

## **GUIDELINES FOR CHILD'S LAWYER PRACTICING IN THE YUKON**

Child's lawyer is appointed pursuant to Section 76 of the *Child and Family Services Act* and Section 168 of the *Children's Law Act* which states:

“the official guardian has the exclusive right to determine whether a child requires the appointment of a guardian, or separate representation by a lawyer or any other person...”

Child's lawyer may be appointed in wardship matters in Territorial or Supreme Court and custody and access matters in Supreme Court and only on the recommendation of the Court. These Guidelines apply to both matters.

### **I     GENERAL**

1. Any litigation involving a child should move forward quickly as it is important to minimize disruption and uncertainty for the child involved in litigation.
  
2. Throughout the proceedings, the child's lawyer should continue to communicate his or her views about the best interests of the child or the child's wishes, and preferences.
  
3. The child's lawyer must at all times be and appear to be independent, and any appearance of bias must be avoided.
  
4. Once the child's lawyer has been appointed pursuant to the recommendation by the court, the child's lawyer has full standing in proceedings unless the court orders otherwise. If a child's lawyer has been appointed without the recommendation of the court, then the child's lawyer shall apply to the court for standing, if appropriate.
  
5. The role of the child's lawyer is to represent the interests of the child and not those of any other party. The child's lawyer should not offer legal advice or assist any party in preparing documents or researching case law.
  
6. Whenever appropriate, the child's lawyer should be active in attempting to resolve the matter without the need for a trial. This may include facilitating discussions between the parties or constructing a preliminary position that reflects the agreement of all parties.

7. The qualifications for a child's lawyer may include but are not limited to:
  - a. Training in alternative dispute resolution;
  - b. Understanding the various issues that face the child, such as alcohol and drug abuse, domestic violence, emotional and psychological abuse;
  - c. An understanding of child development;
  - d. Understanding FASD and ADHD symptoms;
  - e. Experience in interviewing children;
  - f. Good understanding of child's lawyer matters and the court process; and
  - g. Experience in family law.

## **II PROCEDURAL**

1. Upon receiving a request for appointment, the child's lawyer must immediately complete a conflict check.
2. If a conflict of interest arises, it must be addressed immediately. It can be resolved by agreement between the parties, by seeking a declaration from the presiding Judge that no conflict of interest exists, or by the child's lawyer withdrawing from the file.
3. In accordance with the Supreme Court Rules, the child's lawyer must file a Notice of Appointment of Solicitor and deliver it to all parties. The Notice of Appointment provides notice to the court of the child's lawyer's appointment and provides an address for delivery.
4. In Territorial Court matters, the child's lawyer must file and deliver to all parties a Notice of Appointment of Child's lawyer (Form I attached).
5. In wardship matters, the child's lawyer should request from all parties copies of material filed or served by that party in the most recent application.
6. In Supreme Court matters, there may be other documents, such as Examination for Discovery transcripts, that the child's lawyer may want to request from counsel.
7. In either Territorial or Supreme Court matters, after filing the Notice of Appointment, the child's lawyer can review the file at the court registry.
8. The child's lawyer should advise the parties that the relevant information they disclose may be shared with the other parties and the court because there is no privilege between the party and the child's lawyer.

9. Children Lawyers may be requested/appointed for children 10 years of age or older.
10. Lawyers or self-represented litigants who request a Child Lawyer for children under 10 years of age must provide a letter to the Public Guardian and Trustee outlining the rationale as to why a Child Lawyer is required (e.g. the child is very articulate for his/her age, the child has a strong view or position about the matter, if a conflict exists between the interests of the child and the interests of the other parties, whether the parties will put forward the relevant evidence of the interests of the child, there are collateral witnesses who a Child Lawyer should interview, etc.).

### **III MEETING WITH THE CHILD**

1. In wardship matters, the child's lawyer should contact Family & Children's Services to determine where the child is residing.
2. In Supreme Court matters, the child's lawyer should contact the person who has care and control of the child to arrange a meeting with the child.
3. The child's lawyer should meet with the child as soon as possible.
4. During the first meeting, it is important to explain the child's lawyer's role to the child and the confidentiality of discussions between them in language that is appropriate to the age of the child and his or her level of understanding.
5. Depending on the circumstances, meetings can take place in a variety of settings including the child's lawyer's office, the school, the child's home, or a public place such as a park or a restaurant.
6. When a child's lawyer represents more than one child in a family, it may be beneficial to initially meet with the children together or to meet with them separately to allow each child to express his or her wishes independent of his or her siblings.

