



LEGAL AID ONTARIO

AIDE JURIDIQUE ONTARIO

Helpful Tips for Lawyers Representing Clients in Proceedings Under the Child and Family Services Act

March 2008

ACKNOWLEDGMENTS

The following information is intended to serve as a support for lawyers who represent clients in the area of family law in Child Protection matters. LAO wishes to acknowledge and express its thanks for the generous contributions of time and written materials: Kristina Reitmeier, Anthony Macri, Christina MacNaughton, Sheilagh O’Connell, The Honorable Justice Carole Curtis, Elizabeth McCarty, Charlotte Murray, George MacPherson, Helen Carbone, Christine O’Neill, Lauren Stringer, John Schuman and Judy Miyauchi.

TABLE OF CONTENTS

PROCEEDINGS UNDER THE CHILD AND FAMILY SERVICES ACT

A. THE FIRST APPEARANCE	<u>4</u>
1. The First Appearance on a Protection Application	<u>4</u>
2. Presentation to the Family Bench and Bar at North York re First Appearances After Apprehension	<u>5</u>
I. Addendum 1 - The Cons of Arguing a Temporary Care and Custody Motion on a First Appearance	<u>9</u>
II. Addendum 2 - The Pros of Arguing a Temporary Care and Custody Motion on a First Appearance	<u>9</u>
B. THE CLIENT INTERVIEW	<u>11</u>
1. The First Client Interview: A Checklist.....	<u>11</u>
2. The Retainer – Setting Client Expectations (Simple Form)	<u>13</u>
C. THE INTERIM STAGE.....	<u>16</u>
1. Negotiating Check List	<u>16</u>
2. ADR, Mediation, Settlement meeting	<u>19</u>
3. Temporary Care and Custody Hearing: The Basic Test on Temporary Care and Custody	<u>20</u>
4. Answer	<u>20</u>
D. FINDINGS AND DISPOSITION	<u>21</u>
1. Assessments: Joint Retainer Letter.....	<u>21</u>
2. Consent Orders: The Statement of Agreed Facts	<u>22</u>
3. Disposition under the Child and Family Services Act	<u>23</u>
E. TRIAL PREPARATION CHECKLIST	<u>23</u>
F. STATUS REVIEW	<u>26</u>
G. TIPS.....	<u>28</u>
1. The Role of Parents’ Counsel- Advocate for your client as best possible	<u>28</u>

H. OTHER RESOURCES.....	<u>31</u>
1. LAO LAW.....	<u>31</u>
2. Family Law Legislation – Consolidated Ontario Family Law Statutes and Regulations	<u>31</u>
3. Dealing with Difficult Clients	<u>32</u>
I. APPENDICES	<u>33</u>
Appendix A – Plain Language Client Expectations Document	<u>33</u>
Appendix B – Court Process Chart Under the Family Law Rules	<u>34</u>
Appendix C – Glossary of Commonly-used “CAS” Terms.....	<u>36</u>
Appendix D – Releases (sample forms).....	<u>38</u>
Appendix E – Plan of Care.....	<u>39</u>
Appendix F – Summary Judgment.....	<u>40</u>
Appendix G – Interfacing With Legal Aid.....	<u>40</u>
1. Opinion Letters	<u>40</u>
2. How to get paid?.....	<u>41</u>

A. THE FIRST APPEARANCE

1. THE FIRST APPEARANCE ON A PROTECTION APPLICATION

Where a child protection worker believes that a child is in need of protection and a court order is required to protect the child, the worker must bring an Application to the court on notice to the persons having charge of the child. If the time required to make an Application would result in the child being at risk, the protection worker may act to protect the child first, and seek a court order afterward. If time permits, the worker first obtains a Warrant of Apprehension from a Justice of the Peace. If the time required to obtain a warrant would result in the child being at risk of harm, the worker may apprehend the child without a warrant. Police have the same powers of apprehension as a child protection worker.

When a child has been removed and brought to a place of safety, the society must, within five (5) days, either return the child to the person who had charge prior to the intervention or to the person who has a custody order that is enforceable in Ontario, or enter into a Temporary Care Agreement with the parent, or bring the matter to court for a hearing.

“Bringing the matter to court” means the Society will commence a Protection Application (Form 8B), and generally will also bring a motion regarding the temporary care and custody of the child pending final disposition of the Protection Application (Motion – Form 14; Affidavit in support – Form 14A).

As a result of the short time frame, the parent is often advised orally about the court date and time, and may be served with copies of the society’s documents at the courthouse. If the parent contacts counsel before the first appearance, counsel should contact the society worker and ask for the name of the CAS lawyer who will be assigned to the case, as well as for a copy of the court documents in advance.

The court generally has only the society’s evidence before it on the first appearance which may result in the Society’s motion placing the child in its temporary care and custody being adjourned. The onus is on the Society to establish on credible and trustworthy evidence that there are reasonable and probable grounds to believe that there is a real possibility that if the child is returned to his parents, it is more probable than not that he will suffer harm and the child can not be adequately protected by terms and conditions of an interim supervision order (see s. 51(3) of the test). If it is clear that the Society has not met this test on the face of its own affidavit materials before the Court on a First Appearance, then parent’s counsel should bring this to the attention of the Court and argue for the return of the child on the First Appearance. This does not prejudice parent’s counsel in still requesting a temporary care and custody motion at a later date so that the parents’ responding materials can be filed if this argument at the First Appearance is not successful. Counsel should always request that any temporary care and custody order made at the First Appearance be made on a without prejudice basis so that the parent can then file responding materials and the motion can be argued at a later temporary care and custody motion if unsuccessful in persuading the Court that the Society has not met its onus on credible and trustworthy evidence.

Under the CFSA, the court cannot adjourn for more than 30 days without the consent of the parties. Depending upon the circumstances, it may be in the parent’s interests to request as

brief an adjournment as possible (in order to argue as soon as possible that the child should be returned), or seek sufficient time to make a realistic plan before arguing the motion (especially if resources need to be put in place to shore up the plan).

If an alternate family or community member is proposed as the caregiver, notice of this plan should be brought to the society's attention as soon as possible as it may take some time for the society to assess the plan and comply with the Regulations in this regard. It should be noted that proposing an alternate family member at this stage does not mean that the parents are conceding that they cannot care for the child. The parents' position may well be that they wish the return of the child, but in the event that is not the outcome, there is an alternate plan available. This strategy can reduce delay if it becomes apparent to everyone or is determined by the court that the child cannot be safely returned to the parents' care.

If the child has been removed and placed in foster care, he or she will most likely remain in the CAS placement on a "without prejudice" basis following the first appearance – unless the evidence in the society's materials is patently insufficient. It is important that the parent seek an access order that maximizes the amount of contact with the child during the adjournment while being sufficiently realistic that the parent will manage to attend at all ordered and scheduled visits and will not be unduly disruptive to the child. The access order set up at the first appearance often sets the stage for future developments in the case.

When an application is commenced without the child having been removed (for example, where the society is seeking a supervision order on notice), reasonable notice should be given to the parties so as to enable them to prepare responding evidence in advance of the first appearance.

The parties may negotiate the terms of a temporary or final supervision in advance rather than or in addition to filing responding materials.

At any stage of the proceeding, the parties have an obligation to consider alternative methods of dispute resolution such as mediation. If mediation might settle the dispute, the parties should move quickly to put this in place.

December 2007
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2. PRESENTATION TO THE FAMILY BENCH AND BAR AT NORTH YORK RE FIRST APPEARANCES AFTER APPREHENSION

Legislation Governing First Appearances after an Apprehension:

Section 46(a) of the *Child and Family Services Act* provides that within 5 days after a child has been apprehended, the matter shall be brought before a court for a child protection hearing.

As a practical matter, the parties will not usually be prepared for a full child protection hearing under s. 47(1) of the *Child and Family Services Act* within 5 days of a child being apprehended and these hearings are virtually always adjourned. This paper therefore will not deal with

situations where a full temporary care and custody hearing occurs on a first appearance. We have, however, added an addendum setting out the pros and cons of arguing a full temporary care and custody hearing on a first appearance.

Section 51(2) of the *Child and Family Services Act* deals with the temporary care and custody of a child pending the adjournment. This section provides that where a hearing is adjourned, the court shall make a temporary order for the child's care and custody providing that the child:

- a) be returned to the person who had charge of the child immediately before the apprehension;
- b) be returned to the person who had charge of the child immediately before the apprehension subject to Society supervision on terms and conditions;
- c) be placed in the care of another person subject to Society supervision on terms and conditions; or
- d) be placed in the temporary care and custody of the Society.

Test on a "Show Cause" Hearing:

Under **Section 51(3)** of the *Child and Family Services Act*, the court cannot make an order under clause 2(c) or (d) above unless satisfied that there are **reasonable and probable grounds to believe that there is a risk of likely harm** to the child **and** that the child cannot be adequately protected by an order under clause 2(a) or (b).

Again as a practical matter, the parties will not likely even be prepared for a hearing under s. 51(2) (the "Show Cause" hearing) as the parents will not in most cases have had the time to prepare responding materials to the Society's motion. Consequently, counsel who appear on behalf of parents on a first court appearance following an apprehension will generally need to direct their minds to the question of ***whether the Society has made out a prima facie case for having the child placed in its temporary care and custody*** (the onus is of course on the Society to make out its case). Counsel on a first appearance after an apprehension should consider the following:

1. Do the facts presented in the Society's affidavit (though untested and unanswered) constitute reasonable and probable grounds to believe that there is a risk of likely harm to the child?
 - Note that it is not helpful to submit in argument that the "parents deny the allegations" or that "the parents are not responsible for the injuries", "the injuries to the child were not caused as presented by the Society", etc. as all the court has in front of it is the Society's case. This line of argument will only support an adjournment with the court making an interim without prejudice order in favour of the Society so that the parents can file affidavit materials placing their version of events before the court.
 - If, however, counsel reviews the Society's affidavit and believes that the Society has not met the test on the face of its materials and that there is an argument to be made that the Society did not provide credible and trustworthy evidence that the child would be at risk of likely harm if returned to his/her parent, counsel should bring this to the

attention of the court at the first appearance and argue for the return of the child. It may be that there are terms and conditions that can be imposed by a court that would alleviate the risk, to enable the child to return to the parent, so this should be argued as well.

