



Parenting Orders for the Adult “Child” of the Marriage

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Table of Contents

Ontario Bar Association	4
Executive Summary	4
Principles Drawn from Recent Appellate Case Law	5
Who Is an Appropriate and Willing Representative?	7
<i>Appointment of the Public Guardian and Trustee to Act for Adult Child</i>	8
<i>Amicus Curiae</i>	9
<i>Privately Retained Counsel</i>	9
<i>Funding</i>	9
<i>Bias Issues</i>	10
<i>Capacity Issues</i>	10
<i>Safety</i>	10
<i>OCL</i>	11
Recommendation	11
<i>Public Guardian and Trustee</i>	11
<i>Office of the Children's Lawyer</i>	12
Conclusion	13



Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public, and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Family and Child and Youth Law sections. Members of these sections represent a wide range of clients within the family justice system, both in litigation and various alternative dispute resolution processes. They have significant expertise in provincial and federal family law legislation, case law, and applicable Court rules across the full spectrum of family law issues.

Executive Summary

It is recommended that the mandate of either the Office of the Children's Lawyer ("OCL") or the Public Guardian and Trustee ("PGT") be expanded to explicitly include representation for adult children living with a disability¹ that are engaged in a family law proceeding. Specifically, those that are captured under the definition section of the Divorce Act, RSC 1985, c 3 (2nd Supp) ("*Divorce Act*") under subsection (b) of the definition of "child of the marriage" ("section 2(1)(b)"), which includes those that are "the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life."

This amendment is required because the Ontario Court of Appeal (ONCA) in *J.F.R. v. K.L.L.*, 2024 ONCA 520 ("*J.F.R.*") (later affirmed by *D.F. v. R.W.F.*, 2025 ONCA 129 ("*D.F.*")), has held that adults living with a disability are presumed to be capable, and procedural fairness requires

¹ Terminology Note: We use the term "adults living with a disability" throughout the submission for consistency. However, we acknowledge that language preferences vary and evolve over time. Some may prefer identity-first terms, while others prefer person-first terms. Our terminology choice is not intended to exclude or diminish either preference



that they have counsel to represent them. However, in practice, some are struggling to access their own counsel because these claims do not fall under the mandate of any publicly funded agency and hiring private counsel can be financially or logistically difficult.

Litigants, counsel, and judges are now expending precious public resources and Court time in their efforts to determine how to implement *J.F.R.* In addition to the impact on the families left in limbo, this leads to a significant waste of funds as counsel from multiple government agencies spend time and attend Court debating on their roles. Assigning this role to an existing agency, either the PGT or OCL, will save significant Court and government resources, and Ontario's family law system will better reflect the Court's recommendations in *J.F.R.* regarding procedural fairness, reducing further litigation and potential for appeals.

Principles Drawn from Recent Appellate Case Law

J.F.R. and *D.F.* both addressed parenting orders for an adult with Down Syndrome. *J.F.R.* outlined the approach that the Court must follow to determine the threshold issue of its jurisdiction over an adult "child" living with a disability as defined in the *Divorce Act*.² The Court has jurisdiction for the purpose of making parenting orders for the adult child if they are a "child of the marriage" by virtue of their disability.³

The principles below must be followed:

- 1) The orders "should never be made without input from, participation of, or independent legal representation for the adult child...that parties cannot agree to apply the definition of a "child of the marriage" to their adult child without input from the adult child and Court oversight." If parties come to such an agreement, the Court must take on a "gatekeeping role" by inquiring into the adult child's position on the issue."⁴

² "Child of the marriage" means a child of two spouses or former spouses who, at the material time... (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life."

³ *D.F. v R.W.F.*, 2025 ONCA 129 ("DF") at para 58.

⁴ *DF* at para 59.



