



## **Do We Need to Improve the Procedures Employed by the Office of the Children's Lawyer in the Resolution of Custody and Access Disputes?**

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We are certainly due for a re-evaluation of the procedures employed by the Office of the Children's Lawyer in the resolution of custody and access disputes. The procedure itself, which consists of either the assignment of a legal representative or a clinical investigator to assist the parents and the Court in the resolution of a custody and access dispute, is generally unproblematic. What is problematic is the procedure employed by the clinical investigator in determining and reporting to the Court its recommendations respecting the resolution of the custody and access dispute, which are then so heavily relied upon by both the parents and the Court in determining incidents of custody and access, whether at an interim or final stage of the court proceedings.

### ***The Aftermath of Mayfield v. Mayfield*<sup>1</sup>**

This procedure was reviewed by the Family Justice Review Committee ("the Committee") and its report, entitled *The Report on the failure of the Ontario's Office of the Children's Lawyer to serve the best interest of the children and families*<sup>2</sup>, was released on March 15, 2002 ("the Committee's report"), nearly a decade ago. The Committee's report purported to evaluate the overall performance of the Office of the Children's Lawyer and to address the deficiencies in its performance. However, the Committee's report was focused primarily on the case of *Mayfield v. Mayfield*<sup>3</sup> and the clinical investigator's inexperience and delay in the preparation and production of her report to the Court. Since the Committee's report, there seems to have been more emphasis placed on expedience in the determination and reporting of the clinical investigator's recommendations to the parents and the Court.

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<sup>1</sup> [2001] O.J. No. 2212 (S.C.J.).

<sup>2</sup> *Report on the failure of Ontario's Office of the Children's Lawyer to serve the best interest of child and families*, In the matter of *Mayfield v. Mayfield*, The Family Justice Review Committee, March 15, 2002.

<sup>3</sup> *Supra*, note 1.

## ***Expanding the Clinical Investigation Process***

The involvement of the Office of the Children's Lawyer in a custody and access dispute is entirely at its own discretion. However, once the Office of the Children's Lawyer agrees to become involved in a custody and access dispute, it follows a very simple protocol in determining whether to assign a lawyer or clinical investigator. The Office of the Children's Lawyer will request, in addition to the previously completed custody and access intake forms, all of the pleadings filed by the parents in the court proceedings, as well as all of the orders made by the Court in respect of custody and access. Where a clinical investigator is assigned, as opposed to a lawyer, he or she will interview the parents, the children (if appropriate) and collateral sources. He or she will also observe the parents with the children in what is determined to be an appropriate environment, such as the children's respective homes and/or schools. This is the general investigative procedure employed by the clinical investigator in the preparation of a report to the parents and the Court, known as the Children's Lawyer Report ("the OCL Report"), which contains its recommendations in the resolution of the custody and access dispute.

With time being of the essence in both the resolution of custody and access disputes (as stated time and again by the Court) and the preservation of the public purse which funds the involvement of the Office of the Children's Lawyer in such disputes, the investigative process has been abridged such that the clinical investigator will meet with each parent once or twice at the most, place a brief telephone call to each of the collateral sources identified by the parents or involved with the family (such as the police or child protection agencies), obtain a report from the police or the child protection agency if available, conduct one observation visit between each parent and the child, and attempt an interview with the child, but if unable to do so, conclude the investigation so as not to waste any more time or money on the investigative process. The abridgment in the investigative process has proven, in my experience, to be a costly mistake for both parents and the Court. The abridgment may yield a report within a three (3) month period, but it comes at a risk.

If a more thorough and comprehensive investigative process, albeit more time consuming, yielded a more reliable report, I doubt very highly that parents, the Court or the public purse would be offended by that process if it spanned more than a six (6) month period. The main concern in the Committee's report was that there was so much time wasted by the clinical investigator in initiating and completing the investigative process. What added insult to injury was that the OCL Report released by the clinical investigator (who was as fresh as a fish out of water) after a six (6) month period, was completely unreliable and proved to be nothing more than a waste of time and money. I would venture to argue that, if the clinical investigator assigned to that case was both experienced and well-established, and equally thorough and comprehensive in her approach to the investigative process, the Committee may not have taken such objection to the time expended in the production of the OCL Report.

