

**LEGAL REPRESENTATION FOR CHILDREN AND YOUTH
PROJECT REPORT**

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FOR THE
OFFICE OF THE CHILD AND YOUTH ADVOCATE**

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PURPOSE OF REPORT

Under the agreement entered into between the consultant and the Office of the Child and Youth Advocate, the consultant was asked to gather information from a legal perspective regarding the current process for appointing legal representation for children and youth in matters under the *Child, Youth and Family Enhancement Act (the Enhancement Act)* and the *Protection of Children Involved in Prostitution Act (PCHIP)*.

The consultant was asked to engage a small number of lawyers from across Alberta who have experience in the representation of children, as well as provincial family court judges who have heard cases in which children or youth have had legal representation, or in which they have directed that legal counsel be appointed.

With this information, the consultant was asked to develop a detailed description of the current process for appointing counsel for children and youth and for payment of services provided. Specifically, the consultant was asked to identify issues regarding the current process for appointing and paying legal counsel, and to describe the process that occurs between the time a lawyer is appointed to represent a young person and payment for services is requested.

SCOPE AND LIMITATION OF REPORT

The consultant was asked to provide information on the above issues based on information gathered from a random group of lawyers and judges. The opinions expressed in this report are not intended to be an exhaustive list of issues as identified by the legal profession and judiciary. Rather, the opinions expressed in this report are representative of the major themes and issues that emerged from the consultant's interviews with lawyers and judges. As such, this report does not provide recommendations or a comprehensive analysis of the opinions of the legal profession and those of the judiciary.

Further, upon consultation with the Office of the Child and Youth Advocate, this report does not include feedback from the Legal Aid Society of Alberta in regard to the above issues. As such, information regarding alternative modes of service delivery, including the staff lawyer model (as adopted at the Family Law Office) has not been provided in this report. Consideration of the benefits and drawbacks of all modes of legal service delivery should be solicited in any further consultations undertaken by the Office of the Child and Youth Advocate, as the range of legal services currently provided to children and youth under the *Enhancement Act* and *PCHIP* includes the use of rosters and staff lawyers.

Names of individuals interviewed have been removed due to confidentiality concerns. However, approximately 18 lawyers from across the province were contacted and asked to provide feedback. Of the lawyers contacted, 12 lawyers from across the province responded and were interviewed. While the majority of these lawyers practice in Edmonton and Calgary, approximately 5 of these lawyers practice in rural areas. Six provincial court judges were asked to consider providing feedback. Of the judges contacted, one provincial court judge responded and was interviewed.

ISSUES

- A. What is the current process for appointment of counsel for children and youth and for payment of services provided?
- B. What is the process that occurs between the time that a lawyer is appointed to represent a young person and payment for services is requested?
- C. What areas of concern exist regarding the current process for appointment and payment of legal counsel?

FINDINGS AND ANALYSIS

A. What is the current process for appointment of counsel for children and youth and for payment of services provided?

Matters under the *Enhancement Act*

Section 112 of the *Enhancement Act* allows the Court to appoint counsel for the child at the request of the child, guardian of the child, or a director if the Court is satisfied that the interests and views of the child would not otherwise be adequately represented.

If such an appointment is granted, the Court refers the young person to the Legal Aid Society of Alberta or to the Minister of Justice if the Court is satisfied that no legal assistance is available to the young person. For children under 12, the referral is made to Alberta Justice. Children 12 years of age and over are referred to Legal Aid for counsel.

Appointments handled by Alberta Justice

Matters referred to the Minister of Justice are handled by the Family Law Division of Alberta Justice. The procedure followed by Alberta Justice is straightforward. Upon appointment of counsel, the clerk's office at the Provincial Court notifies Alberta Justice of the appointment. Upon notification, Alberta Justice initiates contact with lawyers on the roster maintained by Alberta Justice.

The current process followed by Alberta Justice is that lawyers are contacted in sequential order, starting at the top of the roster. The first lawyer who is available for a particular case is appointed. If counsel is appointed for a group of siblings, the referral is made to Alberta Justice if at least one of the siblings is under the age of 12.