- 2) There must be specific evidence that speaks to the decision-making capacity of an adult child who is unable to withdraw from parental care in relation to the particular order sought. Capacity is context specific. Parties cannot rely on “generic assessments made for unrelated purposes.”⁵
- 3) “In the absence of a prior capacity determination relevant to the orders sought under the Act, an adult whose capacity is called into question and is potentially affected by the order should have the following procedural safeguards:
 - a) Notice/service of the pleadings and materials upon the alleged incapable person; and
 - b) Independent counsel for the alleged incapable person because legal representation is key to the adult child being on notice of the application.”⁶

In summary, if the Court determines that the adult child has capacity, it does not have jurisdiction and the proceeding is over. If the Court determines that an adult child does *not* have capacity, the Court has jurisdiction to make parenting orders. Depending on the circumstances, it may still be appropriate for the adult child to have counsel (as is given to minor children through the OCL).

The Court in *J.F.R.* found the mechanism for facilitating an adult child’s participation is rule 7(5) of the Family Law Rules: “(5) The Court may order that any person who should be a party shall be added as a party and may give directions for service on that person.” If the adult is a child of the marriage for the purpose of the order sought, Rules 4(2) and 4(3) allow for the appointment of an “appropriate and willing representative.” For adults, the Court identified that this representative may be the PGT if the PGT consents and there is no one else available.⁷

J.F.R. was an appeal of an interim parenting order for M., a 26-year-old with Down Syndrome. In allowing the appeal, the Court of Appeal outlined the approach that must be followed in

⁵ *DF* at para 60.

⁶ *DF* at para 61.

⁷ *J.F.R. v. K.L.L.*, 2024 ONCA 520 (“*JFR*”) at para 46.



determining whether an adult child is a “child of the marriage” pursuant to the *Divorce Act* for the purpose parenting orders,⁸ making the following findings:

- 1) There was a breach of natural justice (specifically the right to be heard or *audi alteram partem*) because M. did not have the opportunity to obtain counsel and was not served with the materials.⁹ The psychologist’s report expressing M.’s views and preferences ordered by the motions judge was not an adequate substitution for participation.¹⁰
- 2) Adults have presumptive capacity and the onus of proof rests on the challenging capacity. This is a high threshold.¹¹ The threshold to establish capacity is low and nuanced.¹² Specifically, capacity is a spectrum and “the fact that a person is incapable of making decisions regarding property does not mean that they are incapable of making decisions regarding personal care. Further, a person may be capable of making decisions regarding some aspects of property and personal care, for example, one’s residence, but not others...”¹³
- 3) Since capacity is context specific, so is the definition of “withdrawal from parental charge” in the *Divorce Act*. Put another way, capacity needs to be assessed in relation to the specific order sought. Without a prior determination of incapacity *relevant to the order sought*, an adult is presumed capable and needs to be served and given the opportunity to obtain counsel.¹⁴

Who Is an Appropriate and Willing Representative?

While the Court of Appeal sets out the steps that must be taken when two parties are disputing a “parenting” order for an adult child, the practical aspects of how this is to take place, and who

⁸ *DF* at para 58.

⁹ *JFR* at para 18 and 23-26.

¹⁰ *JFR* at para 19.

¹¹ *JFR* at para 29 and 32.

¹² *JFR* at para 27 and 29.

¹³ *JFR* at para 28.

¹⁴ *JFR* at para 38. This approach was later affirmed by *D.F. v. R.W.F.*, 2025 ONCA 129.



is to pay for it, are unresolved. The dearth of cases since *J.F.R.* and *D.F.* demonstrate that the Court and litigants are struggling with how to implement the caselaw.

Even if the adult child is appointed as a “special party” per the ONCA’s direction, the “appropriate and willing representative” is not clear. The adult child is entitled to their own lawyer. The mechanisms to provide representation to disabled adult children are as follows:

- Appointment of the PGT;
- *Amicus Curiae*;
- Privately retained counsel either through a legal aid certificate or through a private retainer.

In practice, none of these mechanisms as they currently stand are appropriate.