- It is relatively safe for counsel to be satisfied that an argument on the first appearance will not be considered by the Court or Society Counsel to be the Show Cause hearing, as the parents have not filed responding materials at this stage. Should counsel argue on the first appearance that the Society has not made out a prima facie case and lose this argument, counsel should still request that the temporary care and custody order be made on a **without prejudice** basis so that the parent can file responding material and the judge can consider both sides of the evidence in a full Show Cause hearing.

- It should also be noted that **s. 51(6)** of the *CFSA* allows the court to vary or terminate a temporary care and custody order at any time as long as the parent can show a material change in circumstance that alleviates the risk of likely harm to the child.

2. If the Society is able to present a prima facie case, is there a less intrusive order (than temporary custody to the Society) that may be appropriate?

- Note that often parents will attend court with relatives seeking to have the child placed with that relative (or other friend or community member) rather than having the child in temporary foster care.

- While the court is unlikely to order that a child be placed with another person prior to the Society assessing that person on at least a preliminary basis (regulations under the *CFSA* require that the Society conduct a basic assessment in these circumstances including seeing the proposed caregiver's home, obtaining criminal record, child welfare checks, etc.), counsel on a first appearance may be able to assist in speeding up the process by asking the court to order a fast track criminal record check on the proposed caregiver, advising the caregiver regarding the signing of consents to assist the Society in its assessment, asking the court to impose timelines on the Society to investigate the relative's plan and/or requesting a short return date where appropriate.

3. If there is no less intrusive order that would be appropriate, what should counsel consent to?

- If the evidence presented by the Society clearly justifies an order in favour of the Society pending the next court date, counsel should request that the temporary care and custody order being made in favour of the Society is "**without prejudice**".

4. If there is no less disruptive order that would be appropriate to protect the child, what interim access order should be made pending the adjournment?

- if a temporary care and custody order is being made in favour of the Society, counsel on a first appearance should consider s. 51(5) of the *CFSA*, which allows the court to order interim access pending the adjournment.

- in most cases, the Society will seek an access order to the parents "at the discretion of the Society". Counsel on a first appearance can advocate for the parents by requesting

specified access or at least a minimum amount of access (i.e. twice per week for two hours) that the Society must facilitate.

Some Helpful Case Law under s. 51 of the *Child and Family Services Act*:

1. ***Test on a Show Cause hearing:***

Children's Aid Society v. Ottawa-Carleton v. T. [2001] O.J. No. 2273 (SCJ);
R. (S.M.) v. CAS of Oxford County (2003) 41 R.F.L. (5th) 168 (Ont. S.C.J.).

The **test** to justify an order for temporary care and custody to a CAS, is that the Society must establish, on credible and trustworthy evidence, that there are reasonable and probable grounds to believe that there is a real possibility that if the child is returned to his parents, it is more probable than not that he will suffer harm. Further, the Society must establish that the child cannot be adequately protected by terms and conditions of an interim supervision order to the parents.

2. ***Access:***

Children's Aid Society of Toronto v. M. (A.) (2002) 26 R.F.L. (5th) 265 (Ont. C.J.)

The protection order imposed at the interim stage must be appropriate to the need shown by the evidence. It is fundamentally unfair at the earliest stages of the proceeding for the Society to provide a level of access that in its effect sets the child on the path to a loss of his family. The parties and their counsel must deal with the case justly, which requires that only high quality, admissible evidence be presented in the affidavit. The Society's affidavit must place *at the beginning* the Society's account of what prompted the intervention, why less disruptive steps were not taken and what has been learned to date in the investigation.

3. ***Onus and Burden of Proof:***

Catholic Children's Aid Society of Toronto v. D. (A.) (1994) 1 R.F.L. (4th) 268 (Ont. Gen. Div.)

The onus of proof in a temporary care and custody hearing is on the Society and the burden placed on the Society is "balance of probabilities".

Show Cause hearing and Motion to Vary:

Children's Aid Society of the County of Simcoe v. B. (B.J.) [2005] O.J. No. 3907 (Ont. S.C.J.);
C.A.S. v. L. (E.) [2003] O.J. No. 3281 (Ont. S.C.J.)

The tests are different when conducting a hearing under s. 51(2) [the Show Cause] and s. 51(6) [a motion to vary]. There is a two-stage process in an application to vary under s. 51(6). First the moving party must demonstrate that there has been a material change in circumstances. If it cannot demonstrate this, the matter is ended. However, if there has been a material change, the court will reconsider whether in fact there are still grounds to believe that there is a risk of likely harm to the child that cannot be alleviated by a supervision order. The court also has a broad discretion to reassess best interests of the child.

January 15, 2008

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I. Addendum 1 - The Cons of Arguing a Temporary Care and Custody Motion on a First Appearance

There will be circumstances where parents will obtain counsel prior to the first court appearance after an apprehension. Counsel will then need to assess whether or not it will serve the parents interests to file responding material on the first appearance and argue the temporary care and custody motion immediately. Counsel for parents should be mindful of the pitfalls in proceeding with a full s. 51(2) hearing on the first appearance and consider the following:

1. The court may in fact refuse to conduct a full s. 51(2) hearing on the first appearance due to the volume of the court's caseload that day. As the court has the right to control its own process, the judge may direct the parties to set a specific date and time for full argument on the motion. Thus, assuming the Society has made out a prima facie case in its materials, the court may adjourn the hearing and make a temporary without prejudice order in favour of the Society in any event. Parents' counsel would have scrambled to prepare, serve and file responding materials within 5 days or less, only to have the matter adjourned. In the cold light of reflection, counsel may regret the quality and completeness of the materials that it filed and cannot now take back.
2. Should the court agree to conduct the full s. 51(2) hearing, if parents' counsel having hastily prepared their materials, are unsuccessful in securing the return of the children, they may lose a second opportunity to argue properly prepared, as the order obtained on the first appearance is no longer "without prejudice". While parents' counsel may argue that the Society must prove its case at every court appearance, Society counsel will surely take the position that a s. 51(2) order was granted and no further interim hearing can take place unless parents' counsel can show a material change in circumstances since the s. 51(2) order was made. Counsel has then placed its client in the position of having as its only recourse a motion to vary under s. 51(6).

February 22, 2008

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II. Addendum 2 - The Pros of Arguing a Temporary Care and Custody Motion on a First Appearance

Not many child protection clients can get themselves into a lawyer's office within 24 hours of a children's aid society apprehending their children. Even if they are able to retain counsel so swiftly, there are problems in gathering appropriate evidence to put before a court by the first return date especially since the Society's materials will not have been received. There are, however, situations in which there has been some prior period of involvement by the CAS before an apprehension or the initiation of an application. For example, in cases where the Society has asked the parent or parents to agree to a temporary placement while the Society conducts its investigation, there is an opportunity to prepare anticipatory materials. In such

situations, it is possible to, at a minimum, put together a reasonable “safety plan” to present to the court at the outset. Provided that interested family or community members are prepared to cooperate, and the lawyer and client have sufficient stamina, comprehensive plans that include schedules for supervision, criminal/vulnerable persons checks, reports from previously involved third party professionals and even, where the financial resources permit, home-studies, can be completed within 36 to 48 hours. Whenever possible, the best practice for helping parents is to get their case together and take on the Society’s case at the earliest opportunity – the first appearance.

If retained in time, parent’s counsel should always put together materials and prepare to argue for the return of the children or, at least, their placement with a family or community member. There is no such thing as a “first appearance” under the *Child and Family Services Act*. The judge has to make the least intrusive order before any adjournment, including the first, so the “best practice” for parents’ counsel, if possible, is to get material together, including affidavits and a plan of care, and to argue for the return of the child. Parents will usually have a fairly clear understanding of the concerns that led the Society to take action and so will have the ability to put together a plan to address those concerns. If the nature of the concerns is such that rebutting evidence can’t be obtained very quickly (i.e. suspicious physical injuries), the goal will be to put together a plan that addresses all of the Society’s safety concerns as if they are assumed to be true. If, on the other hand the Society has acted on the basis of information that can be swiftly and clearly proven to be baseless, the materials should be prepared with a view to dismissing the application immediately. For instance, someone has reported that the parent is mentally ill and has failed to provide adequate supervision for the child, you get reports from her psychiatrist, her community worker, the child’s day care provider and affidavits from family members indicating that she is compliant with treatment, has always followed doctor’s advice, has always made contingency plans for the child, you will want to put the Society to the test right away.

The first appearance is often an excellent opportunity to advance the parents’ case as the Society will probably not have had the opportunity to put together its best evidence and will be relying largely upon hearsay and, too often, speculation. Putting materials before the Court from the parents at the earliest opportunity is important in the sense of showing the Court that they are committed and proactive. In the majority of cases, the only version of events, and impression of the parties, that is available for the Court’s consideration is that of the Society. At the first appearance, the parents have the opportunity to give the Court a sense of who they are and to address the Society’s concerns before it can find new ones during the adjournment period while the children remain in its care with very limited access by the parents. At a minimum, active advocacy on behalf of the parents at this stage is likely to result in more than the *de minimis* access being offered by the Society and more stringent timelines being imposed upon the Society to investigate any safety plan being proposed. If much of the work has already been done, it is more difficult for the Society to assert that it will require 6-8 weeks to investigate a safety plan.

There are legitimate concerns about challenging the Society’s case at the first appearance. The Court often has little time available for such appearances. The judge likely has a full docket of other cases, so, may be unable to give full consideration to the matter, or even to adequately review the materials filed. In these circumstances, the general tendency of the Court is to “err on the side of caution” and rule in favour of the Society. The Court may make a “with prejudice” temporary order without having had a complete opportunity to consider the evidence and submissions. Since disclosure of the Society’s file will not have been made, the parents’ materials may be deficient in certain areas. Where there are parallel criminal

proceedings, there is the risk of making inconsistent or even inculpatory statements. The Society may later take the position that, since the parents insisted upon arguing the issue of temporary care and custody, having filed materials, and lost, the Society will not have to meet the same threshold of likely harm on any future occasion.