Alberta Justice does not maintain set criteria for lawyers who wish to be included on the roster. Practice differs between the offices of Alberta Justice in Edmonton and Calgary. In Edmonton, the roster was initially somewhat selective and limited to lawyers who have a demonstrated interest in the field, experience in child intervention matters (formerly called child welfare matters) and a reputation as a skilled practitioner. However, over the last few years, the list has become open to individuals who have expressed an interest in being included on the list, regardless of their qualifications.

In Calgary, there are a number of criteria used for lawyers who wish to have their name placed on the roster. Interested lawyers must apply to be included on the roster. Criteria for inclusion on the roster include: ability to relate well to children, familiarity with child intervention matters, courtroom skills, Legal Aid experience, and reputation as a practitioner.

Since the development of the training course on the representation of children, both rosters have been sealed due to the pending transfer of this area of responsibility to the Office of the Child and Youth Advocate. A significant number of lawyers who participated in the training course have expressed interest in having their names added to the roster.

Lawyers assigned to specific cases receive retainer letters from Alberta Justice, and bills from counsel are sent to the local Children's Services Authority. The reporting letter sent by counsel for the child is sent to both Alberta Justice and Children's Services. According to the managers at Alberta Justice involved in this process (Reeva Parker in Edmonton, and Jonathan Nicholson in Calgary), bills are generally accepted without dispute and have rarely been inordinate.

The hourly rate for lawyers appointed from the roster is \$72 per hour and \$82 per hour for experts who have been retained by counsel. One lawyer indicated mixed success with negotiating higher expert remuneration with certain Children's Services authorities.

In rural areas, a lawyer who is not on the roster may be appointed if the lawyer is present in court at the time the order is made. In general, applications are less contested in rural areas. Accordingly, fewer cases in rural areas have counsel appointed for the child. Information can be obtained from Alberta Justice as to the number of Section 112 appointments made, though it was roughly estimated by Reeva Parker, Alberta Justice, that counsel is appointed in approximately 30 - 40% of cases in urban areas.

Appointments handled by the Legal Aid Society of Alberta

While the Family Law Office in both Calgary and Edmonton handle the majority of cases under the *Enhancement Act* and the *PCHIP Act*, referrals are made to the Legal Aid list if the office is unable to provide representation either due to conflict of interest or lack of resources, or if the client requests alternate counsel.

There is no criterion used by the Legal Aid Society of Alberta for lawyers who wish to be placed on the list. However, Legal Aid makes the decision as to which lawyer is contacted if a lawyer has not been specified. Further information is required in order to determine how this decision is made.

Payments made under Legal Aid appointments follow the Legal Aid tariff regime.

Matters under the *Protection of Children Involved in Prostitution (PCHIP) Act*

The *PCHIP Act* provides a young person with the right to be informed of the Director's reason for confinement, the length of time of confinement, the details of the show cause hearing, the right to attend the hearing, the right to contact counsel, and the telephone number of the Legal Aid Society of Alberta.

The Family Law Office operated by Legal Aid generally handles all matters under this legislation unless there is a conflict. Regions outside of Edmonton and Calgary are handled through the Legal Aid list.

B. What is the process that occurs between the time that a lawyer is appointed to represent a young person and payment for services is requested?

As expected, the interviews conducted by the consultant confirmed that there is wide variation in practice in this area of law. Acknowledging the wide degree of variation in practice as to the representation of children, the information and opinions gathered by the consultant identified the following as some of the common practices and related issues that exist in the representation of children in matters under the *Enhancement* and *PChIP* legislation.