The lack of a specified procedure for appointing counsel for adult children of the marriage has created a gap that undermines the ability of litigants and the Courts to ensure that the adult child has access to fundamental rights of natural justice and creates waste as multiple agencies are contacted to try and address the same issue and use Court time at multiple case conferences.

Appointment of the Public Guardian and Trustee to Act for Adult Child

Parties may bring a motion to declare the adult child a party to the proceedings and ask for the appointment of the PGT which is the route identified by the Court in *J.F.R.* However, in practice, the PGT is not automatically accepting these cases, or directing them to proceed under the Substitute Decisions Act, 1992, SO 1992, c 30 (“*SDA*”) (despite the concurrent jurisdiction of the *SDA* and *Divorce Act*), leaving adult children without representation in the *Divorce Act* proceeding. Additionally, *J.F.R.* indicates that an adult child must have representation before there is a capacity determination as they are presumed capable and require independent counsel.



The PGT is a representative of last resort and can decline to act, if there is another appropriate person who can be appointed to represent the adult child. However, in family law proceedings, it is difficult to find someone outside of the conflict to do so.

Amicus Curiae

In both *J.F.R.* and *D.F.*, the Court of Appeal was assisted by counsel appointed as *amicus curiae*, but this is not an appropriate mechanism to rely on for future cases. Appointment of *amicus* in family law cases is rare. Counsel appointed as *amicus* are funded by the Ministry of the Attorney General through Legal Aid Ontario. The Ministry of the Attorney General has challenged appointments in family law cases (not always successfully) and directed the Court to other options.¹⁵ Courts have generally appointed *amicus* to assist unrepresented, unruly and disruptive litigants in order to assist the Court in moving a matter forward.¹⁶ Counsel acting as *amicus* have no solicitor-client relationship with any party, and their role is only to assist the Court. This may have been a stop-gap solution to facilitate the appeal rather than an actual solution for adult children broadly.

Privately Retained Counsel

Private counsel, through Legal Aid Ontario or private funding, are usually inaccessible to adult children living with a disability.

Funding

Many adults living with a disability do not have funds to pay for their own lawyer. If only one parent pays for the lawyer, there is an appearance of bias. Some adults living with a disability may qualify for a legal aid certificate but may struggle to actually go out and hire their own lawyer for the reasons outlined below.

¹⁵ *Morwald-Benevides v. Benevides*, 2019 ONCA 1023.

¹⁶ *Ibid.*



Bias Issues

It is almost impossible for an adult child to hire private counsel without one parent raising allegations of bias against the other. Adults living with a disability, by virtue of their disability but also by virtue of being young adults who have never hired a professional before, may require assistance to connect with counsel which often comes from the parent alleging they have capacity. At paragraph 28, the Alberta Court of Appeal in *Puszczak v. Puszczak*, [2005 ABCA 426](#), stated with respect to minor children:

If counsel is to be appointed for the child, it is imperative that the counsel, at the outset, be free from the appearance of alignment with the position of one of the parents. This is particularly so where the child's interests may conflict, at least on the face, with the interests of one of his or her parents.¹⁷

In Ontario, parties must ensure the order is made pursuant to Rule 4(7). In *V.F. v. J.F.*, [2016 ONCJ 759](#), counsel acted for a child without such an order in a manner that aligned with one party and was ordered to pay costs personally. While these cases are about minor children, the same principle applies for adults living with a disability. Perceived alignment with one parent's side is a distraction from the task of analyzing the person's capacity.

Capacity Issues

Private retainers can also present liability issues for counsel because, while an adult child may have capacity (or presumed capacity) with respect to the specific issue being litigated, they may not have capacity to sign counsel's retainer agreement or give instructions on procedural issues or other broad issues in the case.

Safety

In addition, there is no screening, training or public roster of individuals who could act for adults living with a disability who are involved in a parenting dispute between their parents.

¹⁷ *Puszczak v Puszczak*, 2005 ABCA 426 at para 28



This is different from panel lawyers who are appointed to represent minor children by the OCL, or section 3 counsel who are appointed under the *SDA*.