In practice, however, the Society will at all stages have difficulty maintaining an argument that, where there has already been a temporary care and custody hearing, despite that there is new evidence about the safety concerns, new family plans have come forward or problems are developing in the Society's plan, the parents must meet some higher threshold to vary the order. It is always the Society's onus, and public obligation, to satisfy the Court that it is pursuing the least disruptive remedy that is consistent with the child's protection and best interests. Subsequently developing evidence that the Society's concerns lacked substantial foundation, that its plan for the child is beneficial in effect or that there are familial or community placements that afford adequate protection for the child, will very likely be viewed as constituting a material change under 51(6)

February 22, 2008

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B. THE CLIENT INTERVIEW

1. THE FIRST CLIENT INTERVIEW: A CHECKLIST

1. "What has happened to you and your child to bring you here today?"- The application and affidavits will have set out the agency's version of events, but you need to obtain the client's version of the situation.
2. "What do you want to happen by the end of the court process?"
3. Is there anything in what the agency is offering by way of services that the client thinks he or she really could use?
4. Is he or she still living with a domestic partner?
5. What is the nature of the relationship between them? Can you ascertain whether there has been abuse or neglect in the spouse-spouse relationship?

Even if the parents in a child protection case present at your office together, you cannot act for both of them. They are by definition adverse in interest. LAO will take it as given that both parents share the same economic circumstances, and if a legal aid certificate is provided to one, a second will be issued to the other.

6. Alternate phone numbers, and a family member or friend's contact information.
7. Has a child protection agency has been involved with the client concerning any child at any time before this most recent incident? Get all particulars-dates, orders, agreements, and resolutions.
8. Names, addresses and telephone numbers of the family doctor, paediatrician. And any other professionals involved with the children and either parent.
9. Has your client ever been involved, or are they currently, in counseling for parenting issues?
10. If there are allegations of substance abuse, are the problems being addressed?
11. Where do the children go to school? Names of principal and teachers. What involvement has this parent had with the school?
12. Who is the usual babysitter and how can you get in touch?
13. Is there a church, synagogue or mosque that your client and/or children attend?
14. Who are the children's sports coaches. How can you contact them? (Likewise, the Cubs, Brownies, dance and gymnastic leaders involved with any of the children).
15. Does the child spend any time at the homes of friends? And if so, obtain names and contact information for the friends' parents.
16. Has this family or this parent moved recently? If so, where did they live before? Who were and how do you contact all such persons involved with your client and/or children.

Consents to Release of Information:

Signed consents are required by professionals who are otherwise bound by their own codes of ethics regarding privacy of their clients, patients, and parishioners. This would include physicians, dentists, nurses, priests and clergy, therapists, counsellors, other lawyers, bank managers and financial planners as well as school principals and teachers.

It is best not to take the shortcut of having the client sign multiple copies of an omnibus consent form. You risk breach of privilege. Professional A reading a release form that makes reference to professional B may be able to deduce information that the client prefers they not have.

November 2007
Prepared by **Chris MacNaughton**
Area Director, Niagara North, St. Catharines

2. THE RETAINER – SETTING CLIENT EXPECTATIONS

Precedent Retainer Agreement When Acting for the Parent

Date []

Re: [description of matter]
Legal Aid Certificate Number: []

Dear [client name]:

Your Instructions to me:

You have hired me as your lawyer because the [*name of agency*] claims that your child/children:

Name birth date

Name birth date

Etc

should be found by the Family Court [to be/ still to be] “in need of Protection.” The [name of agency] states that you [and your partner / spouse / room mate] [have/ are likely to] [neglected / abused] the [child / children] as follows:

[details from the application]

The [name of agency] asks the Family Court to make the [child/children] wards of the [agency/ crown] for [____ months / years / until they reach the age of 18].

You have hired me to oppose the claim, and to seek a court order that the children be immediately returned to your care without supervision by the agency. [or as the case may be].

If the court disagrees with you and finds the children to be in need of protection, your preferred caregiver would be _____.

If the children are placed / remain in foster care, you wish to have access to your children as follows: _____.

Your Legal Aid Certificate

Your legal fees and my out of pocket expenses in your case are being paid by Legal Aid Ontario (LAO). Enclosed is a photocopy of your legal aid certificate.

The services that I am allowed to help you with are set out on the certificate, as is the amount of time that Legal Aid will pay for services up to, but not including a trial. If you need to take your matter to trial, I must first give the Area Director of LAO an honest opinion as to your chance of success. The request may be granted or not.

If the Area Director refuses to grant funding for a hearing, you may appeal to “the Area Committee.” The local LAO Area Office has the necessary appeal form, and they will help you fill it out.

I can only perform services for you that are authorized by LAO.

My role as your lawyer

I will keep you informed about issues that arise and will discuss with you any significant decisions you must make. I will give you my best legal advice, but you will make the final decisions. Significant decisions may require your written consent.

Your legal aid certificate does not allow me to give advice or perform legal services for you relating to any other matter.

I am also able only to spend the amount of time that is authorized by LAO to do any work on your case. That includes such things as the time we spend speaking with each other in person or on the telephone, the time I spend preparing court documents and letters, the time I spend negotiating on your behalf, and the time we spend at court.

Your Role as Client

I can only do my best job if I have your trust and you tell me the truth. You will need to sign consent documents that will allow me to interview any professionals who have provided service to you or the children, especially doctors and teachers.

If you have questions or information for me, please contact my assistant, [*name* *phone number and extension*] She will likely be able to answer your questions. She may ask you to meet with me in my office. Or I may telephone you to discuss your case.

Remember, I will bill LAO for all telephone calls and meetings with you or the lawyer for the [__agency__], including any time I may need to prepare for such conversations and to make notes about them afterwards. To get the best value for the time LAO allows us, I will be as efficient as possible. In turn, you will need to limit our conversations in time, and to those topics necessary to my work on your behalf.

Your Obligation to Legal Aid Ontario

If your income or financial circumstances change, please inform me immediately. I am obliged to inform LAO of such changes. In addition, the LAO Area Office will require you to be financially reassessed every three months. They may be able to do this by telephone and mail.

If your financial situation improves, you may be asked to pay regular contributions to LAO or place a lien in favour of LAO on any property you own. If your financial situation gets worse, and you have been making payments to LAO, those payments may be reduced, postponed or excused altogether.

Billings

Each time I bill LAO for services to you I will send you a copy of the account for your records.

Ending the Lawyer-Client Relationship

I am free to withdraw my services at any time if I have good reason. For example, I would withdraw my services if

- I find that you have lied to me or failed to disclose important facts;
- you do not cooperate with me in any reasonable request;
- you ask me to do something unethical or illegal;

- you do not cooperate with LAO's local office, and your certificate is cancelled;
- I learn of a conflict of interest that would make it unethical for me to continue to act for you.

If you wish to dismiss me as your lawyer, you will have to make that request in writing to the LAO Area Office. The Area Director will only grant a change of solicitor in very unusual circumstances.

Confidentiality

As your lawyer, I have to share relevant information about your case with the agency's lawyer and with the court. But unless I need to share this information as part of my work, all information you give me will be kept confidential between us.

No Guarantee of Success

I will try my best for you and give you my best legal advice. However, you understand that I cannot guarantee a successful outcome. That depends not only on the decision of the court, but also on you and your cooperation with the agency.

It is IMPORTANT for you

- to be regular and on time for all access visits you have with your children;
- to deal immediately and positively with your _____ addiction;
- to cooperate by attending any courses or programs recommended to you by the agency;
- to be pleasant and cooperative with the family service worker, the child's worker, the foster parents, agency volunteers, and anyone else with whom you must interact in this matter;
- to be on time for all appointments;
- to make arrangements in advance with anyone with whom you need to rearrange an appointment or meeting or event.

If you are satisfied with this contract, please sign and date both copies and return one of them to me.

Keep one for your records.

If there is anything you do not agree with, or if there is anything you would like to discuss before signing, please call or write to me.

Lawyer's signature

Date

I have read this document carefully and I agree with it.

Client's signature

Date

Prepared by **Chris MacNaughton**, Area Director, Niagara North, St. Catharines
November 2007

C. THE INTERIM STAGE

1. NEGOTIATING CHECK LIST

In child protection cases there are three basic categories of negotiation:

1. Lawyer – Lawyer negotiation between lawyers for the parents and the lawyer representing the child protection agency.
2. Mediation in which the parents and the agency's responsible personnel, usually in the presence of their respective lawyers, negotiate directly with each other, facilitated by an appropriately trained and experienced mediator pursuant to an agreement to mediate that spells out the procedure.
3. Judicial Pre-trial Settlement conference.

Not so long ago, lawyers did not consider child protection cases to be candidates for either mediation or traditional negotiation. But these days court lists are long, placement options are broader, and we recognize the importance of achieving stability of home and school for children expediently as well as responsibly.

The lengthy delays inherent in bringing a case to and through a child protection hearing keep children, parents, and extended family unsettled in limbo. Negotiation is very much worth while to attempt.

Family law and child protection negotiation demand frank honesty, flexibility, and imagination.

This is not a sum zero game. Approaches to parenting and the needs of children should never be set in a win/lose dichotomy. This exercise is not a power struggle. It's not about blaming, apart from any determinations of criminal liability for abuse. This is a search for workable solutions that respect the needs of the child and the abilities of the parents in the context of available community resources.

Throughout the negotiation or mediation the one item that is not negotiable is the safety and security of the child.

Adopting the strategy of negotiating at all opportune moments from the beginning of the case onward will help to:

- Minimize agency-parent hostility;
- Reduce the intensity of interfamilial disputes;
- Move toward stability;
- Design and adopt a plan of care satisfactory to the agency in which the parents are emotionally invested as co-creators;
- Enable agreed to services to be implemented promptly;
- Agree as to all or some of the facts giving rise to the child being apprehended;
- Keep the focus on the identification of issues, and problem-solving

- Avoid last minute rushed court house corridor agreements that leave the parents feeling coerced and powerless.

