



Clinical Services at the Office of the Children's Lawyer

By Lucy McSweeney and Nancy Webb¹

The Office of the Children's Lawyer [“OCL”] is an independent law office operating within the Ministry of the Attorney General, Victims and Vulnerable Persons Division. An article published in Matrimonial Affairs in February 2012 raised some concerns about the clinical services delivered by the OCL in custody and access disputes.² In response, this article attempts to provide an overview of the role and process of the OCL in custody and access proceedings, with a focus on clinical service delivery, and in so doing to provide correction and clarification with respect to the issues raised in the February article.

With a mandate deriving from legislation, the OCL protects the personal and property rights of children and youth under 18 in family law, civil litigation and trusts/estates matters. Its staff of 80 includes 25 in-house lawyers, and 10 in-house clinicians.

In the personal rights (family law) area, the OCL provides both legal and clinical services. Twelve staff lawyers supervise approximately 400 fee-for-service lawyers across the province who represent children in custody and access, child protection, secure treatment and adoption cases. With respect to our clinical work, our Provincial Manager of Clinical Services, Nancy Webb, leads a team of 10 regional supervisors, all with a Master of Social Work and extensive clinical experience, who in turn supervise approximately 250 clinicians located across the province.

In 2011/2012, lawyers represented children in 1,338 new custody and access matters and 2,365 new child protection matters. Clinicians investigated 1,358 new cases and provided assistance to lawyers in 678 new matters. Although each day new cases are opened, and completed cases are closed, at any given time the OCL carries a steady volume of over 10,000 files across our organization, serving approximately 20,000 children.

In the current economic climate, faced with continually high service demands, the OCL is mindful of the need to deliver our services in a cost-effective manner. To that end various efficiencies are being realized in a process of organizational improvements, including updates to our customized case management software.³ It has been suggested that cost-saving measures may be adversely affecting how OCL handles the clinical investigations it undertakes. We would like to clarify that no changes have been made that impair or constrain the investigative process undertaken by clinicians preparing reports under section 112 of the *Courts of Justice Act* [“CJA”].

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² Vaccaro, Ivana. “Do We Need to Improve the Procedures Employed by the Office of the Children's Lawyer in the Resolution of Custody and Access Disputes?” *Matrimonial Affairs* 24:1 (February 2012).

³ Black, Adam. “Voice for the Vulnerable: A Chat with Ontario Children's Lawyer, Lucy McSweeney” *JUST Magazine* (August 2012) at 39.

OCL assistance in Custody and Access Cases – the legal framework

There are two different ways in which our office may become involved in a custody and access dispute. We are appointed by court order pursuant to sections 89(3.1) and 112 of the *CJA*. The OCL has discretion as to whether we accept the appointment by the judge.⁴ The decision to accept or reject a case includes a consideration of a list of criteria, which is published on our website.⁵ The OCL does not have to provide reasons for accepting or rejecting a custody and access matter, although we take steps, where possible, to assist parties to understand why a case has not been accepted.⁶ The vast majority of children in the OCL’s current custody and access caseload are living in what is often described as “high-conflict” families.

Custody and Access – Legal Representation of children per ss. 89(3.1) of the *CJA*

When it accepts a referral in a section 89(3.1) *CJA* involvement, the OCL assigns a lawyer to provide legal representation to a child(ren).⁷ There are a number of steps that child’s counsel takes prior to advocating a position on behalf of our clients. These include: multiple interviews with our child clients, speaking with the parents, and collecting information from various collateral sources (e.g. schools, coaches, doctors, Children’s Aid Societies) that are relevant to the case. In taking a position on behalf of the child, counsel always attempts to ascertain the views and preferences of the child and considers:

- (a) the independence, strength and consistency of the child’s views and preferences;
- (b) the circumstances surrounding those views and preferences; and
- (c) all other relevant evidence about the child’s interests.

After taking these steps to inform him or herself about the child’s wishes and relevant life circumstances (described as the “views and preferences, in context”), OCL counsel identifies the position to be taken in the litigation on behalf of the child(ren). That position is always disclosed to the parties prior to attending court, during a disclosure/settlement meeting, which is generally held at the office of the lawyer acting for the children. The parties themselves (usually the parents) and their counsel (if they are represented), are invited to attend. The children are not present. If a settlement is not reached at the disclosure meeting, the matter proceeds to court. In a custody and access case, the parties may reach an agreement at any stage, and where this happens, child’s counsel will not continue with the litigation,⁸ but may assist the parties in crafting the minutes of settlement and explaining to the child client(s) the terms of the agreement.

Where settlement is not reached and the dispute proceeds to court, the OCL will advocate the position on behalf of the child, and it is then the role of the judge to make the final “best interests” determination. At trial it is open to all parties, of course, to present evidence in support of their position, including evidence that supports or contradicts that of the other parties or of the OCL. Once this has been done, and submissions have been made, the court will ultimately make a decision regarding the child’s best interest.