1. Determination of Conflicts of Interest

A consistent theme that emerged from interviews was the privileged position of counsel for the child, and the special relationship of trust between a young person and the lawyer. It is therefore important for lawyers to be aware of potential conflicts that may impact the ability of the lawyer to be independent. Some of the following conflicts were identified:

- a. If a lawyer is appointed as counsel for siblings, it is necessary to determine whether conflicts exist that may require that the lawyer decline representation of all the siblings. Connected with this issue is recognizing the importance of sibling bonds, and the need to interview siblings separately where possible.
- b. The obligation of the lawyer to determine if conflicts of interest exist with either parent or any parties involved in the proceedings.
- c. Counsel for the child needs to determine if they are acting from an advocacy or best interests approach, and ensure that their role been explained to the client, other counsel, and the court. This is an area of potential conflict. The interviews revealed that lawyers generally appreciate the distinction between the two roles but that there is wide variation in practice as to the factors that determine the approach adopted by counsel, and how counsel reconciles the conflicts that may arise if a client is not able to provide instructions on all matters. One of the factors that helps determine the role of counsel is the approach used to assess capacity.

2. Determining Capacity of a Young Person to Give Instructions

Determination of capacity varies according to different philosophies and viewpoints. There is no case law that provides definitive instruction as to the assessment of capacity. Some of the issues identified in the interviews as important in determining capacity to give instructions included:

- a. Ability of the child to communicate.
- b. Maturity level of the child.
- c. Clarity and logic of the child's position.
- d. Whether the position of the child has been fully explored in an appropriate manner. Have appropriate supports (for example, therapists, or individuals that the child trusts) been used to assist counsel in determining the child's position? Have all options been fully explored with the child?
- e. Ability of the child to instruct on all matters or only certain issues. If a child has limited capacity, counsel needs to determine what role should be taken with respect to issues where the child may lack capacity. Opinion differs among lawyers as to the submissions that should be made to the court regarding matters in which the child lacks capacity.

3. Meeting the Child

Given the unique characteristics of children, important consideration needs to be given to various matters that may arise from a meeting with a child. This includes:

- a. Use of the meeting to provide an explanation of counsel's role and how it differs from other service providers and counsel for other parties.
- b. The need to maintain independence and boundaries with the child and between counsel for the child and other parties in the child's life. One lawyer noted that young children can tend to focus on a resilient adult, and that lawyers need to be careful in their relationship with children.

- c. Meeting with the child in a developmentally appropriate manner. This includes ensuring that communication is at an appropriate level, that the child is comfortable with the location of the meeting, and that the lawyer actively considers the number of meetings that would be appropriate. Again, practice widely varies with respect to the way meetings are conducted.

Given the unique needs of children, the need to assess on a case-to-case basis, and the comfort level of the lawyer with different approaches, many different approaches were identified. For example, preferences included meetings held at counsel's office, the child's school, in vehicles, at the child's home, or at restaurants. If a child is not able to provide instructions, certain individuals noted that it was useful to nonetheless observe and meet the child to gain an understanding of the child and their needs.

It was also noted that much information can be obtained by meeting with the child's therapist or other supports. The assistance of other supports in a child's life was identified as an important factor in allowing the lawyer to communicate effectively with the child.

4. Information Gathering

- a. Meeting with parents, counsel for each party, social workers, the children's advocate, therapists, neighbours, teachers, and any other potential sources of information. The interviews revealed that most lawyers considered it important to use a variety of methods to gather information about a young person and his or her needs and opinion. In addition to meeting with the young person, gathering information from professionals involved in the young person's life, the young person's family (or foster family) and other sources was identified as a priority, taking into account the benefits or disadvantages of engaging with the young person.

One lawyer indicated that if a significant number of professionals are involved with a young person (particularly those under the age of 9 or 10), he is reluctant to engage a young person unless, after talking with the professionals who are involved with the young person, he is satisfied that a meeting with the young person would be of benefit to the young person and would provide information that he would not otherwise have access to.

Meeting with other individuals involved in the child's life can also have the added benefit of providing the lawyer with assistance with some of the emotional and psychological issues related to the child and his or her family that may otherwise consume an inordinate amount of the lawyer's time.

- b. Review of relevant records, including school, health, and social services documents.
- c. Review of court documents.