What Can Be Negotiated

The Attorney General's Office in British Columbia made this salient point that does not just apply to mediation:-

“Whether or not a child is in need of protection can never be mediated. The social worker is responsible for making that assessment and, if required, the court will make a final determination on that matter. The social worker also has an absolute statutory obligation to ensure that any agreement made (in mediation or otherwise) is consistent with the safety and well-being of the child. Facts cannot be mediated, including facts about the existence or non-existence of abuse or neglect. What can be mediated is the course of action parents and the Director follow as a consequence of those facts.”

<http://www.ag.gov.bc.ca/dro/child-protection/documents/Qs&As.pdf>

Among the **issues that can be negotiated** at traditional negotiation or in mediation include:

- What services the agency can offer the family, and obtaining agreement that the family will cooperate with as part of a plan of care;
- What ancillary services by volunteers or agency employees that will allow a parent to participate in the identified programs;
- Determining what changes in the child's home environment will ensure the child's safety, and then enlisting the parents' cooperation;
- Whether and how the child's safety is to be preserved by making arrangements for the child to reside with family or friends;
- How long the child will be in the care of the child protection agency;
- Making a plan to ensure the child's participation in and exposure to cultural, racial, linguistic, and religious heritage while the child is in the agency's care;
- the details of any supervision order, including meeting dates with the social worker;
- The terms necessary to apply for an order by consent—including the extension of an existing order;
- Whether or not parents can have any input into selecting the child's foster placement;
- How and when the parent or others in the extended family and the circle of the child's adult and older child friends will have contact with the child by phone, mail and in person, and whether any pre-existing pattern of overnight visits with third parties (for example a regularly monthly sleep-over at Grandma's);
- The amount and structure of a parent's financial contributions towards the maintenance of the child in the child protection agency's care.

Who Should Be At the Table?

The ideal negotiation or mediation would involve participation by all the chief parties.

- the parents;
- the parents' respective counsel;
- the child protection agency's lawyer;
- the family service worker;
- the child's social worker;
- the supervising social worker;
- the child's lawyer, if any;
- *the child, under certain circumstances (see * below),
- the mediator, if any.

*There may be circumstances when the child's presence in part or all of the discussion can be useful for the mediator. Whether the particular child or children would benefit emotionally by participating should be in the sole discretion of the mediator after the mediator has met alone with the child (and Children's lawyer if one is acting for the child).

No child should be coerced or forced to express a view or make a decision or take part in mediation meetings by any of the parties or their lawyers.

If a child is participating in some of the mediation discussions, care must be taken to ensure that all parties and the child(ren) and their respective lawyers are clear that the child is not being asked to make any decisions concerning the parenting plan being worked on, nor is the child being expected to take sides, or to provide evidence for or against any parent or caregiver. If the child is "at the table" so too should the Children's Lawyer if appointed in the case.

Ideally there will be more than one negotiating meeting, and not all of these persons will be needed at every meeting.

The current situation likely evolved over many months, or even years. Don't expect to have all the aspects solved and everyone 'bought in' to the solutions in one meeting. These parents are fragile and vulnerable. They usually lack the resources, of everyone else around the bargaining table. Think 'baby steps' and think 'empowerment', 'responsibility'.

Using Community Resources

In suggesting or accepting community resources such as parenting courses, anger management counselling, substance abuse, make sure that you are well informed about the resources in your community. You need to know:-

- What the available programs are;
- What each aims to accomplish;
- The client group served;
- Eligibility requirements;
- The cost;
- Subsidies and grants available;
- Location;
- Time of Day;
- Whether child care available on site;

- Frequency;
- Transportation availability and cost;
- The waiting list particulars

Importance of Parental Involvement in Arriving at a Solution

Parental involvement in the child protection sphere through negotiation and mediation meets the parent's need to be involved in arriving at a plan of care for their child that is doable. The parent is more likely to feel respected and understood through this process.

Participating in arriving at the solution gives the parent an emotional investment in the outcome plan of care, and increases the likelihood of compliance, and cooperation with the agency. It also increases the likelihood that when the child is able to live once again with its parent(s), the child's safety and security will become the main parental priority.

November 2007

Chris MacNaughton

Area Director, Niagara North
St. Catharines

2. ADR, MEDIATION, SETTLEMENT MEETING

Child and Family Services Act

R.S.O. 1990, CHAPTER C.11

Resolution of issues by prescribed method of alternative dispute resolution

20.2 (1) If a child is or may be in need of protection under this Act (CFSA), a society shall consider whether a prescribed method of alternative dispute resolution could assist in resolving any issue related to the child or a plan for the child's care. (CFSA, S.O. 2006, c.5, s.5)

- Consider mediation to resolve the case. The CAS are dedicating resources to various alternative dispute resolution initiatives, including mediation, to resolve child welfare issues. The legislation now requires them to **consider** whether ADR could assist a resolution. This may lead to earlier resolution of the case.
- A roster of child welfare mediators is available to the parties. (see resources on Ontario Association for Family Mediation Website) <http://www.oafm.on.ca/>
- Child protection mediation that meets the requirements of the Regulation is paid for by the Ministry of Children and Youth Services. Ask your local CAS as to how this is administered locally.
- Any decision as to whether mediation is appropriate for your client depends on your assessment of your client.

* ADR- Family Group conferencing may be available

3. TEMPORARY CARE AND CUSTODY HEARING: THE BASIC TEST ON TEMPORARY CARE AND CUSTODY

See Memorandum on LAOLAW website:

Article- **“Children in need of Protection”**

<https://www.research.legalaid.on.ca/login.html> (LAO LAW Website- go to Family Law, then General and Specific Memoranda- then CH5-8- **Children - Children in need of Protection - CFSA**

“ORDERS FOR TEMPORARY CARE AND CUSTODY – TEST” (available in English only)

4. ANSWER

The Answer and “default” orders

The Family Law Rules, Rule 10, requires a parent or other party to respond to a Protection Application or Status Review Application by filing an Answer and Plan of Care (Form 33B.1) within 30 days of being served. A respondent who fails to do so is not entitled to notice or to participate further in the proceeding. Since the court has jurisdiction to make a final order at a conference, provided that notice of the order sought has been given to all parties, it is essential that the Answer be served and filed in a timely way.

The Answer form includes space for the parent/party to set out her or his Plan of Care for the child.

Just as the CAS will amend its application when its plan for the child changes, a respondent who has a “new” plan should deliver an amended Answer and Plan of Care.

The parties cannot consent to a variation to the timetable to file documents set out in Rule 33. Only the Court can extend the time for filing an Answer / Plan of Care and can only do so if it is in the child’s best interests.

November, 2007
Kristina Reitmeier

D. FINDINGS AND DISPOSITION

1. ASSESSMENTS: JOINT RETAINER LETTER

(Toronto Family Law Office)

Dr. X
Court Support Services
----- Hospital
----- Avenue
Toronto, ON

DEAR DR. X:

RE: PARENTING CAPACITY ASSESSMENT, CHILDREN'S AID'S SOCIETY AND AB, DOB -----1972, AND CD,

Further to our telephone conversation, this confirms that I represent Mr. **CD** in child protection proceedings before the Ontario Court of Justice. Ms **AB** is represented by Mr. --- (Lawyer 1) and the Children's Aid Society of Toronto is represented by Mr. --- (Lawyer 2).

I have provided your curriculum vitae to the Children's Aid Society and mother's counsel and all parties are consenting to your assistance in conducting a parenting capacity assessment of both parents with respect to their children. We understand from your c.v. that you have experience working with native persons. This is important to the parties, as the parents are native persons.

The parents have two children, namely **HD**, born -----, 2002, and **SD**, born ----- 2003. **HD** has been in the care of the Society since and **SD** is recently in the care of the Society under a temporary care agreement. **HD** was in the care of the parents from his date of birth until March 1, 2002. **HD** was returned to his parents' care on June 14, 2002 and then placed in the Society's care again on November 29, 2002. **SD** was placed in a temporary care agreement between the parents and the Society on August 17, 2003.

The parents have resided together for approximately four years and want both children returned to their care. They have been working closely with a number of counsellors with Native Child and Family Services to address the protection concerns of the Society. The Society is seeking Crown wardship with no access for the purpose of adoption with respect to **HD** and temporary care of **SD** at this time. **HD** has been identified as having special needs and being developmentally delayed, although it is unclear at this time as to the extent and diagnosis and further testing is being conducted at ----- Hospital.

Some of the questions the parties would like you to address in the assessment are the following:

1. How do the parents see themselves as parents, especially in light of a native concept of parenting?
2. What is the parents' capacity to parent on a long-term basis?
3. How would you assess their parenting together as a couple and apart?
4. What kind of appreciation do the parents have of their children's needs?
5. How would you describe the attachment between the parents and both children?

As discussed, you indicated that you would be able to start the parenting capacity assessment in the last week of September 2003 and that your hourly rate is \$125.00 per hour. I also confirm that you require copies of all of the pleadings before that time and I will endeavour to provide you with all documents by the end of next week. The Society and Legal Aid Ontario have agreed to pay for your assessment. If you require a retainer, please advise and I will make arrangements to forward this to you.

I also understand that you wish to see the parents with the children together and we can arrange for observational visits. Currently, the parents are seeing the children three times a week, although supervised at the Society's office.

Please do not hesitate to contact me directly at (416) ----- if you have any questions or concerns regarding the above. Mr. ...(Lawyer 1) can be reached at(416)----- and Mr....(Lawyer 2) can be reached at (416)-----.

Yours truly,

Lawyer (for Mr. **CD**)

c.c. Client

2. CONSENT ORDERS: THE STATEMENT OF AGREED FACTS

Most child protection cases result in orders made on consent of some or all of the non-CAS parties. A consent order can be made at any stage, once all service issues have been dealt with. (The process of identifying and locating all the persons who qualify as “parents” under the CFSA can be lengthy and complicated.) A Statement of Agreed Facts generally supports the making of the consent order, although other evidence may also be filed in specific circumstances.

There are two forms of Statement of Agreed Facts (authorized) by the Family Law Rules. Each collects the information that the court is required to consider at the relevant type of proceeding.

Form 33C – Statement of Agreed Facts: Protection Application

Contains the information required for the court to determine that the child is in need of protection, that a court order is necessary to protect the children in the future, and the order under s. 57 that is in the best interests of the child

- Statutory findings about the child – name, birth date, parentage, Indian/native status, religion, where the child was apprehended
- Information about the history of CAS involvement with the family
- Reasons for the apprehension of the child(ren)
- Basis for the finding in need of protection [relevant paragraph in s. 37(2) and supporting facts]
- Significant events since the protection application was commenced
- Order(s) agreed upon, including any conditions and access terms.

Form 33D – Statement of Agreed Facts: Status Review Application

Contains the information that the court requires to make an order on status review in the best interests of the child

- Relevant events that have occurred since the making of the last order
- Order(s) agreed upon, including any conditions and access terms.

While Forms 33C and 33D are authorized by the Family Law Rules, the parties may draft their own agreements in whatever form they wish, provided that the information meets the statutory criteria required for making the order that is requested. In particular, counsel may wish to

consider preparing a Statement of Agreed Facts that deals with some of the issues in an application or motion but may not finally dispose of the matter in its entirety. For example, the parties can agree to certain facts but not agree as to the order that is in the child's best interests. This type of Statement of Agreed Facts can narrow the issues and may shorten the amount of time needed for a hearing of the motion or application.

November 2007
Kristina Reitmeier

3. DISPOSITION UNDER THE CHILD AND FAMILY SERVICES ACT

Article- "The New Disposition Provisions of the Child and Family Services Act" , The Honourable Justice Stanley Sherr, Ontario Court of Justice, September 16, 2006

<https://www.research.legalaid.on.ca/login.html> (LAO LAW Website- go to Family Law, then Secondary Resources)

E. TRIAL PREPARATION CHECKLIST

For Family Law Proceedings in the Ontario Court of Justice

Your Case

1. What is the theory of your case?
2. What are the specific facts you need to prove to support your case? Are these in your pleadings? What evidence or admissions do you have to support each of those facts?
3. What is the legal test applicable to each of the issues before the court? Who bears the onus of proof? Is there case law on point? Have you circulated copies of any case law on which you intend to rely to opposing counsel? Have you updated your research?
4. Have you reviewed your pleadings to ensure that they are complete and still accurate?
5. Have you pleaded everything you are seeking (variation of arrears, costs, etc.)?
6. Do you need to amend your pleadings? Is there sufficient time for your opponent to respond to any amended pleading?
7. Know all of the evidence to be presented, that which supports your case and that which does not. What is opposing counsel's theory of his or her case? Is there any additional evidence you need to call to disprove the other side's case? Remember that the court can only decide on the basis of the evidence admitted.
8. Is the Plan of Care filed with the court still current and accurate?
9. Has your Financial Statement been updated to within 30 days of trial?
10. Have you received an updated Financial Statement from opposing counsel/ the other party?
11. Do you need a section 42 order under the *Family Law Act* for proof of the opposing party's income?
12. Have you prepared your Opening Statement? Do you have a draft Closing Argument?

Witnesses

1. Who are your witnesses? Have you met with the witnesses? Do your witnesses know the theory of your case?
2. Why are you calling the witnesses you will be calling? What can they say? Will it be useful?
3. Have you considered the order of witnesses? Are they available when needed? Have you advised opposing counsel of the order of your witnesses? What is the order of your opponent's witnesses?
4. Have you confirmed attendance dates with your witnesses in writing?
5. Do your witnesses require a summons to ensure their attendance?
6. Do your witnesses have to be paid for their time to testify? Who will pay and how?
7. Will the witnesses be relying on notes for their testimony? Are these to refresh their memory or is it past recollection recorded (no independent memory)?
8. Is an interpreter required? Have you confirmed with the court that one is available?
9. Have you discussed with opposing counsel which witnesses need to be called to testify or be made available for cross-examination? Is your opponent consenting to the proposed document/ report/ affidavit being entered for the truth of its contents without cross-examination?
10. Consider whether an adverse inference might be drawn as a result of not calling a particular witness.
11. Do you need an order excluding witnesses at trial?
12. Do you have a phone number where you can call the witness in case of a change in plans or an emergency, i.e. adjournment, illness, settlement or to move the time of their appearance forward?
13. Is any special accommodation required for your witness and has this been canvassed with the court? i.e. testifying behind a screen
14. Is your time estimate for putting in your case still accurate? Have you reviewed this with opposing counsel? (This is an ongoing concern throughout your trial).

Expert Witnesses

1. Do your experts know the theory of your case?
2. Do you have current resumes/ curriculum vitae from your experts? Have these been provided to opposing parties?
3. Do you have reports from your experts? Is there an original, for filing with the court? Are there any expected issues regarding authenticity, if you propose to file a copy or electronic copy? Has the report been served on the opposing party?
4. Does the expert's report require updating?
5. In what area are you seeking to have your expert qualified as an expert?
6. Is your opponent consenting to your expert being qualified as an expert, in the subject area that you propose and require?
7. If not, can you qualify your witness as an expert in the face of opposition? What is the test to be qualified as an expert?
8. Is the opposing party intending to call any experts? Have you received C.V.'s and reports?
9. In what areas is the opposing party hoping to qualify their expert(s) to give opinion evidence? Are you consenting? If not, what is the basis for your objection? Are you prepared to cross-examine the purported expert on his/her qualifications?

Documents

1. Have you served your Notices pursuant to sections 35(3) and/or 52(2) of the *Ontario Evidence Act*?
2. If relying on s. 35(3), does your document meet the test to qualify as a “business record”? What is the test?
3. If relying on s. 52(2), is the author a “practitioner”? What is the test?
4. Are you able to properly prove the document? What is the test? Are there issues of authenticity? Can a Request to Admit be used to clarify the opposing party’s position?
5. Do your documents/reports contain hearsay? Consider the purpose for which you intend to rely on each statement: is it for the truth of its content, or for some other purpose?
6. Do you have original reports for the court? Is opposing counsel consenting to the use of copies? (See above re: authenticity.)
7. If you are not relying on all of the documents available, but rather intend to submit only part of a record, are the excerpts you wish to rely on representative of the other documents, or do they misrepresent the big picture? Does your opponent have copies of all of the documents – those you intend to tender in evidence, as well as the ones on which you are not relying?
8. What documents or exhibits are all parties consenting to being presented to the Judge?
9. If a document or exhibit is being challenged, what is the basis for the objection, and what is your response?
10. Can the parties agree that portions of the document(s) that each of them wants the judge to read will be highlighted?
11. Do you have two copies of the document to provide to the court: one for the record, and one for the Judge’s own personal use, if requested?
12. If there are Transcripts (from prior family proceedings, out of court questioning or other proceedings, for example, collateral criminal proceedings), are these available and can you use them under Rule 23(13) to (15)?
13. Is there a Report of the Children’s Lawyer? Was the Report served more than 30 days prior to the scheduled commencement date of trial? Pursuant to Rule 21(e) is the report being disputed and have you served a Disputing Statement within 30 days of receiving the report?

Other Issues

1. Have you confirmed your retainer and/or received authorization to proceed to trial, where necessary?
2. Service – Have all parties been served with the pleadings? Has the time for filing an Answer elapsed? Alternatively, have you dispensed with service on those you need to?
3. Are there any outstanding “parents” issues (especially under the Child and Family Services Act?)
4. Are there any facts in agreement? Draft an Agreed Statement of Facts, no matter how minimal or how late it is done. (i.e. Identifying information and critical dates)
5. Would a Request to Admit simplify/shorten the trial?
6. Are there any legal issues that could be sorted out and determined in advance of proceeding with the trial? What is your position? What is your opponent’s position? And what case law do you have to support this?
7. Are there any issues of admissibility of documents or statements that need to be resolved in advance (*voir dire*)?
8. Have you obtained disclosure, updated to the commencement of trial? Have you responded to any requests for disclosure from opposing parties?

9. If relying on video- or audiotapes- have copies been provided to your opponent or an opportunity provided to view/hear the tape? Do you require original tapes or are copies sufficient?
10. Hearsay – Consider the purpose for which it is being tendered. Have you canvassed with opposing counsel whether he/she will allow it to go in for the truth of its contents through another, or whether the person who made the statement is required to be called as a witness? Can it go in under another exception?
11. Children’s out of court statements – Consider the purpose for which the statement is tendered. If for the truth of its content, can you meet the necessity and reliability test? Do you have an assessment from a professional that it would be harmful to the child that the child be called as a witness?
12. If a person has been convicted of a crime, will you require a Certificate of Conviction?
13. Are there any issues relating to the conduct of the trial on which the parties have agreed or can agree? Do you need to confirm any specific agreements in writing?
14. Costs – Have you submitted an Offer to Settle? Does it need to be updated? Is this a case in which costs might be considered? If seeking an order for costs, have you prepared a draft bill of costs?

Do you need an order for security for costs? What is the test? Rule 14(13) to (17).

Anthony Macri
Counsel, Toronto Children’s Aid Society

F. STATUS REVIEW

The Status Review Hearing

What is a Status Review and Who May Apply:

A status review is a review of an order for Society wardship or a supervision order before the order expires. Section 64 of the CFSA governs status review hearings. The Society can apply any time before the expiration of a previous Court Order for Society wardship or a supervision order. However, the Society must apply to the Court for a review of a child’s status before the previous Court Order expires. If the Society does not bring the status review application before the previous Court Order under the Protection Application expires, then the Court loses jurisdiction. In such a case, a mistrial must be declared and a new determination that the child was in need of protection must be made. (*C.A.S. of Sudbury and Manitoulin Districts v. L. (J.)* (2000) 12 R.F.L. (5th) 41)

Furthermore, it is important to remember that if a child is apprehended from a parent or person under a final supervision order, then the Society must apply for a review of the child’s status within 5 days of the date of removal from the care of the person with whom the child had been placed under a supervision order. (s. 64(2) (c)).

A child 12 years of age or older, a parent, a person with whom the child was placed under a supervision order, or a representative chosen by the child’s band or native community may also apply for a review of a child’s status on notice to the Society, however, an application by these persons can not be made within 6 months of the day the last protection order was made

unless the person can demonstrate to the court that a major element of the plan for the child's care in the previous order is not being carried out. (Section 64 (4) of the CFSA)

The Test on a Status Review Application:

There is currently no consensus in the case law regarding the test to be applied on a status review application, where termination of society supervision, society wardship or Crown wardship is sought. In some cases, the courts apply the two-pronged test enunciated by the Supreme Court of Canada in *Catholic Children's Aid Society of Metropolitan Toronto v. M.(C.)* (1994), 113 D.L.R. (4th) 321, 2 R.F.L. (4th) 313, affirming 101 D.L.R. (4th) 766, 47 R.F.L. (3d) 109, 13 O.R. (3d) 227 (C.A.). This test requires the court to consider firstly whether the child before the court continues to be in need of protection and, if there is a need for a continued order for protection, to consider what disposition is in the best interests of the child. Other cases hold that as a consequence of the 1999 amendments to s.65(3) of the CFSA, the only test to be applied on a status review hearing is the best interests test. For purposes of proceedings under Part III of the CFSA (Child Protection), best interests of a child is defined in ss.37(3).

The case law has also established that once it has been decided that a child continues to be in need of protection, the court must consider the least restrictive alternative consistent with the child's best interests. (*C.A.S. of Peel v W.* (1995) 14 R.F.L. (4th) 196)

Interim Orders Pending Final Disposition of a Status Review:

It is important to recognize that the Court has the power to make an interim order pending the final disposition of a status review application. Section 51(2) gives the Court the authority to make an interim order on a status review and section 64(8) establishes the criteria. The child shall remain in the care and custody of the person or society having charge of the child until the application is disposed of, unless the court is satisfied that the child's best interests require a change in the child's care and custody. The original order is presumed correct. (*C.A.S. of Toronto v. R.* (1993) 16 O.R. (3rd) 351)

Kinds of Orders that Can be Made on a Status Review:

Section 65 governs the kinds of orders that a Court may make on a status review application. The Court can, in the child's best interests:

- a) vary or terminate the original protection order made under section 57 (1) of the Act;
- b) order that the original order terminate at a specified future date;
- c) make a further order or orders under section 57;
- d) make an order under section 57.1 (custody order under the 2006 amendments).

Status Review of Crown Wards:

Sections 65.1 and 65.2 govern the status review of crown wards and former crown wards. Section 64 limits status review to society wards and supervision orders. Although the procedure for a status review of a crown ward under s. 65.1 is similar to that under s. 64 for society wards and supervision orders, there are important differences and it is important to

read these provisions carefully. The two most important distinctions are set out in s. 65.1 (5) and 65.1(9).

A parent of a child can not make an application for a status review of a crown ward without permission or leave from the Court if the child has, immediately before the application, been in the same foster home or received continuous care from the same foster parent, or from the same person under a custody order, for at least two years. (s. 65.1 (5))

No person or society shall make an application for a status review of a crown ward who has been placed in a person's home for adoption, if the crown ward still resides in that person's home. (s. 65.1 (9))

January 2008
Sheilagh O'Connell
Director
Toronto Family Law Office

AND see:

1. **LAO LAW:** <https://www.research.legalaid.on.ca/login.html>

(then Family LAW- General and Specific Issue memoranda: Children: Children in need of protection: CH 5 –Children in Need Of Protection CFSA- Specific issue Memos

Status review Application: Test to be applied SCH5-6)

G. TIPS

1. THE ROLE OF PARENTS' COUNSEL- ADVOCATE FOR YOUR CLIENT AS BEST POSSIBLE

1. Preparation

- (a)Preparation is the key;
- first step is to meet with the client
- meet as many time as you have to
 - meet with their interpreters so that you understand them
- Talk with collaterals, schools, counsellors; if it isn't possible to speak with them directly, get directions and request report

- (b) engage client in the process
- have your client do some of the leg work if they are able to
- have them respond to the application itself prior to meeting with them
 - have them get things like school reports, and report cards on the children – if it's relevant
 - If they are engaged and working it will make the entire process much more simple for them, and yourself.

- (c) Disclosure is a very important part of the preparation
 - You're entitled to go to the CAS, and always review the entire file;
 - That includes access visit reports. Always read the hand-written version. The typed version is simply a synopsis
 - there's valuable information in the access visit report, and in the case notes → it's a gold mine of information
 - it's your obligation, not CAS's, to put that forward as you prepare the best case for your client

- (d) Access and long and short term plans
 - You're entitled to speak with foster parents on the issue of access
 - I.e. how did the children act before the visit? How did they behave after the visits? Did they talk about the parents? Or their wishes to come home?
 - These questions are important information particularly if you're looking at crown wardship and no access applications
 - At the very beginning, start looking at potential long-term plans and if not, certainly start looking at family plans on a temporary basis
 - I.e. where can this child go immediately?(the CAS's definition of immediately is 4-6 weeks after an assessment)
 - at the very beginning – I have the client start giving me names and addresses of people
 - I have them start talking to these people even though we are not necessarily there yet
 - Family plans include community plans and all community members and sometimes a teacher or coach could come forward to provide a home

2. Advising the Client

- We have an obligation to take instructions; it's also our obligation to advise
 - This does not mean sugar-coating → tell the client exactly what the situation is
- Depending on their situation – whether it is mental health, or a teenager, or someone with addictions, delivery may be different but the message is clear and consistent
 - I tell them the likelihood of success, what they have to do and don't pretend otherwise → remember – this is their lives
 - The obligation is on them. Tell them "If you want your children back, I can get them back for you BUT-. You have to do A, B, C, and D and if you do that, it's not an issue. But when you come back to me in three months and you haven't done those things, we won't succeed."
 - Tell them exactly what they have to do, and advise them consistently
 - Advise them not to proceed with useless care and custody motions when there is no hope of success – it's an emotional roller coaster for them
- It exacerbates the litigation process so that you can't move into something a little calmer and it's very difficult for the parents to go through that process
 - Even if you say "you only have a 10% chance" → don't say that if there is no chance
- It's really important for the client not to go through unnecessary motions or trials
 - Certainly they are difficult, I let the clients know how difficult they are
- Consider going through a mock examination with them so they will know what they are going to be experiencing for several days.

- Many clients at the very last minute have sabotaged return of their children. On a Saturday night they will relapse after going through a treatment process, going to all of their visits, staying clean for months (i.e. relapsing on a Saturday before the children are coming Monday)
 - Sometimes they know better than you that they can't do it, and you have to listen to the signs and you have to see the signs.

3. Open Dialogue

- Open dialogue with the social worker
 - Between the social worker and you – and between the social worker and the client
- It's hugely important, because social workers are really doing their job and trying to assist the family and they like to see a little bit of an achievement
- If a social worker is working with a client and sees a step forward and a little bit of progress → they will go beyond what a judge might order, beyond what the legal department might say and even beyond what their supervisor says
- They will go to bat for the client – if you can develop some sort of rapport between the two

4. Prepare a good care and custody motion

- Prepare a good care and custody motion
 - It's the most important part of the case
 - You can't wait until trial because if you do there are all sorts of problems that could develop-e.g. Separation anxiety and decreased access simply because of the scarcity of resources
- if you don't believe that you are going to be successful in a care and custody motion, get the client into services and concentrate on access
 - There are too few access motions in CAS matters – and too many unsuccessful care and custody motions
- Get working on the access, get them into the programs -that will be the best way for you to move your client's position forward.

- Finally –

- consider other options –e.g. Mediation, certainly the CAS has been working on their own plans
 - Mediation is currently occurring at LAO through some area directors
 - That should be at the forefront of your options as soon as you see or hear of an apprehension or an application for a supervision order

George MacPherson
Barrister and Solicitor, Ottawa Family Law office

H. OTHER RESOURCES

1. LAO LAW:

<https://www.research.legalaid.on.ca/login.html>

- **The Bottom Line in Family Law**- a weekly review of important family law cases on-line, or by subscription
- **Secondary Sources**

CAS Court - A Navigator's Guide: Child Protection Proceedings

A practical guides to CFSA proceedings. Prepared for Legal Aid Ontario by Brigid Y. Luke Counsel, CAS of Ottawa, George A. MacPherson Counsel, Family Law Office - Ottawa and Ann Scholberg Director, Family Law Office - Ottawa
February 15, 2005

- On-Line Mentoring Peer advice via e-mail is now available within 48 hours
- memoranda, case specific research,
- family law factums, Family Law Factums are now online.
- Training seminars for Legal Aid Ontario panel members are available at a nominal cost. Once logged in, choose "Learning Opportunities" from the menu
- links to useful websites,

2. Family Law Legislation – Consolidated Ontario Family Law Statutes and Regulations

Child and Family Services Act, R.S.O. 1990, c. C.11

O. Reg. 464/07	ADOPTION INFORMATION DISCLOSURE
O. Reg. 494/06	COMPLAINTS TO A SOCIETY AND REVIEWS BY THE CHILD AND FAMILY SERVICES REVIEW BOARD
O. Reg. 25/07	COURT ORDERED ASSESSMENTS
O. Reg. 87/06	EXEMPTION: LICENSING, LOCKING-UP AND SECURE ISOLATION
R.R.O. 1990, Reg. 70	GENERAL
O. Reg. 496/06	METHODS AND PROCEDURES REGARDING ALTERNATIVE DISPUTE RESOLUTION
O. Reg. 206/00	PROCEDURES, PRACTICES AND STANDARDS OF SERVICE FOR CHILD PROTECTION CASES
R.R.O. 1990, Reg. 71	REGISTER
O. Reg. 495/06	TRANSITIONAL MATTERS RE: ENACTMENT OF THE CHILD AND FAMILY SERVICES STATUTE LAW AMENDMENT ACT, 2006

(Family Law Rules)

Ontario Courts of Justice Act, O.Reg 114/99(as amended)

Rule 2(4) The Primary Objective
 Rule 10- Answering a case
 Rule 16- Summary Judgment
 Rule 18-Offers to settle
 Rules 19 and 20- Document and Witness disclosure
 Rule 22- Admission of facts
 Rule 24-Costs

**RULE 33: CHILD PROTECTION
 TIMETABLE**

33. (1) Every child protection case, including a status review application, is governed by the following timetable:

Step in the case	Maximum time for completion, from start of case
First hearing, if child has been apprehended	5 days
Service and filing of answers and plans of care	30 days
Temporary care and custody hearing	35 days
Settlement conference	80 days
Hearing	120 days

O. Reg. 91/03, s. 7 (1).

CASE MANAGEMENT JUDGE

(2) Wherever possible, at the start of the case a judge shall be assigned to manage it and monitor its progress. O. Reg. 114/99, r. 33 (2).

COURT MAY LENGTHEN TIMES ONLY IN BEST INTERESTS OF CHILD

(3) The court may lengthen a time shown in the timetable only if the best interests of the child require it. O. Reg. 114/99, r. 33 (3).

PARTIES MAY NOT LENGTHEN TIMES

(4) The parties may not lengthen a time shown in the timetable by consent under subrule 3 (6). O. Reg. 114/99, r. 33 (4).

3. Dealing with Difficult Clients

“Dealing with the Difficult Client” ,Carole Curtis, B.A. LLB. (now Madame Justice Carole Curtis)
<http://www.practicepro.ca/practice/DifficultClients.asp?version=printer>

I. APPENDICES

APPENDIX A – PLAIN LANGUAGE CLIENT EXPECTATIONS DOCUMENT



What to Expect from Your Lawyer

Your Lawyer:

Is there to protect your interests under the law, and for no other reason.

Is your voice, and follows your instructions and no one else's.

Provides you with the information you need to make an informed decision about how the lawyer should represent you.

Is there to stand up for your rights to the best of their ability.

Does not decide what is "good for you".

Only deals with legal matters (as funded by their Legal Aid certificate).

Will talk or meet with you as soon as possible.

Will expect you to provide all the information about your case that is required, and actively participate in the collection of necessary reports, such as school reports.

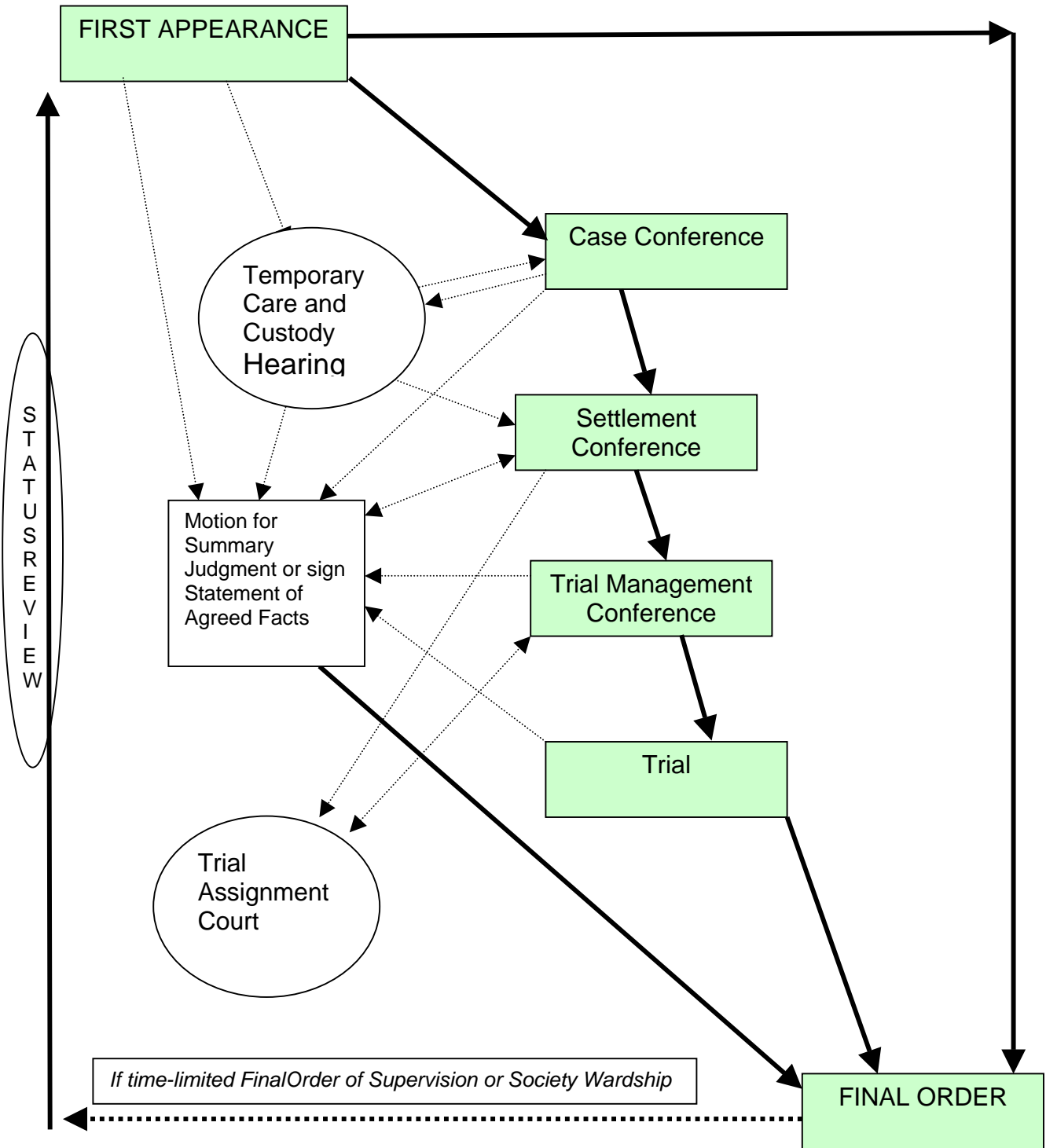
Will answer questions you have about your case.

Will inform you of the results of each step in the proceedings and what it means for you.

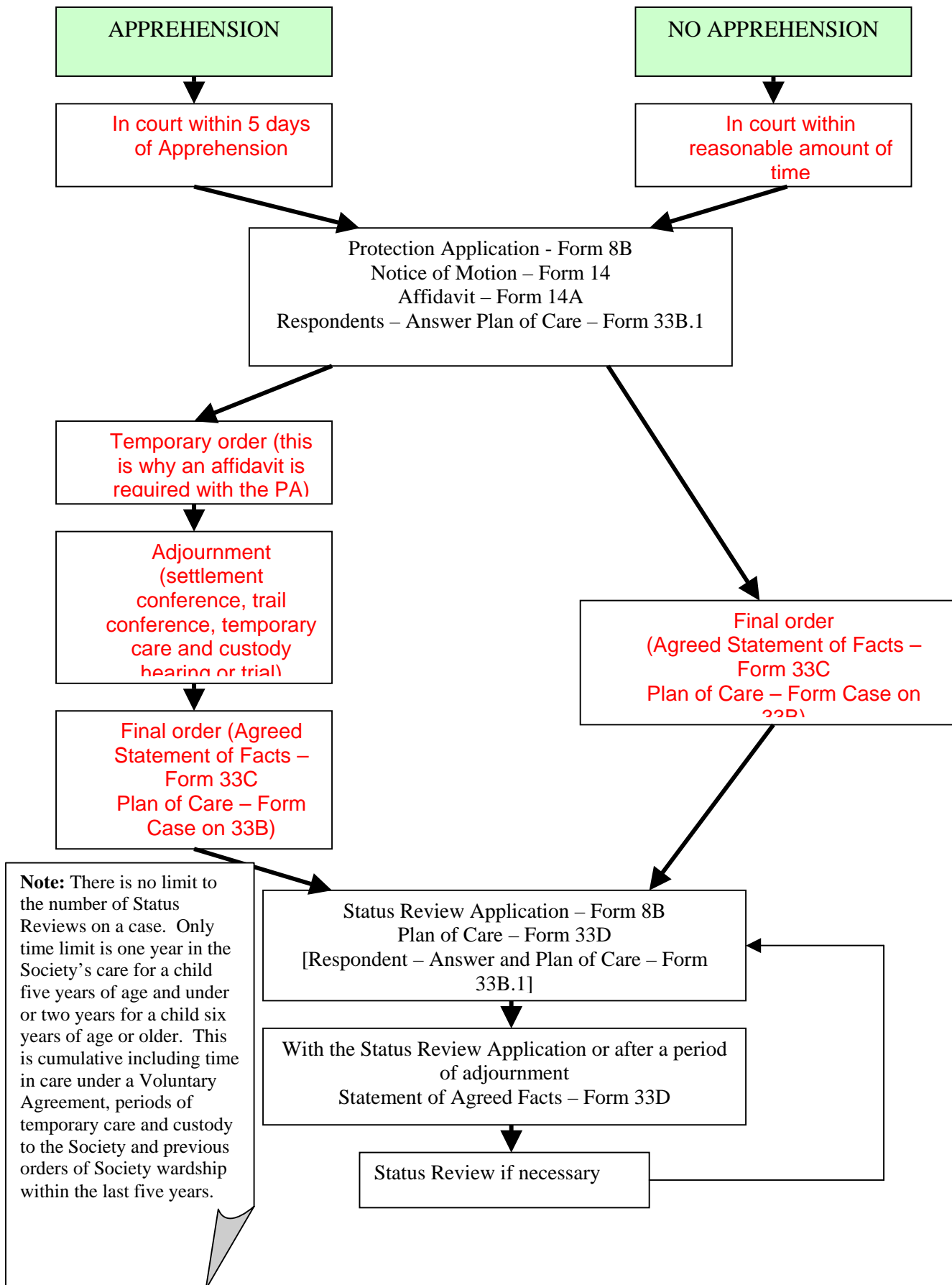
Will try to accommodate your special needs (such as providing an interpreter if needed).

Will maintain your confidentiality.