Custody and Access – Clinical Investigations per section 112 of the *CJA*

⁴ *Bhajan v Bhajan*, 2010 ONCA 714 at para. 79; *Novoa v Molero*, 2007 ONCA 800, [2007] O.J. No. 4591.

⁵ Office of the Children’s Lawyer, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/>>.

⁶ *Dabirain v Dabirian*, [2004] OJ No 846; *B(AC) v B(R)*, [2010] ONCA 714, (2010) 104 OR (3d) 368. The court may suggest that a case be assigned in a certain manner, such as requesting a section 112 or a lawyer and a clinician, but the OCL makes the ultimate decision. The court may suggest, but cannot order that a specific lawyer or clinician be assigned to a matter.

⁷ In some cases, particularly those presenting more complex issues, the OCL assigns a clinician to assist the lawyer (this type of role is referred to by OCL as a “clinical assist”). The clinician assists the lawyer, with their clinical expertise, in the process of formulating a position on behalf of the child client(s). Although working as a team, the clinician takes direction from the lawyer with respect to the management of the case.

⁸ If a settlement is reached, OCL counsel does not proceed with the litigation, as it is an agreement in a private dispute between parties that can be withdrawn from the court by the parties.

In a section 112 *CJA* involvement, a clinician is assigned to investigate and prepare a report to the court. The clinician follows essentially the same process as outlined above: interviewing the parties, children, and obtaining information from various collateral sources. The end result of a clinical investigation is different, however, in that a Report is produced for the court, which assists the judge in the determination of what arrangements are in the best interests of the child(ren). The judge makes the ultimate decision. Unlike the position we take in a section 89(3.1), the OCL clinician may make recommendations which highlight what they consider to be factors to consider when the court is identifying the best interests of the child(ren).

Clinicians follow a protocol that is consistent with the standards of practice for conducting child custody evaluations set out by the College of Social Workers and Social Service Workers, the American Psychological Association, and the Association of Family and Conciliation Courts.

i. Clinical Updates and Interim Reports

We routinely conduct updates, however, we will not provide an update where there is no significant change in circumstances, as this can serve to encourage protracted litigation and will not meet the legal test required by the court to vary an Order. In recent years, the OCL has developed a procedure by which an interim Report may be filed. The decision to file an interim Report is based on the specific child and family's needs. In some cases, a longer involvement is contraindicated because the child(ren) are better served by a more speedy resolution.

ii. Best Practices – Clinical Investigations

We are continually evaluating our procedures to ensure they keep current and are consistent with accepted best practices. The OCL follows “best practice guidelines”, which align with international standards. While complying with these standards, clinicians are required to exercise their clinical judgement to identify, for example, what steps are needed to complete a comprehensive investigation. Each investigation is designed to address, and to highlight for the court, information relating to the specific needs of the child(ren) and family. This may mean, for example, that in some instances we conduct two observation visits, or additional interviews with parents, children or collateral sources.

A few comments regarding the OCL's approach to meeting with and interviewing children: the specific approach taken for a family may differ with respect to the determination of the appropriate environment for interviews. When conducting a clinical investigation, the OCL clinician asks children where they feel most comfortable meeting, and request their permission to attend their school. Where a child expresses discomfort, we respect his or her wishes and talk about alternative location options. We always request to interview children privately. We do not interview children in their classroom in the presence of their peers or teacher. A clinician may attend a daycare or preschool to observe a child with limited verbal skills, however, the child would not be asked questions about their custody and access dispute. Clinicians are trained and keenly aware of the need to establish rapport and are attentive to a child's comfort within an interview.

We traditionally spend more than one hour interviewing each parent and encourage them to provide us with all relevant information that may assist us in understanding their perspective.

iii. Hiring and Supervision of OCL panel Clinicians

We take great care in selecting our clinicians. A clinician may be new to our panel; however, they always bring to their work with us a degree in a mental health discipline, and extensive experience working with children and families. We closely train and mentor new clinical panel members. All new clinical panel members are initially assigned one case and are expected to consult with their Regional Supervisor at each step of the investigation. Clinicians receive training twice annually and extensive supervision. For example, the OCL provides ongoing training in interviewing children and in the best practices relating to children's stages of development.⁹

⁹ Mitnick, Mindy. “*Improving Your Interviews With Children*”, Ministry of the Attorney General for Ontario, Office of the Children's Lawyer, Spring Professional Development Toronto (26 June 2007). See e.g. Dr. Jean Clinton,

Every OCL panel clinician is required to consult with his or her supervisor on each of their cases: every section 112 *CJA* Report is read by their Regional Supervisor prior to filing with the court. A clinician's observations, clinical decisions and recommendations are discussed and reviewed in collaboration with their Regional Supervisor to ensure that they are focused on helping the parties and the court understand and meet the needs of the child(ren). This approach also enables the OCL to ensure compliance with our statutory obligations and the established professional standards for conducting custody and access evaluations.