### **IV MEETING WITH OTHER PEOPLE**

1. The child's lawyer should contact the parties. The child's lawyer must always ensure that he or she has obtained the prior permission of counsel for each party if the party is represented.
2. The child's lawyer should contact other people who have a significant role in the child's life, such as foster parents, grandparents, teachers, caregivers, daycare providers, counselors, or other community support people.

## V ROLE AND RESPONSIBILITIES

The child's lawyer should determine the role to be taken in the proceedings. Where the child is capable of giving instructions, the child's lawyer should act as the child's lawyer based on those instructions and should communicate this to the court.

If the child's lawyer determines that the child is incapable of providing formal instructions, the role of child's lawyer is similar to a "friend of the court". Here the primary purpose of the child's lawyer is to ensure that the child's views, wishes, and all relevant evidence relating to the child's best interests are before the court.

### 1. Determining Ability to Give Instructions

- a) In determining whether the child is able to give instructions, the child's lawyer should take into account the following:
  - i) The age of the child;  
  
Generally, older children are more likely to be able to instruct the child's lawyer. In some instances, however, younger children may have the ability to instruct counsel, while teenagers may not.
  - ii) The child's maturity, as demonstrated by the child's understanding of the proceedings, and whether the child shows sufficient appreciation for the consequences of the decisions a court may make;
  - iii) Whether the child's wishes are clearly expressed and consistent;
  - iv) Whether the child has considered the circumstances affecting his or her situation in expressing those wishes; and
  - v) The length of time the wishes have been expressed.

In the case of *Alexander v. Alexander (1998)*, 15 R.F.L.(3d) 363 at 365 (B.C.C.A.), upon reviewing the evidence of a 14-year-old boy, the Court felt that:

"The child's wishes are not necessarily best for the child, but there does come a point where at near adult years a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter. Concomitant with that, he must take responsibility for his own actions. I think that point has now been reached. For three years or more he has been unswerving in his wishes, and no change is to be expected. It is not fair to push this boy to the point of rebellion...."

## **2. Basis for the Child's Wishes**

The child's lawyer should attempt to understand, from the child's point of view, the basis for the child's preference.

- a) A child-centered approach involves the child's lawyer determining through discussions with the child those factors that are important to the child in his or her current situation.
- b) This may also require the child's lawyer to meet with the parties to provide a context within which to understand the child's preferences and to discuss these preferences further with the child.
- c) The child's lawyer should consider whether the child is being influenced or pressured by a party.
  - i) The child's lawyer should investigate any concerns that a child is being influenced or pressured by talking to caregivers and other third parties and by talking to the child.
  - ii) If the child's position remains the same after discussing these concerns and the child's lawyer has determined that the child is capable of giving instructions, the child's lawyer should present these instructions to the court.
  - iii) In some cases, the child's lawyer may feel that the basis for the child's preferences is contrary to the child's best interests. Where the child is capable of giving instructions, they should be followed provided that the difference between the instructions and the best interests are not so great as to require the child's lawyer to withdraw.

In *Davey v. Davey (1993) Carswell Ont. 1630 (Ont. Gen Div.)* page 8, the Court concluded that the creation of hostility in a child cannot be used as a basis for denying access.

“[The mother] has systematically programmed them to hate Dad. As a result of her persistent course of conduct, they now wish to have nothing to do with him. If I were to disregard the question of what is in the best interest of the children, it would be patently unfair to deny access to the father on the ground that the children did not wish to see him, when their negative feelings toward him are the product of the mother's persistent programming. The mother's position that the wishes of the children should prevail are self-serving and intellectually dishonest, given my conclusion that she deliberately molded their feelings and willfully turned

them against their father.... The issue in this case is whether it is in their best interest to order access in the face of their unequivocal and firmly entrenched opposition to it. Although these boys are said to be quite intelligent, a distinction must be drawn between intelligence and wisdom. Even intelligent adults are not always wise enough to ascertain or choose what is in their best interest, although they may believe they are doing so. Even intelligent boys can be influenced by a parent who sets out to do so.... While I take into account the reality of their position, I discount the weight that should be given to it, due to its illegitimate genesis. I am satisfied that granting the proposed access will not cause any physical or emotional harm to the boys....”

