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INDEPENDENT CHILD LEGAL REPRESENTATION: A CONCEPT IN THE MAKING

RACHEL BIRNBAUM*

RÉSUMÉ

Les juges aux tribunaux de la famille ont souvent recours au Bureau de l'avocat des enfants en Ontario pour une représentation indépendante en justice des enfants ou pour de l'assistance clinique relative à l'obtention de renseignements afin de leur permettre de prendre des décisions éclairées dans l'intérêt supérieur des enfants touchés par une décision dans le cas des conflits relatifs aux droits de garde et d'accès. La représentation indépendante en justice des enfants donne aux enfants une voix au chapitre dans un processus auquel ils ne participent pas souvent, bien que les documents judiciaires portent leurs noms. La représentation de l'intérêt des enfants devant la Cour dans des conflits relatifs aux droits de garde et d'accès demande un engagement pour essayer de mieux comprendre les besoins cognitifs, émotionnels et comportementaux des enfants relativement à leur âge et leur stade de développement.

Cet article examine le rôle que joue la représentation indépendante en justice des enfants et explore les défis et les limites qui sont apparus dans ce processus de représentation des intérêts juridiques des enfants dans le cas de conflits relatifs aux droits de garde et d'accès. On a tendance à supposer que la représentation indépendante en justice des enfants est utile aux enfants, et cela en dépit de l'insuffisance de recherches publiées sur les résultats. Par ailleurs, on ne sait que peu de choses au sujet du processus utilisé par les avocats pour obtenir des informations sur le milieu familial de leur jeune client et sur la façon dont ils utilisent cette information pour aider leur jeune client.

L'auteure propose des changements au niveau du programme, de la formation et de l'élaboration des politiques en matière de représentation indépendante en justice des enfants au Bureau de l'avocat des enfants en Ontario. Travailler avec des enfants dont les parents sont en conflit ouvert requiert des compétences qui vont bien au-delà d'une simple connaissance des lois et des règlements.

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INTRODUCTION

Hilary Rodham wrote, “the phrase ‘children’s rights’ is a slogan in search of a definition”.¹ The author contends that independent child legal representation is a similar concept in search of a meaning.

Independent child legal representation in Ontario continues to be an evolving concept with respect to representing children’s legal interests before the court. Historically children had few rights and only recently have begun to be perceived as persons with independent rights and interests. The United Nations adopted the *Convention on the Rights of the Child* in 1989,² which recognizes the right of children to be heard in proceedings that affect their future, and in some cases the *Canadian Charter of Rights* may require that representation is to be provided to a child. In 1997, the Parliament of Canada created the Special Joint Committee³ on child custody and access and made recommendations for a more child-focused approach to family law policies. Of the forty-eight recommendations made, one recommendation addressed the need for a more child-focused collaborative approach on children’s views and preferences to be provided by independent legal representation of children.

There is an underlying assumption that having a lawyer represent a child before the court in either private (child custody and access) or public matters (child protection) is beneficial for children. A lawyer allows the child to have a voice in the proceedings. However, questions remain: (1) whose voice is being heard? (2) how can lawyers who are untrained in the social sciences understand and interpret child development and family dynamics while representing children in the throes of child protection proceedings and/or family law litigation? and (3) does child legal representation assist or exacerbate further delays in the resolution of these cases before the court?⁴

1. R. Rodham, “Children under the Law” (1973) 43:4 *Harvard Educational Law Review* 487.

2. Article 3 of the *Convention* provides that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

Article 9 of the *Convention* provides that “where the parents are living separately and a decision must be made as to the child’s place of residence”, the determination shall be made in “accordance with applicable law for the best interests of the child”.

Article 9(3) specifies that governments “shall respect the right of the child who is separated from one or both parents to maintain personal relationships and direct contact with both parents on a regular basis, except if it is contrary to a child’s best interests.”

Article 12 provides that children have a right to express their views freely in matters concerning them. [1992] C.T.S. 3.

See also: *For the Sake of the Children*, Report of the Special Joint Committee on Child Custody and Access (Ottawa: Parliament of Canada, 1998). Recommendation 3:22.4.

3. *Supra* note 2, *For the Sake of the Children*, 1.

4. M.D. Drews & P.J. Halprin, “Determining the Effectiveness of a Child in Our Legal System: Do Current Standards Accomplish the Goal?” (2002) 40 *Fam. Ct. Rev.* 40, 383–408; R. Joyal & A. Quéniart, “Enhancing the Child’s Point of View in Custody and Access Cases in Quebec” (2002) 19:1 *Can. J. Fam. L.* 173–92; E. Leeco, “Independent Legal Representation for Children in

These are important questions that need to be examined and explored in the absence of little, if any, empirical support to demonstrate either effectiveness and/or efficiency of child legal representation.⁵ This lack of supporting documentation is concerning, given the significant role that lawyers have in representing children's legal *and* emotional interests before the court. Equally concerning, from a policy perspective, is understanding whether or not independent child legal representation is an effective intervention for children.

To date, the literature about child legal representation has focused on the role that lawyers should assume when representing children in either child-protection proceedings or family-law-related matters.⁶ Yet the literature remains sparse and provides few best-practice approaches and/or lessons learned about the complex understanding of the role, processes, and systems (*i.e.* mental health, justice, educational) with which the children's lawyers are involved in representing children's legal interests before the court. Children do not live in isolation from their family environment, extended family, friends, and broader community. Therefore when representing children's interests, all of these systems must be considered. Lawyers representing children must have a working knowledge and understanding of systems (mental health, educational, medical, criminal and civil justice) and how they interrelate. Brooks⁷ argues that one of the difficulties facing many judicial officers and lawyers who represent children is that they continue to look for individual rights and respond with individual remedies that characterize the legal system.

An abundance of literature demonstrates the risks associated with separation and/or divorce when children are exposed to parental conflict, family violence, and unpredictable post-separation parenting arrangements.⁸ Yet there appears to be less available literature that addresses how legal advocates assist children in minimizing these

Custody and Access Cases: A Case Commentary of Strobridge" (1996) 34:2 Family and Conciliation Courts Review 303–19; L.E. Shear, "Children's Lawyers in California Family Law Courts: Balancing Competing Policies and Values Regarding Questions of Ethics" (1996) 34:2 Family and Conciliation Courts Review 256–302.

5. Birnbaum & McTavish (1999) conducted a survey of all Ontario judges about their views and comments regarding child legal representation and/or advocacy by clinical investigators at the OCL. The vast majority of judges believed that the OCL was an important resource to them in resolving matters.
6. E. Baker, "Assessing and Managing Allegations of Child Sexual Abuse: An Australian Perspective" (1997) 35:3 Family and Conciliation Courts Review 293–99; P. King & I. Young, *The Child as Client: A Handbook for Solicitors Who Represent Children*. Family Law (Bristol: Jordan and Sons, 1992); Shear, *supra* note 4; G.M. Thomson, "Eliminating Role Confusion in the Child's Lawyer: The Ontario Experience" (1983) 4 Can. J. Fam. L. 125–52.
7. S.L. Brooks, "A Family Systems Paradigm for Legal Decision-Making Affecting Child Custody" (1996) 6:1 Cornell J. L. Pub. Pol'y 1–23.
8. R. Emery, "Family Violence" (1989) 44 American Psychologist 321–28; J.B. Kelly, "The Best Interests of the Child: A Concept in Search of Meaning" (1997) 35:4 Fam. Ct. Rev. 377–87; N. Marcil-Gratton & C.L. Bourdais, *Custody, Access, and Child Support: Findings from the National Longitudinal Survey of Children and Youth* (Ottawa: Child Support Team, Department of Justice, 1999).

negative outcomes. What does exist also suggests that representing children requires more than legal “tools” in the courtroom.

The purpose of this article is threefold. First, the article will explore the role of child legal representation as it is practised in Ontario, specifically at the Office of the Children’s Lawyer, Ontario.⁹ Second, the article will highlight the challenges and pitfalls that have emerged over time in representing children’s legal interests before the court. This section will explore issues related to representation of children who may already be emotionally compromised as a result of their parents’ dispute and then being asked to provide their views and preferences about where they should live, with whom, and what kind of visitation, if any, they may want. Third, and most importantly, the author will provide recommendations on training and skills required for lawyers who represent children’s legal and emotional interests before the court.

BACKGROUND HISTORY

Ontario has the most comprehensive child legal representation program in Canada. The law in Ontario requires by statute that all children can be legally represented pursuant to the *Courts of Justice Act*¹⁰ and the *Child and Family Services Act*.¹¹

Child legal representation at the Office of the Official Guardian, as it was then known, was formally established in 1881 to safeguard the property and estate interests of children. In 1975, a shift in focus included the personal rights of children in custody and access disputes before the court, and in 1979 in child welfare proceedings before the court. The Office of the Children’s Lawyer¹² (OCL) operates as an independent law office within the Ministry of the Attorney General, Ontario.

The OCL has a history of intervening when children’s rights are at question. For example, the OCL was granted intervenor status in *Gordon v Goertz*¹³ before the Supreme Court of Canada. This case concerned a mother who wanted to relocate to Australia with her daughter. While the OCL did not take a position on the actual case, it did advocate that the only test was best interests of the child, and the court was under an obligation to judge the merits of the case solely on the best interest test. In 2000, the OCL intervened on behalf of the children in Walkerton, Ontario, following an incident that caused serious physical illness to children as a result of E. coli contamination in the water system. The OCL was also involved in obtaining compensation for

9. The focus will be on child custody and access legal representation.

10. R.S.O. 1990, c. C.43, s. 89(3.1).

11. R.S.O. 1990, c. C-11, as am. s. 38.

12. The name changed in 1994 to distinguish the OCL from the Office of the Public Trustee. The OCL consists of lawyers and clinical investigators. The OCL, “as provided for at law, ... investigates, advocates, protects and represents, in proceedings before the court and tribunals of Ontario, the personal and property rights and obligations of children” (Mission Statement, 1).

13. (1996), 19 R.F.L. (4th) 177 (S.C.C.).

children infected with tainted blood during the early 1990s investigation into tainted blood across Canada.

The OCL is a model for independent child legal representation that continues to enjoy high credibility and delivers quality representation at no cost to any child in Ontario. The Government of Ontario has supported the efforts of the OCL despite broader public policy that has focused on reducing the size and scope of publicly funded services.

The OCL provides a voice for the children who are more conspicuously absent and without voice. However, legal representation of children remains a complex form of advocacy, because the client is a child. Determining their views, wishes, and preferences needs to be balanced with the understanding that not all children know what is best for them because of their age, may not know what they want, particularly during times of family distress and turmoil, and can be influenced because of their vulnerability.

In Ontario, children from separating and/or divorcing families may be referred to the OCL for either a custody and/or access investigation (pursuant to s. 112 of the *Courts of Justice Act*), conducted by a clinical investigator,¹⁴ child legal representation (s. 89 (3.1) pursuant to the *Courts of Justice Act*), or a combination of both lawyer and a clinical investigator.¹⁵

All cases are referred to the OCL by way of a court order throughout Ontario. There is a referral criterion to the OCL published on the government website,¹⁶ which also explains the mandate, role, and intake criteria, and provides information about the OCL. The OCL has absolute discretion whether to even take on a case. Once a determination is made to accept the case, the OCL also has sole discretion to appoint a lawyer, a clinical investigator, or both, in child custody and access matters. There is no discretion in child-protection matters referred to the OCL, which are automatically assigned a child legal representative.

The OCL employs approximately 25 lawyers (property and personal rights) and 10 clinical investigators full-time, 156 fee-for-service clinical investigators,¹⁷ and over 400 lawyers in private practice across Ontario to represent and/or advocate for children's

14. In cases where the focus is on more clinical issues, a clinical investigator (mental health professional, with a background in the social sciences) gathers information about the children's family situation and makes recommendations on custody and access issues to assist the court in their decision making.

15. This third intervention is referred to as an assist. The clinical investigator collects information and assists child counsel when there are more clinical issues that need to be explored. While there is no statute that allows for this type of collaborative approach between a lawyer and a clinical investigator, the OCL has been using this form of intervention for many years. In part, this approach was a result of the decision in *Strobridge v Strobridge*, 42 R.F.L. 3d 154 (Ont Ct.J.) and 4 R.F.L. (4th) 169 (Ont. C.A.) (1994).

16. See <<http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl>>.

17. The majority of the clinical investigators have graduate training in one of the social sciences (psychology, social work, child development, or counselling).

legal interests before the court (personal and property). The OCL has a Policy Statement for both lawyers and clinical investigators that outlines their involvement with children and families. Lawyers maintain a solicitor–client privilege with their child clients. The clinical investigators have no privilege when conducting a section 112 pursuant to the *Courts of Justice Act*.

There are also training materials for clinical investigators that address the substantive issues involved in conducting an investigation and report for the court. The clinical investigators receive training twice a year in policy matters and clinical issues. The lawyers receive training once per year on various legal issues (*e.g.* evidence for children, relevant case law decisions). Over the years, the OCL has selected lawyers who bring not only important legal skills to the panel but have demonstrated an ability to work collaboratively with mental health professionals. The content of their training over the years has become more than just “legal training”. Additionally, the lawyers and clinical agents meet together at least once per year to discuss regional and clinical issues affecting their child clients.

An OCL annual newsletter and annual review are also published for all the stakeholders involved in the justice system as well as their agents (legal and clinical) in Ontario.

Family law is unique in relation to other areas of law. Family law deals not only with support and property issues, but more importantly, with children’s ongoing emotional, behavioural, and physical arrangements after separation. Their emotional and physical well-being is often determined by the outcome of the legal process. There are few, if any, cases that are more important for the justice system than those that decide the future well-being of a child. How do lawyers gather their information from their child clients to advocate on their behalf?

INFORMATION GATHERING BY LAWYERS

When lawyers undertake to represent children in child custody and access disputes, they meet with the child to discuss the child’s views, wishes, and preferences, collect information about the child’s family (meet with the child’s parents and/or other caregivers who may provide additional information about the child), and collect personal and professional information (*i.e.* from doctors, teachers, daycare providers, grandparents). On the basis of this information the lawyer formulates a plan on behalf of the child client. This “plan” should be the position of the OCL. How do lawyers understand what information to collect and how to interpret the information collected? How do lawyers handle situations with children who have learning problems and/or mental health problems who may not be able to articulate their views and preferences?

In the recent *Family Court Review: An Interdisciplinary Journal* (2005), writers from a variety of disciplines explore the challenges and limitations of determining child custody and access recommendations by mental health professionals (*i.e.* what clinicians can and cannot respond to when the question arises of who the custodial parent should be or when children should see their other parent). There is no literature that explores these very serious questions when child legal representation is involved.

There is a scholarly body of literature available on child custody and access assessments questioning the scientific methodology and validity of these assessments,¹⁸ the assessor's professional values and beliefs,¹⁹ and more recently the legal community's beliefs and attitudes about child custody evaluations.²⁰ There is no literature on the views and potential biases of lawyers who represent children before the court. Lawyers, like mental health professionals, have personal views and biases about parenting and families. The very nature of child custody and access outcomes is subjective.