OCL

The OCL currently only provides services for minor children and is not available to adults living with a disability. These services range from full legal representation to obtaining a “Voice of the Child Report” on discrete issues. Their mandate is rooted in section 112 of the Courts of Justice Act, RSO 1990, c C.43 (*“Courts of Justice Act”*), which states:

112 (1) In a proceeding under the *Divorce Act* (Canada) or the Children’s Law Reform Act in which a question concerning decision-making responsibility, parenting time or contact with respect to a child is before the Court, the Children’s Lawyer may,

(a) cause an investigation to be made on all matters concerning decision-making responsibility, parenting time or contact with respect to the child;

(b) cause an investigation to be made on matters specified by the Court related to decision-making responsibility, parenting time or contact with respect to the child; or

(c) meet with the child to determine the child’s views and preferences with respect to matters that may include decision-making responsibility, parenting time or contact.¹⁸

Recommendation

We recommend that the mandate of either the OCL or the PGT be expanded to explicitly include representation for adults living with a disability engaged in a family law proceeding per section 2(1)(b) the *Divorce Act*.

At the first case conference, the individual should be added to the proceeding as a special party and representation automatically ordered in order to comply with the legislation and the case law.

Public Guardian and Trustee

Under section 3 of the *SDA*,¹⁹ the Court can direct the PGT to arrange for legal representation for a person whose capacity is at issue under the *SDA*, and the person is deemed to have

¹⁸ *Courts of Justice Act*, RSO 1990, c C.43, s 112(1).

¹⁹ *Substitute Decisions Act*, 1992, SO 1992, c 30, s. 3:



capacity to retain and instruct counsel. This is not available to adult children living with a disability in *Divorce Act* proceedings. This provision should be added explicitly to the *Courts of Justice Act*, respecting adult children so that “section 3 counsel” can be appointed to represent the presumptively capable adult child.

In the current state of the law without this provision, litigants and the Court have struggled to engage the PGT on this issue. “Section 3 counsel” are also trained and experienced in dealing with capacity issues and would have the requisite expert knowledge in this area if their scope was expanded.

Office of the Children’s Lawyer

Expanding the mandate of the OCL is another option. Section 112 of the *Courts of Justice Act* states that the OCL is engaged when a “question concerning decision-making responsibility, parenting time or contact with respect to a child is before the Court”. Given that the definition of “child” under the *Divorce Act* includes adult children living with a disability, we believe that the OCL’s mandate could be expanded without needing to change the legislation itself.

The OCL already has the infrastructure to neatly engage in a family law proceeding. However, the OCL does not accept all cases. Under the *J.F.R* framework, the OCL’s mandate would specifically need to be expanded so that they accept all applications from adult children where subsection (b) of the definition of “child of the marriage” of the *Divorce Act* is engaged.

A challenge in expanding the mandate of the OCL is that not all OCL panel lawyers may be experienced in dealing with client with disabilities or capacity issues in the same way as section 3 counsel. It is therefore recommended that additional training be provided to panel

Counsel for person whose capacity is in issue:

3 (1) If the capacity of a person who does not have legal representation is in issue in a proceeding under this Act,

(a) the Court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person; and

(b) the person shall be deemed to have capacity to retain and instruct counsel. 1992, c. 30, s. 3 (1).



members or that a special “sub-panel” of OCL lawyers be established who are experienced in dealing with capacity claims and adults with disabilities.

Conclusion

While the recent Court of Appeal decisions provide a strong legal framework emphasizing autonomy, capacity, and procedural fairness for adult disabled children, significant systemic and practical barriers persist. Adult children adults living with a disability require automatic representation from either the PGT or OCL to save resources and Court time.

Despite the Court of Appeal rulings, there appears to be a continued legislative gap facing adult children in disputes about them between their parents. Unlike children under the age of eighteen, who can have Court appointed counsel, adult children have limited and far inferior options available to them, which overly complicates litigation in an already burdened system.