on behalf of children assist courts in deciding cases by ensuring the judge is placed in the best possible position to make a decision that is in the child's best interests. The question remains though, do lawyers have sufficient knowledge and understanding of the psychosocial aspects of separation and its impact on children to carry out their duties as legal counsel?

Over the past several years, much has been written about the voice of the child in family law proceedings. We have begun to analyze to an extent, the experiences of children in parental separation, and the legal proceedings that ensue. We have begun to look at how children's involvement in the legal process has affected them⁶. However, what of

³ The Honourable Madam Justice McLaughlin, "Children and the Legal Process: Changing the Rules of Evidence" (1992), 50 *The Advocate* 727.

⁴ Birnbaum, R., Burns, C., Moyal, D. "Child Legal Representation in Custody and Access Matters", Paper presented at 2006 Federation of Law Societies, National Family Law Program, Kananaskis, Alberta.

⁵ Ibid,

⁶ Baker, E. (1997). Assessing and managing allegations of child sexual abuse: An Australian perspective. *Family and Conciliation Courts Review*, 35(3), 293-299. Leeco, E. (1996). Independent legal representation for children in custody and access cases: A case commentary of *Strobridge*. *Family and Conciliation Courts Review*, Vol. 34(2). 303-319. Shear.L.E. (1996). Children's Lawyers in California family law courts: Balancing competing policies and values regarding questions of ethics. *Family and Conciliation Courts Review*, Vol. 34(2). 256-302.

the lawyers who represent these children? What are they saying about the experience? How do the lawyers perceive their role? Moreover, what changes ought to be made to how lawyers carry out their duties to ensure that children are appropriately represented in court?

Therefore, it seemed timely to explore the voice of the lawyer and understand their lived experiences while addressing some of these questions.

The Voices of the Lawyers

The exploratory study took place at the OCL and involved 29 lawyers who are retained on a fee-for-service basis. The study used the long interview method⁷ to allow the participants to reflect upon their practice experiences. An interview guide facilitated this process and their narratives were audio-taped and transcribed verbatim for coding and categorizing of themes.

Of the 29 lawyers (18 females and 11 males) who participated in the study their ages ranged from 38 to 61 years of age and they had an average of 14 years of family law practice.

In response to the question of what were the challenges and limitations of their role as child's counsel, many participants reflected on the following:

"The OCL expects lawyers to do things they are not trained for, they expect us to take complicated social work information, process it, and develop a position.....I would rather act as child's counsel";
"..what business do I have even thinking this and at what point should I just stick to the advocacy role and mind my business";
"I don't think it is a good idea to have lawyers involved in doing social work stuff".

In response to the question of how helpful or not it was working along side of mental health professionals, participants stated the following:

"I find it to be a valuable adjunct to the work I am doing"
"consideration should be given to appointing a social work assist in all cases"
"we [lawyers] do not know anything about children other than personal experiences".

Many of the lawyers expressed the need to retain highly skilled and knowledgeable lawyers in an area that overlaps law and mental health. A recurrent theme was that while children's voices need to be heard those voices (wishes) need to be heard in the context of the family situation. In other words, child legal representation involves more than just legal skills. Child legal representation also involves a knowledge and understanding of children's developmental ages and stages as well as family dynamics.

⁷ McCracken, G. (1988). *The long interview: Qualitative Research Methods*, Vol. 13. Sage Publications.

In the final analysis more research and dialogue between the professions (mental health and law) needs to occur if children's interests are to be truly represented.