5. Ensuring that the Child's Need for Appropriate Services is Brought to the Attention of Decision-makers. This could include:

- a. Access to siblings and or parents.
- b. Services that may be unique to a child's background, including cultural and religious issues.
- c. Health care.
- d. Education.
- e. Social services supports, including housing or in-home support.
- f. Provision of services to parents that impact on the relationship with the child, including counseling and parenting education.

6. Participation in Settlement Proceedings

- a. Use of mediation and ADR proceedings to facilitate resolution of cases. It should be noted that most individuals interviewed indicated that counsel for the child is in a strong position to facilitate settlement, and that this leverage should be used as much as possible. On the other hand, certain individuals expressed concern with the amount of cases that go to trial.

7. Participation in Court Proceedings

- a. Most lawyers felt that counsel for the child should be present at most, if not all, of the court proceedings. One issue identified was that counsel for the child is sometimes not treated by other counsel as a full party to the proceedings. Participation in all court proceedings would reinforce the important role of counsel for the child and ensure that the young person's views remain the central focus of any proceedings.

8. Preparation and Information Sharing with the Client

- a. Interviews revealed that the amount of information about the court process that should be provided to children was dependent on the age, maturity, and level of participation of the child in the proceedings.
- b. Accessibility to the lawyer was identified as an issue, as several individuals indicated that most children had minimal contact with their lawyer.

9. Determination of Evidentiary Issues

- a. It is important to determine the form of evidence that should be submitted to the court and the impact of the form of the evidence on the young person. Several interviews expressed the need to recognize the importance of the family unit and the need to preserve the relationship between the young person and his or her family and support system, in particular as related to the nature of evidence submitted to the Court.
- b. Assessments need to have been thoroughly reviewed by counsel for the child to determine their credibility and relevance.
- c. Depending on the child and the judge, a judicial interview may be appropriate. If so, care should be taken to ensure that the child has been adequately prepared for the interview.
- d. Alternate forms of communication by the child to the court may be appropriate. For example, a letter may be appropriate. Even if there is limited evidentiary value, it may be important to consider if the child's participation in any aspect of the proceedings would be beneficial to the child from an emotional or psychological perspective.

- e. Counsel for the child should ensure that all relevant evidence been presented to the court.
- f. If there is limited evidence available and counsel for the child seeks to make submissions to the court regarding the child's viewpoint, consent should be obtained from the court and the parties.

10. Final Actions

- a. Counsel may wish to explore if there are other legal issues in the child's life that may require legal advice or representation.
- b. The child should be given an explanation of the outcome of the proceedings.
- c. If there is an order, counsel needs to review the order for accuracy.
- d. If counsel wishes to withdraw representation or has been asked to by the client, counsel should explore what impact withdrawal may have on the child. Counsel may also need to assist the client in finding alternate counsel.

C. What areas of concern exist regarding the current process for appointment and payment of legal counsel?

Factors identified as areas of concern have been grouped into broad categories, with specific concerns and questions listed under each category. Following the interviews, it became apparent that certain themes were emerging. While these interviews can only be described as a random sampling of opinions in the legal community, it is hoped that the broad themes and questions identified will assist in the development of a process that is responsive and fair to the clients it serves.

There are a number of concerns that were identified that can be broadly defined as accountability issues. These issues include:

1. Accountability

- a. Should guidelines, rules or legislation be developed for the appointment of counsel?
 - i. Should young people have the right to determine which lawyer they wish to hire?