### **3. Factors Affecting Best Interests**

In considering the child’s best interests, the child’s lawyer should include but not be limited to consideration of the following:

- a) Whether the parents are able to provide adequate care for the child at the current time or within a reasonable time;
- b) The parties’ plans for the care of the children;
- c) If there is more than one child, any adverse impact of separation;
- d) The impact of any disruption to the children’s current circumstances;
- e) The relationship between the parents or between the parents and the foster parents including their ability to work together for the children’s sake;
- f) The child’s cultural heritage and the bearing it may have on the child’s best interests;
- g) The role that the child’s First Nation is prepared to play in his or her life; and
- h) The child’s relationship with extended family.

## **VI HEARINGS, APPLICATIONS AND TRIAL**

Prior to the hearing, application or trial, the child’s lawyer should:

1. Confirm the position of all parties. Depending on their positions, it may be appropriate to encourage and facilitate further settlement discussions.
2. Review the applicable law, policies and guidelines. These include:
  - a) *The Child and Family Services Act*—Parts 3 and 4;
  - b) *The Children's Law Act* – Part 5
  - c) *The Divorce Act*;
  - d) The Rules of Court; and
  - e) Yukon Family and Children's Services Manual (available from Family and Children's Services).
3. Determine a preliminary position, if possible. The child's lawyer should not feel pressured to determine a preliminary position; however, once this position has been determined, it should be communicated to the parties and the court. The current practice in Territorial Court is to state the reasons for taking the position. The current practice in Supreme Court is to state the preliminary position only.
4. In Supreme Court matters, the child's lawyer should take advantage of the discovery process, as follows:
  - a) Ask to review the List of Documents, Interrogatories, and Notices to Admit;
  - b) If Examinations for Discoveries have already taken place, request a copy of the transcript from counsel; and
  - c) If the parties are conducting Examinations for Discovery, ask to observe and or participate in the part of the Discoveries relating to the child.
5. In Territorial Court matters, request disclosure from the Director of Family and Children's Services.
  - a) Disclosure may include running records from the social worker, case worker and family support worker, case plans, and assessment reports.
  - b) If disclosure is not provided within a reasonable time, the child's lawyer should apply to court for an order compelling disclosure and setting a deadline for material to be provided.
6. In all proceedings, ensure that he or she has received and provided all relevant documents.
7. In all proceedings:
  - a) Determine the witnesses each party intends to call;
  - b) Determine the witnesses the child's lawyer needs to call, if any. Occasionally, the child's lawyer may be asked by other counsel to call witnesses to ensure the

neutrality of the witnesses. For example, a foster parent who has a good relationship with the parties may not want to be perceived as the Director's witness. Ultimately, it is the child's lawyer's decision whether to call the witness. It is his or her responsibility to subpoena and prepare the witnesses; and

- c) Consider contacting counsel and ask to attend when counsel are preparing their witnesses. Counsel may refuse. The child's lawyer may also want to separately interview other parties' witnesses.
8. Once the proceedings have started, the child's lawyer should:
- a) Be prepared to participate in the same manner as other counsel in the hearing or trial. This may include preparing an opening and closing argument, making applications prior to or during the hearing or trial, and filing case law;
  - b) Advise the court if he or she has reached a position and re-examine that position throughout the hearing or trial in light of the evidence and indicate that position to the other parties and the court;
  - c) Highlight the evidence for the Judge to consider even if the child's lawyer has not reached a position after hearing all the evidence; and
  - d) Continue to encourage and facilitate settlement discussions, if appropriate.

## **VII EVIDENCE**

1. An issue which is often challenging is determining how the child's evidence will be presented to the Court.
2. The child's lawyer should not provide evidence by way of his or her own affidavit or *viva voce* testimony; should opposing counsel propose to call the child's lawyer, the child's lawyer should make it known to the presiding Judge forthwith and indicate his or her position.
3. Only in exceptional circumstances should the child's lawyer consent to the child being called as a witness, eg. an older teenage child who wants to provide evidence to the court having been fully advised of what that entails including potential repercussions such as cross examination by all parties.
4. The child's lawyer should attempt to identify a person with whom the child feels comfortable in disclosing his or her wishes or other information. Potential witnesses may include foster parents, extended family, childcare providers and close family friends.