Child custody and access disputes involve some of the most difficult issues that the justice system must deal with. In fact, children's very lives are at stake.²¹ Custody and access cases typically involve complex human emotions and fundamental questions of values and parenting styles, and they require inherently uncertain judgments to be made about a child's future well-being.²² A host of disputes that children's lawyers can become involved with when representing children's legal interests before the court include same-sex parenting, reproductive technology, alienation of a child against a parent, domestic violence, allegations of parental drug and alcohol abuse, mental health concerns about a parent, cognitive deficits and learning problems in a child,

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18. J.N. Bow & F.A. Quinnell, "Visitation Based Disputes Arising on Separation and Divorce" (2001) 40:2 Fam. Ct. Rev. 164–76; B. Bricklin & P.M. Bricklin, "Commentary: Custody Data as Decision-Theory Information: Evaluating a Psychological Contribution by Its Value to a Decision-Maker" (1999) 6:3 Clinical Psychology: Science and Practice 339–43; R.M. Galatzer-Levy & L. Kraus, *The Scientific Basis of Child Custody Decisions* (New York: Wiley and Sons, 1999).
 19. P.J. Caplan & J. Wilson, "Preliminary Analysis of the Law Society of Upper Canada's Questionnaire Survey of Mental Health Professionals Who Conduct Child Custody Assessments" in *Assessing the Assessor: What You Need To Know* (Toronto: Department of Education, Law Society of Upper Canada, 1990).
 20. J.N. Bow & F.A. Quinnell, "Critique of Child Custody Evaluations by the Legal Profession" (2001) 40:2 Fam. Ct. Rev. 115–36; K.A. LaFortune, "An Investigation of Mental Health and Legal Professionals' Activities, Beliefs, and Experiences in Domestic Courts: An Interdisciplinary Survey" (PhD diss., University of Tulsa, Oklahoma, 1997).
 21. We need only to turn to the news stories: "Jay Handle, 45, appeared in court for less than three minutes facing six counts of first degree murder in the deaths of his six children aged between 2 and 11 in the fire at the home" (Daniel Girard, "6 Children Feared Dead in B.C. House Fire" *Toronto Star* [12 March 2002]); "A Dundas father of four was gunned down at his front door yesterday after a bitter argument over child custody ended in gunfire" (John Burman, "Man Killed Outside Home" *Toronto Star* [22 August 2002]); "A father threw his five-year old daughter off a bridge onto the highway below and then jumped off himself ... He was going to kill himself and he was going to take his daughter to punish his wife for whatever *he* [emphasis added] thought she had done wrong in the relationship" (Colin Freeze, "Girl 5 Survives Plunge onto Highway 401 as Suicidal Father Dies" *Globe and Mail* [7 March 2005]).
 22. N. Bala, "Is the Justice System Helping Children? The Role of Advocacy and the Children's Lawyer" (Paper presented to the Symposium of Office of the Children's Lawyer of Ontario, Toronto, 28 November 2002); J.R. Johnston, "High Conflict Divorce," in David & Lucille Packard Foundation, eds., *The Future of Children: Children and Divorce* (Los Altos, CA: Packard Foundation, 1994) 165.

and parental wish to move away. How do lawyers represent and advocate for these children when they have only legal training? How do lawyers evaluate the medical and psychological information gathered about their child client and make recommendations to the family and the court in the absence of mental health assistance?

Birnbaum²³ reviewed 500 cases in which the OCL conducted an investigation and report and/or provided child legal representation between April 2002 and June 2004. The results demonstrated that the OCL is involved with the most highly conflicted families disputing child custody and access cases before the court. These cases involved children at risk for emotional and physical abuse as a result of their parents' separation. Additionally the parents and their children had been involved with multiple agencies (child welfare, mental health counselling, educational, and criminal justice systems) and have alleged serious parenting deficits about one another.

Therefore, it would appear that lawyers representing these children must not only have an understanding about the rules and the relevant law (*i.e.* the statutory and constitutional underpinnings) but also have a working knowledge of the literature on child development and family dynamics, interviewing children, and the importance of collaboration and communication when responding to children involved in custody and access disputes where family violence, in particular, is alleged.

CHALLENGES AND PITFALLS OF CHILD LEGAL REPRESENTATION AT THE OCL

Currently the standard for custody of and access to children is the "best interests of the child". The best interests test has been defined as myriad factors related to the interests of the child. The *Divorce Act*, R.S.C., 1985 chapter 3 as amended sets out the federal legislation under section 16:

1. A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or access to, any or all children of the marriage.
2. In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
3. In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
4. In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests²⁴ of the child and, for that purpose, shall take

23. R. Birnbaum, "Examining Court Outcomes in Child Custody Disputes: Child Legal Representation and Clinical Investigations", (2005) CFLQ, Vol. 24(2), 167-189.

24. *Best interests* is term that has been evolving over time and for which everyone (parents, lawyers,

into consideration the willingness of the person for whom custody is sought to facilitate such contact.²⁵

In Ontario, custody of and access to children is determined by section 30 of the *Children's Law Reform Act*,²⁶ which addresses similar factors related to the best interest of children.

judges, and assessors) has a different interpretation of its meaning. However, the Parliament of Canada introduced Bill C-22 last year, which directs the court to consider:

- a. the child's physical, emotional and psychological needs, including the child's need for stability, taking into account the child's age and stage of development;
 - b. the benefit to the child of developing and maintaining meaningful relationships with both spouses and each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
 - c. the history of the care for the child;
 - d. any family violence, including its impact on
 - i. the safety of the child and other family members,
 - ii. the child's general well-being,
 - iii. the ability of the person who engaged in the family violence to care for and meet the needs of the child, and
 - iv. the appropriateness of making an order that would require that the v. spouses to cooperate on issues affecting the child;
 - v. spouses to cooperate on issues affecting the child;
 - e. the child's cultural, linguistic, religious and spiritual upbringing and heritage, including aboriginal upbringing or heritage;
 - f. the child's views and preferences to the extent that those can be reasonably ascertained'
 - g. any plans proposed for the child's care and upbringing;
 - h. the nature, strength and stability of the relationship between the child and each spouse;
 - i. the nature, strength and stability of the relationship between the child and each sibling, grandparent and any significant person in the child's life;
 - j. the ability of each person in respect of whom the order would apply to care for and meet the demands of the child
 - k. the ability of each person in respect of whom the order would apply to communicate and cooperate on issues affecting the child;
 - l. any court order on criminal conviction that is relevant to the safety or well-being of the child <<http://www.parl.gc.ca/LEGISINFO/index.asp?Long=E&query=4280&Session=13&List=toc>>.
25. While it is not within the scope of this article to analyse the pros and cons of the legislation concerning the "best interest" of the child, there continues to be focus on providing the court with evidence regarding which parent is "at fault". Moreover, the literature is clear on the silent nature of family violence in particular. See M. Berkman, R.L. Casey, S.J. Berkowitz, & S. Marans, "Police in the Lives of Children Exposed to Domestic Violence: Collaborative Approaches to Intervention," in Peter Jaffe, Linda Baker, & Alison Cunningham, eds., *Protecting Children from Domestic Violence: Strategies for Community Intervention* (New York: Guilford Press, 2004) 153–71; P.G. Jaffe, L. Baker, & A. Cunningham, *Protecting Children from Domestic Violence: Strategies for Community Intervention* (New York: Guilford Press, 2004); R.A. Geffner, P.G. Jaffe, & M. Suderman, eds., *Children Exposed to Domestic Violence: Current Issues in Research, Intervention, Prevention, and Policy Development* (New York: Haworth Press, 2000); N.K.D. Lemon, "The Legal System's Response to Children Exposed to Domestic Violence," in *The Future of Children*, 67–83.
26. R.S.O. 1990, c. C.12 (CLRA).

There have been many different forms delineated in the literature on the role of the lawyer in child legal representation. The roles range from a strict adherence to what the child wants (the traditional lawyer role), to what the lawyer may believe is in the child's best interests (litigation guardian), to a friend of the court (*amicus curiae* role).²⁷ The OCL has opted for a combination of all three roles.²⁸

In another study by Birnbaum,²⁹ she interviewed twenty-nine OCL panel lawyers across Ontario who represented children in child custody and access disputes. All of the lawyers had more than five years of experience as a panel agent for the OCL, and all had considerable legal experience. Thematic analysis revealed that not all lawyers agreed on their role in court, and many found the role challenging, given the emotional nature of representing children. For example, some lawyers reported,

I think it is hard because you're always sort of walking the line between the wishes as opposed to the best interests, and I think the role is probably good at wishes unless we are going to get expertise [clinical] to assist us on a regular basis.