- ii. What are the benefits to having a separate appointment process for children under 12? Feedback indicated concern that the distinction between Legal Aid appointments and appointments for children under 12 can be problematic. For example, one lawyer indicated that on one occasion a judge appointed counsel for a sibling who is over 12 and did not appoint for the siblings under 12. Legal Aid was reluctant to appoint counsel for the sibling over 12 because counsel was not appointed for the siblings under 12.
 - iii. Is there the possibility of undue influence on children by social workers who do not wish the child to have a lawyer?
 - iv. Can a mechanism be developed to ensure that feedback from young persons is obtained as to the adequacy of the system?
- b. Should Guidelines, Legislation or Rules for the Role of Counsel be Developed?
- i. How can it be ensured that the voice of the young person is appropriately represented by counsel?
 - ii. Some rural practitioners indicated that while making sure that the role of counsel was clear, it was equally important for counsel to be flexible and assist in the identification of practical solutions.
- c. Development of Guidelines for the Qualifications of Counsel.
- i. Should practitioners have some experience representing parents in family law matters?
 - ii. In rural areas, is there a greater need to have an ability to foster good relationships with all the parties to the action?
 - iii. Knowledge of community resources was identified as important, as well as experience with social services.
 - iv. Certain individuals expressed the idea that difficult cases should go to lawyers with significant child welfare or child intervention experience.
 - v. It is important to note that there are no recognized specialties within the profession of law, and one lawyer wondered why additional requirements should be added in this area. Others commented that the system will weed out unqualified individuals as a matter of course, if training is available as an option.
 - vi. Most interviews indicated that it was highly important to have an understanding of mediation.
 - vii. The need for counsel to co-operate and access resources/support systems in the young person's life.
 - viii. Training opportunities (including mentorship and practical experience) for lawyers who wish to gain expertise.

- ix. The need for special skills and knowledge of special needs of a child, including means of communication, stages of development, cultural background, and basic psychology.
- x. The need to understand indicators of domestic violence and the impact on the young person.
- xi. Awareness of perception of bias and the importance of maintaining a practice that does not have the appearance of bias.
- xii. Several interviews conducted expressed that while ability was important, a keen interest and passion is needed to practice in this area.

2. Payment

The current structure for appointment of children provides different standards of remuneration, based on which organization is handling the appointment. This lack of uniformity creates a number of concerns. Among those identified:

- a. Adequacy of rates and tariffs, and different rates depending on the organization. Certain lawyers indicated that fees and expenses need to be reviewed on Section 112 appointments, as they are well below the standard rates charged by professionals such as psychologists. Others expressed concern that the special needs of children (including the need to meet children at a comfortable location) were not generally covered by the tariffs.
- b. Limited access to experts due to inadequate rates. Feedback was diverse, but there was concern over what is perceived to be a small bank of preferred experts, and the inequity of resources. Some felt that counsel can be stuck with experts hired by the department.
- c. Different appeal systems to negotiate bills.
- d. Generally, the Legal Aid billing procedure was regarded as overly complicated.

3. Evidence

The use of evidence in child representation is another area in which practices vary among lawyers and courts. The following concerns were identified:

- a. A limited pool of experts that is affordable and accessible.
- b. The adequacy of tariffs to remunerate experts.

- c. A lack of clarity as to the acceptability of lawyers presenting personal opinions and information to the court about the young person.
- d. The need to identify and speak to supports and resource persons in a child's life for information gathering purposes.

4. Resource Identification and Usage

The importance of obtaining information from resources and supports in a young person's life was a common theme. In general, it was acknowledged that lawyers for children need to be prepared to meet with numerous people involved in the child's life. Numerous comments were made regarding:

- a. The need for the lawyer to talk to support systems and the caregiver, who may be the best source of information about the child. In rural areas, it was stressed that good relationships are valued between all parties.
- b. The importance of the lawyer having knowledge of community supports.
- c. Using community supports and resources to assist the lawyer with other issues that may be present in a young person's life. Several lawyers expressed the idea that legal work is often compounded by social work issues. Therefore, the notion of working in tandem or as a team is very useful, if you are able to develop relationships with independent therapists or advocates for the child, such as the Children's Advocate. It is sometimes easier to obtain information through other parties who have ready access to schools, child welfare (intervention services) records, and other relevant documents.

5. Conflicts of Interest

Feedback received during the consultant's research indicated that the representation of children is ripe with potential conflicts. Important consideration needs to be given to developing a structure that avoids conflicts or the appearance of conflicts. Some of the conflicts identified as problematic include:

- a. Representation of siblings by the same lawyer or office.
- b. Representation of parents by the same law office.