APPENDIX B - COURT PROCESS CHART UNDER THE FAMILY LAW RULES



Court Process and Flow Chart under the Family Law Rules-Part-2



APPENDIX C – GLOSSARY OF COMMONLY-USED “CAS” TERMS

A.R.E.	Adoption Resource Exchange
CAS case record	<p>Under the CFSA Regulations and Ministry Standards, CASs are required to keep certain records related to the services they provide. CAS workers commonly make casenotes, which may be handwritten or electronic, depending upon the agency for which they work, and which are made contemporaneously or shortly after the events which they describe. Certain information (investigations, plans of service and reviews of service plans, for example) must also be documented in accordance with Ministry expectations, which include prescribed intervals and time frames. These summaries are referred to as “Recordings” or “periodic recordings”, and are generally approved by a supervisor.</p> <p>When a child is admitted to CAS care, a discrete file is opened for the child, with its own requirements for plans of care and reviews.</p>
CAS workers	are referred to as “workers” because the term “child protection worker” is defined in the CFSA. Although division of responsibilities and titles vary from one society to another, there are commonly “intake workers”, “family services workers”, “children’s services workers” or “child workers”, and “adoption workers”. Every worker in a CAS has an assigned supervisor.
CFSRB	Child and Family Services Review Board. May hear complaints under s.68, and hears reviews of CAS decisions under s. 61(7) and s. 144(1), CFSA
DR/ Differential Response	service philosophy that permits CASs to use either a traditional forensic-style approach to investigation assessment or a “customized” approach, depending upon the circumstances of the case. Intended to permit greater flexibility and build positive relationships with families in order to protect children.
“Fast Track”	Fast Track Information System, or “FTIS”. A provincial database that society workers are required to check when conducting a child protection investigation.
Foster home	may be CAS operated (internal) or independently licensed by the Ministry (known as “OPRs” – outside paid resources). Foster homes are parent-model and may take up to 4 children/youth.
Group homes	may be CAS operated (internal) or independently licensed by the Ministry (known as OPRs or “OPIs – outside paid institutions). Group homes are referred to as residences in the CFSA, and may house up to 6 youth.

Intake	the function by which calls to a CAS regarding cases are received, screened and investigated. When a call is received, if it is about a case that is not already receiving service, it is assessed for eligibility using a provincial “tool”. Eligible calls are opened for investigation – which may entail brief service by telephone or a full forensic-style investigation with or without police, depending upon the circumstances.
Kinship care	“in care” placement of children with members for their extended family or community. The kinship care provider must meet foster care licensing standards, comply with expectations about foster homes and is paid a per diem.
Kinship service	“out of care” placement of children with members of their extended family or community. May be supported by a supervision order or be of a voluntary nature. No foster care per diem rate is payable. There are provincial Kinship Service Standards that set out requirements for assessment, service and documentation.
ONLAC	Ontario Looking After Children model – a structured format for collecting information about and from children in care
ORAM	the Ontario Risk Assessment Model
P.R.I.D.E.	Parent Resource for Information, Development and Education - training modules for foster parents (including kin foster parents) and adoptive parents
S.A.F.E.	Structured Analysis Family Evaluation - the provincially-mandated format for conducting homestudies; to be used for foster home (including kin foster home) and adoption home assessments
TCA	Temporary Care Agreement, under s. 29 CFSA

HOW THE CAS WORKS

Information on the operations of the Ontario Children’s Aid Societies can be found at <http://www.oacas.org/index.htm>
<http://www.oacas.org/about/programs/french.htm>

APPENDIX D - RELEASES (SAMPLE FORMS)

Release

To _____ (named professional or school board) _____:

Or

To Whom it may concern:

I, _____ (name of client) _____, and mother/father of:

_____ (name of child) _____ born day/ month/ year

_____ (name of child) _____ born day/ month/ year

Etc.

Authorize you to allow my lawyer, _____ (your name) _____

DIRECTION

TO:

FROM:

RE: My medical file

DATE:

I, (FULL NAME), (DOB), of (FULL STREET ADDRESS) of the City of -----, hereby CONSENT, and authorize and direct you to release to my solicitor: (FULL NAME)

a copy of the entire clinical record prepared by (DR.'S NAME) in respect of (FULL NAME), BORN (DATE OF BIRTH) and this shall be your good and sufficient authority for doing so.

Dated at -----, this day of , 2008 .

Witness

Signature

APPENDIX E - PLAN OF CARE

Ontario Regulation 114/99 FAMILY LAW RULES

33(7) In a child protection case,

- (c) an applicant's plan of care for a child shall be,
 - (i) if the applicant is a children's aid society, in Form 33B, and
 - (ii) if the applicant is **not** a children's aid society, in Form **33B.1**;
- (c.1) a respondent's answer and plan of care for a child shall be,
 - (i) if the respondent is not a children's aid society, in Form 33B.1,
 - (ii) if the respondent is a children's aid society, in Form 10 and Form 33B;
- (d) an agreed statement of facts in a child protection case shall be in Form 33C; and
- (e) an agreed statement of facts in a status review application shall be in Form 33D. O. Reg. 114/99, r. 33 (7); O. Reg. 91/03, s. 7 (3).

FORMS FOR CHILD PROTECTION CASES

<http://www.ontariocourtforms.on.ca/english/forms/family/index.jsp>

Form 33B.1 Answer and Plan of care (Parties other than Children's Aid Society) (page 5)
(part)

4. What placement and terms of placement do you believe would be in the children's best interests?
(*You should include in your plan of care at least the following information. If your plan is not the same for a particular child, then complete a separate plan for that child.*)
 - (a) Where will you live?
 - (b) Who, if anyone will live with you?
 - (c) Where will the child(ren) live?
 - (d) What school or daycare will the child(ren) attend?
 - (e) What days and hours will the child(ren) attend school or day care?
 - (f) Are you enrolled in school or counselling?
 - (g) If you are enrolled in counselling, where do you attend counselling?
 - (h) What support services will you be using for the child(ren)?
 - (i) Do you have support from your family or community?
 - (j) If you have support from your family or community, who will help you and how will they help you?
 - (k) What will the children's activities be?
 - (l) What will your source of income be?
 - (m) Do you go to work or school?
 - (n) If you go to work or school, what are the details, including the days and hours you work or go to school, and who will look after your child(ren) while you are there?
 - (o) State why you feel that this plan would be in the child(ren)'s best interests.

5. These are the people who have information that would support my plan:

Name	Information
------	-------------

APPENDIX F- SUMMARY JUDGMENT

SUMMARY JUDGMENT: WHERE ARE WE NOW? Robin D. McDonald, Children's Aid Society of the Region of Peel. Presented at "The Child Protection File Best Practices", October 11 2007, The Law Society of Upper Canada

APPENDIX G- INTERFACING WITH LEGAL AID

1. Opinion Letters

Opinion Letter to Area Director

Available Time Allotments:

In a child protection file the block of time initially granted depends on the nature of the remedy sought by the child protection agency:

Application for crown wardship 22 hours
Application for society wardship 19 hours.
Supervision order or voluntary care 19 hours

These time allotments cover all activity on behalf of your client up to and including the first pre-trial settlement conference.

Together with these blocks of time, the Area Director will authorize an allotment of 2 hours preparation time plus the actual duration of attendance for the second and subsequent settlement conferences, pre-trial conferences, case conferences or trial management conferences.

Where the application is for crown wardship or society wardship, an additional block of 6 hours is added to the certificate for the temporary care and custody motion.

If requested, the Area Director can authorize a further block of 6 hours for the temporary care and custody hearing where there is a reapprehension, and a block of 6 hours for any status review hearing that falls before the trial.

With the authorization for trial you receive 15 hours preparation time for the time you spend in preparation prior to the first day of trial, and 4 hours preparation per subsequent day during the trial. You will also bill your actual hours of court attendance each day of the trial.

To review what time allotments you can request for your client you can find the complete Tariff and Billing Handbook posted on the LAO website under Lawyer Resources.

You must write a letter of opinion to the Area Director along with the request for the time allotments.

You will have intimate knowledge of the file and of your client. The Area Director does not know the file or the client at all. Here is a list of the key bits of information needed to evaluate the request. In essence you are telling the Area Director "Here's what I need and why. I'd advise a client of modest means paying privately to take this next step."

1. Name of your client
2. The client's certificate number
3. What authorization you need at this time
4. A synopsis of the case to date – be succinct if you can, include what type of order the society is seeking
5. Has your client presented a reasonable plan of care?
6. Have other parties put forth a plan and how does this affect your client's position?
7. Outline the Judge's recommendations, if any, at the pre-trial settlement conference?
8. In your opinion is there a likelihood that your client will be successful at trial?
9. Provide your analysis of whether a reasonable client of modest means, paying his/her own legal account would proceed to trial.

If the case is complex and difficult such that the blocks of time set out in the tariff are not sufficient, the Area Director has no authority to grant additional time beyond the tariff. The discretion exercised by the Area Director in a child protection case is much narrower than in a general family law file.

Your course of action in such instances is to provide the service to the client, and request that Legal Accounts exercise discretion to allow your account as billed when you submit it.

If you keep the Area Director informed about the file via your ongoing series of opinion letters and providing copies of the bill, you will have enabled him or her to write to Legal Accounts in support of your account urging the favourable exercise of their discretion.

Be aware, however, that the Area Director's support of a request for a discretionary increase is just one factor considered by a Legal Accounts Officer in determining whether and to what extent to exercise discretion. It is not a guarantee of payment in full.

November 2007

Chris MacNaughton
Area Director, Niagara North
St. Catharines,

2. How to get paid?

LAO has established a panel of lawyers who may represent LAO's clients in family law matters. Some area offices have a sub-panel for lawyers acting in child protection matters. The panel standards for family panel members are found on the LAO website under Information for

lawyers at http://www.legalaid.on.ca/en/info/panel_standards.asp . To be admitted to these panels, a lawyer must meet and comply with the standards set by LAO for these panels. The panel is administered through LAO's 51 local area offices. Client applications are processed, and eligibility for legal aid assistance determined, in the area offices.

LAO wants its vulnerable clients to receive timely representation. Counsel who act expeditiously in the client's interest and takes reasonable steps to protect LAO's limited resources will be compensated.

In keeping with this intent, where necessary LAO will:

- Expedite the decision and apply eligibility criteria;
- If the applicant qualifies for a payment agreement, ask the lawyer to arrange the signing of our payment agreement;
- If the applicant does not qualify financially for legal aid, refuse the application and ask the lawyer to arrange a private retainer.

The lawyer must take the following steps:

- If the applicant qualifies for a payment agreement, attempt to arrange the signing of LAO's payment agreement;
- If the applicant does not qualify financially for legal aid, and LAO refuses the application for legal aid, attempt to arrange a private retainer;

LAO's *Tariff and Billing Handbook* which is available at www.legalaid.on.ca outlines the policies and procedures for legal aid billing and the legal aid tariff.