I am only allowed to advocate views and preferences, and what happens in a lot of cases is the parents go back and tell the child that basically you [the lawyer] did not advocate their position before the court, and that causes problems.

Children's views and preferences change over time, just like their age and stage of development, and they can be influenced during custody and access litigation, since children want to please both parents and not be caught in the middle. How do lawyers representing children in these matters know what is in a child's best interest without understanding and exploring the underlying emotional issues involved? How do lawyers advocate for their child clients, who may not know or understand what they want or even want to say what they want, for fear of losing both parents and/or caregiver?

Lawyers are trained in law school to advocate for their individual client, who is typically an adult client. Traditional law schools spend very little time on family law training and focus almost exclusively on financial support obligations (spousal and child support). Traditional family law training materials give short shrift to a child's emotional life during the chaos of separation and/or divorce. Only recently have law schools changed their focus in teaching family law and begun to appreciate the evolving nature of the family with all of its complexities (most notably, the Family Law Education Reform Project, co-sponsored by the Association of Family and Conciliation Courts, Hofstra University School of Law and the Center for Children, Families and the Law, 2005). This collaborative project in the United States is developing a course of study for law students

27. Baker, *supra* note 6; W.J. Keough, *Child Representation in Family Law* (Ithaca: LBC Information Services, Cornell Publishing International, 2000); Shear, *supra* note 4; Thomson, *supra* note 6.

28. R. Birnbaum & D. Moyal, "Visitation Based Disputes Arising on Separation and Divorce" (2002) 20:1 *Can. Fam. L.Q.* 37-53.

29. R. Birnbaum, "Hearing the Voices of Lawyers and Clinical Agents Who Represent Children in Child Custody and Access Disputes" (forthcoming) *Can. Fam. L.Q.*

that incorporates not just legal and substantive matters related to law but practical training in interviewing, counselling, mediation advocacy and understanding the family law system in a broader context while sharing and exchanging information with other disciplines (psychology, social work, and education).

Bala³⁰ argues that, given the uniqueness of children, there are inherent conflicts in representing their needs. He asserts that interviewing children and ascertaining their views about their circumstances requires sensitivity and good communication skills along with a knowledge and understanding of child development. His point is echoed by Garrison³¹ who evaluated the competence of children between nine and fourteen years of age to report their views on a custodial preference and a reason for their choice based on two hypothetical vignettes. The result was that children who can reason and express their views and preferences on a hypothetical situation absent emotional issues may not necessarily have the same ability under the pressures of child custody litigation. In a study by Wallerstein and Kelly,³² they found that children between the ages of nine and twelve are particularly vulnerable to aligning themselves with one parent against another. Grisso³³ suggests that adolescents' preferences are highly unstable and unreliable, because children of this age are still forming an identity.

Given the limitations identified in the literature about obtaining children's views and preferences, and given that the lawyers at the OCL represent mostly children typically six years of age and older, consideration needs to be given to these issues.

These concerns are echoed by the voices of many of the OCL panel lawyers who expressed dissonance with wanting to be a lawyer and knowing that much of their work is beyond their legal expertise: that they want to be lawyers and not "social workers".

For example:

The OCL expects lawyers to do things they are not trained for ... take complicated social work information, process it, and develop a position.

I have heard lawyers doing this work talk to one another, and so often we sound like social workers, and really unless you have a social work degree or background in some kind of social work ... I think lawyers should stick with what they do best, which is the law.³⁴

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30. N. Bala, "Is the Justice System Helping Children? The Role of Advocacy and the Children's Lawyer (Paper presented to the Symposium of the Office of the Children's Lawyer of Ontario, Toronto, 28 November 2002).
 31. E.G. Garrison, "Children's Competence To Participate in Divorce Custody Decision-Making" (1991) 20 *Journal of Clinical Child Psychology* 78–87.
 32. J. Wallerstein & J.B. Kelly, *Surviving the Break-up* (New York: Basic Books, 1980).
 33. T. Grisso, "Fathers, Children, and Joint Custody" (1997) 49 *American Journal of Orthopsychiatry* 311–19.
 34. Birnbaum, *supra* note 24.

Children's issues and interests are more than just legal and must be addressed by policy makers. How can children's interests be legally represented when their interests are so complex and intertwined with their emotional well-being? Fundamentally the good work that the OCL lawyers are doing on behalf of children could be compromised, because they are practising in an area that is beyond their expertise, and this could have serious negative consequences for children's future well-being (emotionally, behaviourally, and physically)³⁵ At the very least children are being empowered to make decisions that may have negative long-term consequences for them.

Having said this, many of the dedicated lawyers who represent children on behalf of the OCL in Ontario acknowledge these challenges and are willing to engage in a dialogue about more collaborative training with mental health professionals about the emotional requisites of child legal representation. It is also to the credit of the Ministry of the Attorney General, Ontario, and the Children's Lawyer of Ontario³⁶ that they to continue to provide an independent voice for children (legal and clinical) that is otherwise lost in the adversarial process. Even with the fiscal and political challenges that come with providing this extraordinary service on behalf of children in Ontario, the OCL remains steadfast in supporting children's interests. Judges continue to rely on the services of the OCL and the expertise they bring. Many of the lawyers are dedicated and hard working and believe in representing their child clients, despite the lack of financial reward.

However, from a public policy standpoint, if children's interests are truly paramount, then policy makers must also provide another set of tools for lawyers to use: clinical assistance in all cases involving children before the court. It should be mandatory for every child not just to be legally represented but also to have a mental health professional advocating for their emotional interests. To some extent the OCL already provides this service under the "assist" in custody and access cases only. However, the collaboration between lawyer and clinician needs to occur on a regular and consistent basis. The OCL is involved in complex and challenging family situations that demand clinical and legal advocacy.

FUTURE CONSIDERATIONS AND TRAINING NEEDS FOR CHILDREN'S LAWYERS

Child legal representation involves not only children's legal interests but also their future emotional interests. This requires that any lawyer who represents children in child custody and access disputes or child protection matters should have not only skilful negotiation skills and an understanding of the rules of court, but also an appreciation of children's developmental needs and the impact of family situations on the child.

35. This matter becomes of greater concern when lawyers are representing infants and toddlers in child protection matters.

36. Clare Burns has been the Children's Lawyer of Ontario since 2003.

The following recommendations may assist lawyers who represent children before the court. Essentially there needs to be a fundamental shift in the way children are being legally represented in Ontario. That is, children should have both a mental health professional and a lawyer advocating for their interest before the court.

Recommendation #1: All custody and access disputes should be conducted by a clinician with legal assistance, rather than follow the current model, which allows for legal representation alone and/or a clinical assist. The former approach would provide the child with the most beneficial means of having a voice in the proceedings.

Recommendation #2: Children's lawyers must continuously collaborate and train with clinicians. This also means that training manuals must be collaborative, to guide both disciplines. The expertise that each discipline provides can serve children well in the long run.

Recommendation #3: There needs to be ongoing research and follow-up among practitioners (lawyers and clinicians), researchers, and policy makers to evaluate the services being provided, their effect upon the child, and whether the services help the court in their decision making.

CONCLUSION

As a public policy response to hearing the voice of the child in family law proceedings, child legal representation in Ontario is a leader and model for other jurisdictions to follow. Yet more needs to be done. If policy makers really want to provide children with a means to voice their concerns and feelings, then collaboration between mental health professionals and lawyers is the most sensible and meaningful way to provide children with legal and emotional representation.