- c. Representation of the Director by the same law office or organization.
- d. Perceived conflicts due to funding sources.
- e. Over alignment with one parent or caregiver.

Some of the interview comments included:

"The current system does not change your performance or competence. Everyone knows the bill goes to the social worker and the bill goes to the government...the conflict does not impact the independence...there will always be some level of conflict ...the Legal Aid Society is also a government institution"

"The appointments made through Alberta Justice look more partisan, though I didn't find that this was the case or that I felt pressure"

"FLO has the same conflict as appointments made through Alberta Justice, as the funding source is the same. While Justice represents the Director, FLO represents parents."

"On certain issues, the bench has a relationship with Director's counsel. This affects the dynamics with counsel for the child."

6. Accessibility & Selection of Lawyers

The current process for selection of lawyers from the roster maintained by Alberta Justice or the Legal Aid list revealed a number of areas of concern about accessibility and selection of counsel. Among these concerns:

- a. Lack of transparency in how lawyers are selected from the list at Legal Aid.
- b. Lack of transparency in how lawyers are added to the roster at Alberta Justice.
- c. Lack of transparency in how decisions are made regarding issues that concern the representation of children, including the development of the Legal Representation for Children & Youth project.
- d. Allowing a young person to choose his or her lawyer. The current system does not provide this option to young people, unless the referral is made from the Legal Aid list and not through the roster system at Alberta Justice or the Family Law Office.

- e. Lack of child-friendly office environments.
- f. Disagreement over where and how many meetings should take place with a young person.
- g. Lack of access to lawyer by client.
- h. Reluctance of counsel to attend all meetings and proceedings.

Some of the interview comments included:

"Simply going to the next name on the roster can be unfair. Lawyers should be given some time to respond." (referring to the system used by Alberta Justice. If a lawyer cannot be contacted within a short time frame, the next person on the list is contacted)

"The roster system at Alberta Justice is not fair. There is no formal application process or transparency as to how decisions are made with respect to your inclusion on the roster."

*"Legal Aid is rather mysterious; how do they go through the list?"
"The system is working fairly well. There are a few more hoops to jump through with Legal Aid but it works fairly well."*

"Secure treatment and PChIP matters are all done through the Legal Aid Family Law Office. This move took work away from the private bar."

"Kids should have choice of counsel - counsel should not be foisted on them. This goes for secure treatments also."

"The Legal Aid office could be less threatening and frightening when an application is being made by a child."

CONCLUSION

The legal representation of children and youth poses unique challenges to lawyers, judges, and the courts. Organizations that provide legal services to children and youth are in a unique and privileged position to help determine the practices and procedures by which services are delivered to children and youth.

The interviews conducted for the purposes of this report revealed that the representation of children by legal counsel poses a number of unique challenges from a practice perspective.

The interviews also indicated that a number of issues and concerns exist with the current process for appointment of legal counsel for children and youth in matters under the *Enhancement* and *PCHIP Acts*. While many issues and concerns were identified regarding current practices and procedures, a number of key themes emerged from the interviews that impact the development and maintenance of practices and processes that are responsive to the needs of children and youth. These themes included (1) accountability in regard to the appointment, role, and qualifications of counsel, (2) concerns about rates and tariffs, (3) evidentiary issues, (4) resource identification and usage, (5) conflicts of interest, and (6) accessibility and selection of lawyers. It is evident from the interviews conducted that there is a wide range in opinion on each of these issues.

While this report does not provide recommendations or a comprehensive analysis of the opinions of the legal profession and those of the judiciary, it is submitted that consideration of the concerns and issues identified in this report will assist the Office of the Child and Youth Advocate in undertaking further consultations and the development of policies and procedures.

Individuals who participated in the interviews provided thoughtful feedback and were keen to participate in the development of this project. By continuing to engage the legal community, the Office of the Child and Youth Advocate will be well-positioned to develop policies and procedures that are responsive to the needs of children and youth and the professionals who work within the system.