5. In some cases, a Custody and Access Report or other assessment has been completed, and the child's wishes can be put forward through the assessor's report or the assessor if he or she is called to testify.
6. If the child has not expressed his or her wishes to anyone other than the child's lawyer and there has been no assessment report completed, the child's lawyer should consider retaining a professional; for example, a child psychologist, a social worker, or counselor. The child's lawyer can then call that person to give evidence either by affidavit or oral testimony.
7. In Supreme Court Chambers applications, the child's lawyer should express his or her position to the court. If the court wants to know why the child's lawyer has taken a particular position, then the child's lawyer should seek an adjournment to enable him or her to put the evidence before the court in a proper manner, namely, an affidavit from an objective third party.
8. In Supreme Court trials, the child's lawyer should express his or her position to the court in the opening statement and advise the court how the evidence will support the position the child's lawyer is taking.
9. Despite the best efforts of a child's lawyer to keep the child out of the proceeding, it may be that a court orders the child to testify. If that happens, the child's lawyer should attempt to minimize the trauma this may have on the child by:
  - a) Determining if there is agreement that the child is competent to testify;
  - b) Determining whether there is agreement regarding the manner in which the child will be examined and whether cross-examination can be avoided;
  - c) Taking steps to ensure the child is comfortable in the courtroom such as arranging a prior courtroom visit or altering the court setup to make things easier for the child; and
  - d) Determining if there is another way of presenting the child's evidence; for example, video conferencing in cases where a child cannot face his or her parents.

## **VIII WITHDRAWING AS CHILD'S LAWYER AND COMPLETING THE FILE**

1. In the following circumstances, the child's lawyer should consider withdrawing:
  - a) If a conflict of interest arises;
  - b) When all issues concerning the child have been resolved;
  - c) If the child's lawyer becomes a witness;

- d) If there is a breakdown of the relationship between the child and the child's lawyer;
  - e) If the child's lawyer feels that the difference between the child's instructions and the child's best interests is so great that the child's lawyer cannot reasonably follow those instructions;
  - f) When the child reaches the age of majority; and
  - g) In any other situation which may bring the lawyer into conflict with the Rules of Professional Conduct.
2. In Supreme Court matters, when the child's lawyer is unable to continue acting or will not serve any further useful function, the child's lawyer should:
- a) Advise the child, the parties, and the official guardian of his or her intention;
  - b) Reassess the decision in light of any concerns raised by the child or the parties; and
  - c) If the child's lawyer believes that withdrawal is still warranted, file a Notice of Intention to Withdraw, serve the other parties of record, and provide a copy to the Official Guardian.
3. In Territorial Court when the child's lawyer is unable to continue acting or will not serve any further useful function, the child's lawyer should:
- a) Advise the child, the parties, the court and the Official Guardian of his or her intention;
  - b) Reassess the decision in light of any concerns raised by the child or the parties; and
  - c) If the child's lawyer believes that withdrawal is still warranted, apply to the Court to withdraw.

## **IX     CASE LAW**

1. In the matter of the *Child Welfare Ordinance C-4*, 1978, R.O.Y.T. and in the matter of the Child Christophe Chartier, [1982] 679 (T.C.Y.T.)
2. Strobridge v Strobridge 10 O.R. (3d) 540 [1992] O.J. No. 1805
3. Lueck v Green [1992] Y.J. No. 170
4. (Re) R.A. [2002] Y J. No.48 (T.C.Y.T.)
5. N.S. v Family and Children’s Services et al 2004 YKSC 17
6. Armitage v McCann 2004 YKSC 01
7. Baxter v Benoit 2004 YKSC 60
8. The Director of Family and Children’s Service v. Iwaniw, 2005 YKCA 0003

**IN THE TERRITORIAL COURT OF YUKON**

**T.C. Registry No.**

**IN THE MATTER OF the *Child and Family Services Act*, S.Y. 2008, c. 1, Part 3,  
Division 5, as amended;**

**AND IN THE MATTER OF: [Name(s) of Child(ren)]**

**NOTICE OF APPOINTMENT OF CHILD'S LAWYER**

TAKE NOTICE that [name of child's lawyer] has been appointed to act as the Child's lawyer for [name(s) of child(ren)].

Dated \_\_\_\_\_  
\_\_\_\_\_ Child's lawyer

Office Address of Child's lawyer:

Child's lawyer's address for delivery:

Fax number for delivery: