

Dentons Canada LLP

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Role of Child's Counsel

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Appointment of Counsel

- If a child is involved in child protection proceedings OCYA (through the LRCY office) has the authority to appoint counsel at its discretion. S. 112 of the *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12
- Provincial Court of Alberta has the authority to direct an appointment of counsel for a child under section 112 of CYFEA; all such Orders should be referred to LRCY
- LRCY has the sole authority to establish policies and procedures relating to the scope of a lawyer's appointment, training, and expectations, service standards and any decisions relating to the selection of lawyer for any particular matter.

History – Role of Counsel

- The role of children's counsel has evolved over the years since the inception of the Legal Representation for Children and Youth Program ("LRCY") through the Office of the Child and Youth Advocate ("OCYA")
- 2 sets of Guidelines has caused confusion; rules outdated and not 'best practice'
- The current Guidelines permit counsel for children to take a best interests approach, an *amicus curiae* role, or request the appointment of a litigation representative
- Problems with the best interests approach and the *amicus curiae* role: the former takes the lawyer out of his or her role of advocate and asks him or her to instruct him or herself on what the child's best interests are; the latter requires counsel to breach solicitor-client privilege
- Only a Court can decide Best Interest of the Child
- LRCY to prepare new Guidelines for child protection proceedings
- LRCY endorses Article 12 of the UN Convention on the Rights of the Child, which states that children capable of forming a viewpoint ought to have a voice in matters affecting them.

Summary of Changes

- If a child is able to instruct counsel, counsel will take instructions directly from the child.
- If the child does not have that ability, lawyer to fully examine the child's **interests and entitlements** and to present evidence and act in accordance with a position that honours the most favourable outcome for the child.
- Counsel will no longer chose to take a best interests or an *amicus curiae* role.
- No appointment of a litigation representative required.

Guidelines

- LRCY and the Law Society of Alberta drafted Guidelines: “LRCY Guidelines on the Role of Counsel” (“LRCY Guidelines”) and “Law Society of Alberta Guidelines for Representing Children” (“LSA Guidelines”)
- The LSA Guidelines have since been removed from the Law Society website
- LRCY wishes to address the concerns that have been raised with respect to the existing Guidelines in an effort to harmonize them with the Code of Professional Conduct and other key legal and ethical principles.
- We intend to conduct final consultations with counsel in the next few months

UN Convention on the Rights of the Child

- A fundamental premise of child representation is to ensure the child's voice is heard. The United Nations *Convention on the Rights of the Child* (the "Convention") states:
 - 1. Parties shall assure to the child who is capable of forming his or her own views that right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
 - 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law ((1989) 28 I.L.M. 1456 at art. 12).
- Lawyers should, act on the instructions of children where possible. This should remain a fundamental principle.

Key Principles

1 - A Lawyer May Not Breach the Duty of Loyalty

- Solicitor Client privilege cannot be pierced just because client is a child
- questioning how the lawyer could have obtained instructions from children due to the various concerns with respect to their development and mental disabilities is improper.
- To answer such questions would put counsel in the position of breaching his or her duty of loyalty to the client by disclosing privileged information about the client

Key Principles

2 - Lawyers Must Follow their Ethical Duties and Must Not Breach the Standards of Care Expected of Them

- disclosing confidential information, providing evidence to the court that is not authorized by the child, or submitting his/her opinion re the child's best interest, may breach loyalty and expose lawyer to liability
- High standard given vulnerable children; the consequences could be lifelong
- If a lawyer is required to step out of the instructional advocacy role, it must only be done in after a proper assessment of the child's ability to instruct is undertaken. In such cases, the child's voice/viewpoint, if known, will still be an important interest that should be advanced

Key Principles

3 - Counsel for the Child Is an Advocate for the Child Whether or not the Child is Able to Instruct

- If counsel establishes that a child has the ability to instruct, those instructions will be honoured even if unreasonable so long as no risk of harm – high threshold (section 4 of CYFEA)
- If a child lacks the ability to instruct counsel, counsel should explore the interests and entitlements of the child by undertaking an examination of all family ties, educational interests, personal, cultural, religious and other important factors in the child's life and put forward evidence to support those interests and entitlements that favour the child without forming an opinion on what is best.
- Courts and counsel must not superimpose a reasonableness test viewed through the adult lens, which is contrary to the first principles of child representation.

Key Principles

4- A Lawyer May Not Determine What Is in a Child's Best Interests

- This is an incorrect interpretation of the key principles underpinning the role of child's counsel and it is contrary to the Code of Conduct and Rules of Court

5 - A Child Lacks the Ability to Instruct if they are unable to understand

- The Code recognizes that “[a] client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision

Key Principles

6 - If a Child is unable to instruct counsel, Oversight by the LRCY Program

- In this role, counsel may present to the Court a purely objective analysis of the child's entitlements, including, but not limited to, physical security and safety, emotional well-being, education, health, religion, family connections and social involvement
- Policies to be developed by LRCY

LRCY's Mandate

- Usually a Litigation Guardian/Representative is required if a client lacks capacity
- The training, policies, rules, and guidelines provided as part of the retainer with LRCY provides sufficient oversight such that in cases where the child lacks the ability to instruct counsel, the lawyer is directed to review and analyse the interests and entitlements of the child and act accordingly.
- LRCY has a mentorship program that will pair up a lawyer seeking further direction and advice on a matter with a senior mentor. This mentor is not acting as an instructing agent or litigation guardian. Rather, they are there to assist any lawyer who requires guidance in ascertaining the interests and entitlements of the child and resolving any other ethical or legal issues that arise.
- No instructing agent is required.

New Proposal

- The role of counsel for the child is to present evidence consistent with the child's position;
- Counsel for the child must assist the child, as appropriate, in formulating an informed decision, position or viewpoint; not just a mouthpiece
- Counsel for the child must advance the client's case; and
- Counsel's opinion on what is in the child's best interest is not relevant.
- In all proceedings affecting children, it is not required that children make a decision about an outcome. Therefore, it is important to emphasize that it is the child's 'voice' that matters, and not necessarily their 'choice'. Therefore, the child's instructions may simply be to ensure their viewpoint is heard and considered (e.g., the positive and negative attributes of mom) and may not necessarily provide the Court with a choice (e.g., to live with mom).

Conclusion

- Justice Kent, in an unreported oral decision stated that LRCY improved the situation of children: “I emphasize at this point that we not only have an institution that permits [children] to get counsel but given the program that LRCY is instituting, that monitors the education and quality of counsel, it is an appropriate institution.”
- The Child and Youth Advocate has the statutory mandate to represent the rights, interests and viewpoints of children and youth in Alberta. An important part of this mandate is to ensure children and youth have a voice, that they are properly represented in Court proceedings and that they are full participants in matters relating to their welfare.
- The recommended changes to the Guidelines ensures a child-empowered voice while ensuring that the ethical concerns of counsel are addressed.

QUESTIONS?

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