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At what point should the Office of the Children's Lawyer (OCL) be engaged in discussions about openness arrangements? What role does the OCL play with respect to planning and implementing openness arrangements?

If the OCL is representing a child in an ongoing child protection proceeding and Crown wardship is a possible disposition, openness should be considered at a very early stage and these discussions would include the OCL as the child's counsel.

The OCL can be appointed by the court in a variety of openness proceedings under s. 153.5 of the CFSA. The section provides that a child may have legal representation in legal proceedings under the following sections:

- (a) S.145.1 – an openness application brought by the Society after a Crown ward without access order;
- (b) S. 145.1.2 – an openness application after a Crown wardship with access order;
- (c) S. 145.2 – a variation of an openness order before adoption;
- (d) S. 153.1 – a variation of an openness order post adoption.

Section 153.5(2) states that if the court finds that it is desirable for the child to have legal representation under one of these proceedings, the Court may appoint the OCL, upon the consent of the OCL, to represent the child.

A. Process when there is a Crown wardship no access order

If the child is subject to a Crown ward no access order, the Society is the only party that can bring an Openness Application. The OCL can be appointed by the Court to provide legal representation for the child. As noted above, s. 153.5(2) specifies that this order can only be made on the consent of the OCL.

B. Process when there is a Crown wardship with access order

The involvement of the OCL in openness discussions when there is a Crown wardship with access order is largely dependent on the type of access that is listed on the Crown wardship order and on the specific notice that is provided to the child.

In 2011 the CFSA was amended to allow the Society to terminate an access order when a child is a Crown ward and is going to be placed for adoption. Section 145.1.2 (2) established that notice of the placement for adoption and the termination of access had to be provided to the person who had been granted access (access holder) and the person to whom an access order had been granted (access recipient). For example, if the order said Michael shall have access to his parents once a month, Michael is the access holder and his parents are the access recipients.

If you are an access holder you also receive notice that you have the right to bring an application for openness (Form 8D.2 or 8D.3). If you are a recipient you simply receive notice that your access will terminate (Form 8D.4).

There are three mechanisms to request OCL involvement in openness files where there is a current Crown wardship with access order:

1. Notice to the OCL through the Ministry of Children and Youth Services (MCYS) notification process
2. Court order
3. Pre-Court Alternative Dispute Resolution (ADR)

1. MCYS Notice Process for the OCL

There is no requirement under the CFSA to serve notices (Forms 8D.2, 8D.3 or 8D.4) on the OCL. However, in response to the legislative changes, MCYS established a process to notify the OCL when a child receives a Form 8D.2 or 8D.3 advising them of their right to bring an openness application. (there is no process to notify the OCL when a child receives a Form 8D.4).

Effective May 1, 2012 if the Society serves a child under the age of 18 with a Form 8D.2 or 8D.3, notice has to be given to the OCL on the same business day. The following information is to be provided to the OCL:

- (a) a copy of the Form served on the child;
- (b) a copy of any current child protection orders in place (including the access order);
- (c) a completed Ministry form entitled: "Notice to the Office of the Children's Lawyer that a Child is Being Served with Form 8D.2 or 8D.3"

This information should be faxed to the attention of Elizabeth McCarty at (416) 314-8050. Ms. McCarty can be reached at (416) 314-8108.

The OCL will then review the materials provided and determine whether or not they will assign counsel to represent the child. Once OCL assigns counsel, they will determine, within the 30 period, whether or not to bring an application for openness on behalf of the child. If the OCL determines that they will bring an application, the child is the applicant and the OCL will provide representation. If the OCL does not bring an application, the OCL can still be appointed to represent the child if another party brings an application.

2. Court Order

In cases where the OCL is not notified about the termination of an access order (where the child is served with a Form 8D.4) the OCL may still be appointed to represent that child if another party brings an application for openness and the court deems it appropriate for the child to have legal representation by the OCL (s. 153.5) on the consent of the OCL.

3. Child Protection ADR

Another mechanism to consider if you want to involve the OCL at an earlier stage in the process is ADR. If a Society is proposing ADR, notice must be provided to the OCL under the Child Protection Alternative Dispute Resolution Protocol. Proposing ADR is a mechanism to bring the OCL into the negotiations prior to the notices being served and prior to an openness application being brought by another party.

The advantage of considering this approach is the earlier involvement of the OCL. In many cases by the time a child is served with a notice to terminated access, there have been ongoing discussions and negotiations between the Society, adoptive parents and the family regarding possible openness arrangements. If those negotiations are complex or particularly sensitive, it may be advantageous to have all of the relevant participants (including the OCL) involved at an earlier stage.

If a Society does propose ADR it is important to reference in the notice to the OCL that the ADR is in relation to openness discussions.

What to expect from OCL Involvement?

The OCL will take a number of steps upon accepting a file. You should expect that the OCL will:

- Meet with the child to ensure that they have an independent voice regarding openness arrangements
- Speak with the Society to get a sense of the current access arrangements (frequency, location, supervised/unsupervised) and to inquire as to whether the access has been positive for the child from the Society's perspective
- Where appropriate meet with the person to whom the child has access
- If possible, meet with the adoptive parents
- Participate in any discussions regarding openness arrangements
- In appropriate cases, serve and file an openness application on behalf of the child and represent the child within the proceeding.