In my opinion, the investigative process employed by the clinical investigator should be expanded to allow for the following, at minimum: no less than three (3) interviews with the parents to understand fully their ability to meet the needs of the children, their objectives and their adaptability to a new parenting and/or time sharing arrangement; a co-operative effort between the clinical investigator and the parents to resolve the custody and access issues so

that the recommendations made by the clinical investigator are tailored to meet the emotional, social and financial needs of that particular family; where appropriate, the use of such forums as mediation to engage the parents in constructive dialogue on the restructuring of the family, time sharing arrangements and establishing a parenting plan; personal interviews with collateral sources; the use of recording devices during interviews with collateral sources, provided that they consent, to ensure that all information is accurately recorded and reported to the Court; requests for and the inclusion of written reports from the collateral sources in the OCL Report, where those collateral sources have pertinent information which the clinical investigator intends to rely upon in making its recommendations to the Court; no less than three (3) observation visits with the children and each parent in a neutral environment; and no less than three (3) interviews with the children, using a combination of both age appropriate and therapeutic strategies to build a rapport of trust with the children and better understand their particular needs, their relationship with each parent, and what parenting arrangement would best meet their needs.

While this process may require more time and effort on the part of the clinical investigator, provided that certain other criteria are met, it may ultimately yield a more reliable OCL Report and result in less Disputes being filed by parents and/or their lawyers, which in turn should reduce the amount of time and money the Office of the Children's Lawyer would generally invest in reviewing and responding to such Disputes. The additional steps indicated are neither drastic nor should they be any more time consuming. They do require, however, that the clinical investigator remain focused throughout the process on the needs of the family to which he or she is assigned. That being said, the clinical investigator should carefully consider and weigh any concerns raised by the parents and/or the children that may have a bearing on the new parenting and/or time sharing arrangement and should be open to updating both the parents and the Court at different stages of the court proceedings on the validity and/or development of those concerns, even after the OCL Report has been released.

### ***Developing a Rapport of Trust and Confidence with the Child(ren)***

Frankly, the investigative process employed by the clinical investigator is far too superficial. The family is much more complex than contemplated by the process, which in turn fails to focus on the individual needs of the family, and specifically the children. For example, one reality which is so often overlooked by the clinical investigator in the interview process with children is that some if not most children need to develop a rapport of trust and confidence with an individual before opening up to him or her. To most children, the clinical investigator is a stranger who is about to probe into their very private and often conflicted world. These children may not be willing to speak to or interact with the clinical investigator at all. They may become reclusive or introverted during the interview process. They may outright refuse to speak with the clinical investigator or avoid him or her altogether. They may dodge questions or distract the clinical investigator with non-sensical conversation. Most of these children would otherwise respond to the process if the clinical investigator took the time and effort required to build a rapport of trust and confidence, and to enable the child to feel that it is o.k. to open up to him or her. These children should not be considered an aborted mission but rather children in need of more time and effort to engage in the interview process. One (1) interview with such a child would be entirely unproductive. Regardless of what the clinical investigator may report following such an interview, that information would be of no value to the parents or the Court.

### ***Spotting the Red Flags***

Depending on the children's age, their reluctance or resistance to the interview process may very well be a red flag for the clinical investigator and worth exploring further. For example, a parent may be responsible for the children's unwillingness to participate in the interview process and this sort of control, influence or manipulation by a parent is relevant to the resolution of the custody and access dispute. Other times, children may say something which is so off the cuff or unusual that it should be investigated further, as opposed to being treated as an isolated or spontaneous statement which is casually referenced in the OCL Report as having little to no importance. Statements made by children directly impacted by a family breakdown, regardless of their age, should never be taken lightly. The clinical investigator should explore further the children's motivation or reason for making such statements. These children are worth the time and money expended in the involvement of the Office of the Children's Lawyer to either advocate on their behalf or assist their parents and the Court in resolving the custody and access dispute which has a direct impact on their wellbeing. Unfortunately, the time and money expended on interviewing the children is not commensurate with the importance of the OCL Report in the resolution of custody and access disputes, and this disparity is a costly one because it comes at the expense of silencing the children impacted by the OCL Report. In my experience, the clinical investigator has rarely exercised his or her discretion to conduct more than one (1) interview with the children, notwithstanding the fact that the children were either unwilling to open up to the clinical investigator or made certain statements that warranted further investigation. This is particularly alarming in cases of parental alienation, where one parent has a strong hold on the children and is attempting to isolate the children from a relationship with the other parent. In such cases, the clinical investigator would need to spend more time with both the parents and the children to identify such a concern which can easily be overlooked by a clinical investigator, whether experienced or not, during a single interview with the alienating parent and/or the children.

### ***Determining the Right Environment for Child(ren) to Freely Express Themselves***

Another concern with the procedure employed by the clinical investigator in interviewing the children and in conducting an observation visit between the parent and the children is the environment in which it takes place. Interviews with the children and observation visits normally take place in the children's respective homes or school. While the prevailing school of thought is that these are the environments which are familiar to the children and in which they will feel comfortable and safe, I beg to differ. Interviewing children is not an easy task, granted, particularly when their age or stage development pose an added issue. However, what can make it increasingly difficult for children to speak openly with a clinical investigator is the very environment in which the interview takes place. The clinical investigator needs to determine which environment is the best environment for the children to feel both comfortable and safe to speak as openly and honestly as possible with the clinical investigator. A child may be afraid to open up to and tell the clinical investigator about a parent or any concerns they he or she may have in respect of that parent's ability to care for him or her, if that child is being interviewed in the home of that parent. The child may feel guilty about saying something to undermine that parent or to place that parent in any perceived trouble by speaking about him or her to the clinical investigator. Some parents actually coach their children not to say anything to the clinical investigator that would result in the children being taken away from that parent and by doing so instill fear in the children so that they do not speak to the clinical investigator about that parent.

Where an observation visit between a parent and the children takes place in the home, that parent may instruct the children not to do or say anything that would result in any perceived trouble for that parent, in advance of the observation visit. With that parent putting their best foot forward during the first and only observation visit and the children being afraid to do or say anything that would result in any perceived trouble for that parent, it is extremely easy for the clinical investigator to walk away from that observation visit with a completely false impression (albeit a great first impression for that parent) of that parent's relationship with the children, their ability to parent the children and meet their needs. The charade is often difficult for even the most experienced clinical investigator to pick up on and can result in a recommendation that is detrimental to the best interests of the children. In order for the clinical investigator to fully appreciate the complexity of the relationship between a parent and the children within the family context and how that plays out in their daily lives and within their respective homes, there should either be multiple observation visits conducted in their respective homes or, where the home is not an appropriate environment because of the pressures or influence described, the observation visits should take place outside of the home. The home itself can be an influencing factor for the children, particularly where the observation visit takes place in the home of a parent who has a strong hold of or control over the children, their views and preferences.

Where the interviews with the children are conducted while the children are at school, as opposed to at their parent's home, they may likewise not be willing to speak with the clinical investigator. The children may feel embarrassed or exposed by the clinical investigator's presence at their school, particularly where their peers or teachers may be present in classroom. In the case of younger children, the toys, activities and/or games that surround them in their classrooms will often distract them from the presence and effort of the clinical investigator to engage them in the interview process.

That being said, my experience has taught me that at times, a clinical investigator may be unable or unwilling to lend any credence or weight to the concerns expressed by a parent in the interview process, notwithstanding the various indicia during the investigative process confirming that such concerns are warranted and should be investigated further, and which would ultimately alert the clinical investigator to the potential risks highlighted above. For example, in a case<sup>4</sup> where it was blatantly obvious that parental alienation was a concern and that one parent had launched a smear campaign against the other parent in an effort to pit the child against the other parent, and there was clear indicia of both, the clinical investigator conducted the investigation as if there were no such concerns to be investigated. Meanwhile, the pre-adolescent child had clearly demonstrated an alignment with one parent against the other; attributed blame for the breakdown in the family to one parent; consistently disobeyed and disrespected one parent; rejected the culture and ethnicity of one parent and embraced that of the other parent; and persistently stated that they wished to be in the care of one parent to the exclusion of the other (who was in fact their primary care giver until the breakdown of the family occurred and who was pressured into consenting to an order relinquishing custody of the subject child). During the observation visit, the child and the 'alienating' parent often spoke

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<sup>4</sup> When I refer to a case as an example, it is a case in which I represented a parent, but cannot disclose the name of that parent, and the Office of the Children's Lawyer (particularly a clinical investigator) was involved with the family.

in their native language in the presence of the clinical investigator, who permitted it without having an interpreter present and without understanding the language spoken. They left the clinical investigator on the main floor of their home while they retreated to the second floor for a substantial period of time to “pray” together. The clinical investigator did not find any of this remarkable or questionable, nor did he take any steps to explore further the clear indicia that the child was being influenced and/or controlled by one parent and pitted against the other.

In another case, where it was clear that one parent had a violent and uncontrollable temper, had physically assaulted the other parent, and was relentlessly speaking ill of that parent to the children while they were in his care, the clinical investigator attended for a single observation visit between that parent and the children in the home of the children’s uncle and allowed all persons present, including the parent, to speak with the children in their native language without having an interpreter present or understanding the language spoken. In fact, the clinical investigator allowed the uncle, who had been involved in the family conflict and had spoken ill of the other parent to the children, to act as the translator throughout the observation visit. The clinical investigator did not take into consideration any of the concerns raised by the parent afflicted by the violence in respect of the other parent, their family members, their collective mistreatment of her and their influence over the children, but rather allowed an observation visit to take place under circumstances which should have otherwise been deemed to be inappropriate. In her report, the clinical investigator did not suggest that there was anything inappropriate about the circumstances under which the observation visit took place nor did she schedule a follow up visit with a certified interpreter present and with no other family members involved in the visit or the translation. In both cases, the clinical investigator turned a blind eye to concerns raised in advance of or during the observation visit which should have been investigated further. Whether this was done as part of a conscious effort to streamline the process and save both time and money for the Office of the Children’s Lawyer, or whether the clinical investigators simply lacked the know how to identify concerns and investigate them further, remains unknown.

### ***Interviewing Collateral Sources***

Speaking of translation, another concerning aspect of the procedure employed by clinical investigators is the manner in which they interview collateral sources. Often, the collateral sources are interviewed over a brief telephone conversation, leaving a huge margin for error between what is actually stated and what is noted by the clinical investigator during the conversation. In my experience, collateral sources are often misquoted, misinterpreted and/or misunderstood. The OCL Report may not accurately reflect the contents of the telephone conversation between the collateral source and the clinical investigator, and does nothing to bring to light the collateral source’s reasons for making certain disclosure. In cases where the collateral source is the police or a child protection agency, it is easier to obtain written reports and/or records concerning their involvement with the family and therefore there is less of a margin for error in conveying that information to the Court. However, there are cases where child protection agencies, for example, engage in a telephone conversation with the clinical investigator *in lieu* of providing a report and/or copies of their records. I distinctly recall a case where a counselor, who had been involved with a child for a considerable amount of time and who was retained by the parents to isolate the motivation for the child’s concerning statements to both parents amidst allegations of impropriety and manipulation following the breakdown of the family, was contacted by the clinical investigator but was unable to provide the investigator

with a comprehensive verbal report given that she was still working with the child. She did, however, during their telephone conversation, raise several red flags concerning a parent's control of the child, the child's fear of speaking of that parent and that parent speaking ill of the other parent to the child. The counselor indicated that she would continue to work with the child in respect of these concerns. The clinical investigator misquoted the counselor when reporting the counselor's disclosure, and in addition, did not heed the counselor's caution vis-à-vis the conduct of that parent when making time sharing recommendations to the Court. The clinical investigator either completely misunderstood the counselor's concerns or completely underestimated those concerns. Once the OCL report was released and brought to the attention of the counselor, the counselor was surprised that she had been misquoted and her concerns were overlooked. In addition, the child protection worker involved with the family did not provide a written report until after the OCL Report was released. The OCL Report focused primarily on the disclosure made by the child protection worker during a telephone conversation.

While interviews conducted in person, recorded on consent, and supported by a written report and/or record may result in some delay, it would be worth the wait if it ensured that the disclosure made by the collateral source was accurately reported to the Court and properly contextualized. A clinical investigator may be easily distracted by the "note-taking" aspect of the telephone conversation and miss out on what is being said or fail to ask pertinent questions, both those which he or she has prepared in advance and those which are necessitated by the information being provided. Clinical investigators should also be prepared to follow up with certain collateral sources, particularly those which are involved with the family and are anticipated to be so for a considerable period of time as the family begins to restructure.

### ***Interim Reports and Updating the Court***

That being said, there seems to be a general unwillingness by clinical investigators to maintain their involvement with a family and to provide updates to the Court in cases where there should be a gradual approach taken to the resolution of the custody and access dispute. In such cases, the OCL Reports may be released on an interim, without prejudice basis, and on the premise that a more comprehensive and complete report will be released at a later, yet finite, date. The interim report may assist the parents and the Court in resolving some of the issues and may highlight for the Court the issues which should not be resolved until further information is made available to both the parents and the Court. While it may not be necessary to maintain the clinical investigator's involvement in all cases, there are certainly those cases where, for example, an important collateral source has limited information prior to the release of the OCL Report but more substantive information after its release, as a result of having spent more time with the family or the children. There are also cases where the family is in such turmoil that it would be too premature to conclude the investigation and release a report without allowing that family to stabilize before doing so.

### ***Getting the Credentials Up Front***

Last but not least is a concern which permeates all other concerns. The clinical investigator's experience or lack thereof can weigh heavily on the investigative process and the quality and/or reliability of the OCL Report. When parents are responsible for paying for the services

of a counselor or a social worker to assist them and their children in the restructuring of their family following a breakdown, they seem to be more inclined to research the credentials and experience of the social worker to ensure that they are getting their monies' worth. Once the Office of the Children's Lawyer is involved, there is no cost to the parents, other than indirectly through their tax dollars. As such, there is less likely to be any inquiry into the credentials and experience of the clinical investigator. At the same time, many clinical investigators do not make it a habit of disclosing their credentials or experience to the parents at the outset of the investigative process, unless they are asked to do so. The parents should be made privy to this information from the onset and be given choice to decline the clinical investigator if they are not satisfied that he or she has sufficient credentials or experience to entrust him or her with the difficult task of investigating the custody and access issues and providing recommendations to the Court in respect of resolving such issues. In *Mayfield v. Mayfield*<sup>5</sup>, the parents may not have chosen to proceed with the clinical investigator if they were made aware of the fact that it was her very first clinical investigation. Giving parents the option of "opting out" of a clinical investigator from the onset may raise other concerns, such as parents opting out of clinical investigators often and without just cause. However, limiting the "opting out" option and contracting or employing clinical investigators with substantive experience working with children of all ages in the context of family breakdowns and the restructuring of families should minimize this concern.

### ***Recapping the Recommendations and a Final Note to the Reader(s)***

Digesting the various concerns and formulating ways in which to address these concerns, such that they are minimized or eliminated altogether, is not an easy feat and may be an exercise in futility. I will nonetheless venture to make the following recommendations, based on my experience as a family law lawyer and on my review of the case law in Ontario concerning the involvement of the Office of the Children's Lawyer (in particular clinical investigators). The recommendations are simple and many of them are embodied in the foregoing article: (a) more time and money should be allotted to the investigative process, generally, so that the clinical investigator is not unduly limited in the number of times that he or she can meet with the parents and the children, especially where it is important that the clinical investigator establishes a rapport of trust and confidence with the children to enable the children to feel comfortable with him or her during the investigative process; (b) special consideration should be given to the environment in which children are interviewed and/or where observation visits take place; (c) the concerns of both parents should be taken into consideration during the investigative process and explored by the clinical investigator; (d) red flags should be identified and explored further; (e) interim reports may be released and updated at a later date, if necessary to ensure that all of the issues have been addressed and the report is complete; (f) the involvement of the clinical investigator should be maintained to allow for such an update; (g) collateral sources should be interviewed in person and recorded with their consent, otherwise written reports should be provided; (h) the credentials and experience of the clinical investigator should be made known from the outset and parents given a limited option of "opting out"; (i) clinical investigators contracted or employed by the Office of the Children's Lawyer should have substantive experience working with parents and children of all ages in the breakdown and restructuring of families; (j) parents should play a co-operative role, where possible, in the restructuring of the family and the resolution of the custody and access dispute; and (k) where there is a language barrier, certified translators should be retained

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<sup>5</sup> *Supra* note 1.

routinely to assist in the investigation. The recommendations may sound simple and perhaps too simple to make any significant difference in the process and ultimately the reliability, comprehensiveness and accuracy of the OCL Report, but they may at least force the clinical investigators to view the family through a kaleidoscope and appreciate its complexity in making recommendations that will be instrumental in restructuring the family.

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