The information that forms the basis of the Report is comprehensive and carefully collected. The OCL's clinicians strive to provide an accurate but succinct picture of their observations and recommendations. Where the parties disagree with the information or feel that more information should be available to the court, they may of course supplement that information or present it to the court through their representative.

iv. A note about the notes

All notes taken by the OCL clinicians are carefully transcribed.¹⁰ Notes are taken with care and in accordance with the best practice guidelines established by the Ontario College of Social Workers and Social Service Workers. Where the parties feel that there is an issue with the information relayed from the collateral source, they may submit additional evidence to the court. Parties have the right to cross-examine the clinician at trial and may seek an Order for cross-examination of the clinician out of court, prior to the hearing of a motion for custody and access.¹¹ Parties may also file a dispute to the Report if still unsatisfied.

v. The role of the OCL in facilitating settlement

Most of the custody and access cases with OCL involvement (legal or clinical) settle outside of court and never go to trial. This is frequently due to the resolution efforts of the lawyers and clinicians. The OCL's Intake Criteria require that we take only cases where other resolution efforts that should have been attempted, are exhausted. OCL lawyers and clinicians do not play the role of mediator, in the traditional sense – we are interested parties (i.e. appointed on behalf of the child) and as such, cannot undertake the role of mediator. However, our professional staff will make significant efforts to facilitate a resolution that conforms to the recommendation of the clinician in a section 112 *CJA* involvement, or the position counsel has taken on behalf of the child(ren) client(s) in a section 89(3.1) *CJA* involvement.

Whether additional efforts by OCL are required is determined on a case by case basis, e.g. multiple interviews of the parents, collaterals or children. Our office has statutorily mandated functions and accordingly, we fulfill our role and try to best assist the parties in coming to a resolution, however, we are not a mediation service. We encourage and support the parties in seeking alternative resolution where possible. However, where resolution is not possible in a custody access case, the OCL does not drive the litigation. It is the parties' responsibility to bring the matter forward to court for a final resolution.

Conclusion

In conclusion, with respect to our custody and access work: every case we take on starts with a request, sometimes a plea, by a judge to please help a child by bringing in some legal or clinical help to move a family's conflict toward resolution. In doing this work we are offered, each time, a privileged window into the world of a child and a family, usually a family in pain and in crisis. The OCL is respectful of the efforts most parents make, often supported by family law counsel, to resolve their differences and focus on the needs of their child. In the

"Experience and Brain Development" Ministry of the Attorney General for Ontario, Office of the Children's Lawyer , Spring Professional Development, Toronto (June 2011).

¹⁰ In the case of a section 89(3.1) *CJA* involvement, rather than a section 112 investigation, the notes are subject to solicitor and client privilege.

¹¹ *Copelan v Perreault*, [2006] O.J. No. 5672, (2006) 44 RFL (6th) 225 (Ont. Ct. J.).

majority of cases which are referred to us, however, the parents, despite clearly loving their child(ren), have lost sight of the child(ren)'s needs during the course of protracted litigation. Where this has happened, OCL involvement is effective, in the majority of cases, in helping families re-focus their energies on their child(ren) and reach a resolution of the litigation.

To be clear, while we are, because of our role, on the child's "side" in the dispute, this does not mean we are "against" their parents: our role, at its most basic, is, first, to help the parents, through focusing on the child's needs, to work out their differences without further court assistance; and if that is not possible, to help paint a picture for the court of the child's life and the strengths and challenges of each of the parents. We acknowledge that the process of having family matters dealt with in a court process can feel exposing to families, and do our best to respect those feelings while performing our court-appointed role. We know that everybody in the litigation wants what is best for the child(ren) in the family.

Let's keep up the dialogue

Times are changing and the OCL is engaging in operational and strategic planning to ensure that we continue to provide our needed and valuable services to the children of Ontario, and to do so in a timely and cost-effective manner. As clarified earlier, the OCL has not implemented any measures that circumscribe or impair the investigative process undertaken by clinicians preparing section 112 CJA reports.

The OCL could not do its custody and access work without the commitment and expertise of the private legal and clinical professionals on our panel (many of whom also represent and work with parent clients): thank you for enabling us to continue helping children and families. And to those who believe that OCL could do better: we would like to hear from you – please let us know what you think. We value dialogue and feedback from the bench, bar, families and community stakeholders – to do the best for the children, we need to hear it all. Let's keep sharing ideas and moving forward!

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