The Case Against Children's Counsel

In Parental Alienation, Appointing an Attorney for the Child is Fraught with Danger

Part 1 and 2

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PART 1

In litigation where custody or access to children is contested, courts are directed to canvass the views of the affected children, at least to the extent that the views can be ascertained. There are various means by which courts can solicit the voice of the child.

Each way has its relative advantages and disadvantages, but there are good reasons to proceed cautiously in this regard. Asking children their opinions creates the risk of triangulating the child further into an interparental dispute. It also can potentially create or contribute to an alliance of one parent and child against the other parent or against other children. What's more, many studies and publications, including a study of 1,000 families published by the Family Law Section of the American Bar Association, suggest that parental lobbying and manipulation of children in custody disputes is very common.

Almost all jurisdictions, through their legislation, jurisprudence, and procedural practices, have recognized many ways of enabling the voice of the child to be taken into account by the courts. This can include a judicial interview, a custody/access forensic assessment, indirect testimony through a children's therapist, parents or others, or through counsel for the child. However, in my opinion, the potentially most damaging option of all the methods is appointing counsel for a child.

In almost all jurisdictions (for example in Ontario, Canada, through the Strobridge decision of the Ontario Court of Appeal in 1994), it is clear that the role of counsel for a child is to be an advocate and not a guardian acting in the child's best interests. This creates a difficult dynamic where children are elevated almost to the position of parties in their parents' litigation, often becoming over-empowered and triangulated into their parents' disputes, with the result that the child's relationship with one parent is damaged.

Through the appointment of counsel, a process meant to support a balanced inquiry into children's needs and the ability and willingness of parents to meet those needs often gets diverted. Instead, it turns into a focus on the child's wants, as opposed to the child's needs.

Developing understandings in neuroscience suggest a substantial concern about the suggestibility of children, resulting from the parents' actions or even by the very existence of counsel representing them in their parents' dispute. The experience of many parents in dealing with counsel for their own children who may be taking either an unknown position or position adverse in interest to them is generally quite upsetting and unfavorable. These parents tell me they don't feel heard by this process.

GETTING EVIDENCE BEFORE THE COURT

In general, counsel for a child cannot advance evidence based on his or her own interviews of the child. Further, because of the advocate role, the file of children's counsel is not available for review by the parents. The interviewing skills and practices of children's lawyers can, therefore, not be tested.

While a child's counsel may sometimes be assisted by a social worker, there is no ability to interview the practitioner for experience, potential biases, and their approaches to the services to be provided. The file of the social worker is generally not provided prior to the children's lawyer taking a trial position in the case and often only in the couple of weeks leading up to the trial itself. Disclosure from various third party sources is often only provided to the assisting clinician and not to the parties themselves until close to trial.

Numerous published standards and expert texts, such as from psychiatry, psychology, and social work regulators and organizations such as the Association of Family and Conciliation Courts, discuss how to conduct forensic child custody/access assessments. There are also standards published by the American Bar Association, the American Association of Matrimonial Lawyers, and others for child representation. However there is insufficient guidance on how to approach situations of concerns about parental alienation and little guidance on how to evaluate the independence of the views and preferences of the children.

It is incumbent upon children's counsel to express to the court whether, in their view, the children's statements are reliable. However, practices in this regard lack consistency. Further, in practice much depends on the education and experience of children's counsel and any associated clinical social worker, and no standards of training exist and practices vary widely.

In many situations, parents are told either by children's counsel or by the clinical assist that records, documents, and other materials they provide will not be read and that a list of collateral sources to be contacted for interviews will only be used in part, or not at all.

RISK OF MANIPULATION

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In cases where children are showing unhealthy levels of alignment or enmeshment with one parent, or rejection of the other parent, the practice of vetting the independence of children's views and preferences is again without consistent standards and training. Children's counsel may not have a robust and up-to-date understanding of the extent of children's suggestibility and risk of manipulation in the course of a contested custody dispute.

In more extreme cases of family dysfunction, issues arise as to whether counsel can actually assess whether the child has sufficient capacity to instruct counsel on issues involving the child's parents. A child can be competent in many domains but not competent to give independent instructions to counsel on issues involving the parents' litigation.

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Psychologists and psychiatrists would generally be much more cognizant of this dynamic than an attorney might be.

The appointment of counsel for children and giving children a seat at the table of their own parents' divorce triangulates them as opposed to insulating them from the effects of divorce.

There are better methods to determine children's needs and an understanding of their parents' ability and willingness to meet those needs.

PART 2

In Part 1 of this series of four articles dealing with children's counsel from January 2019 PASG newsletter *Parental Alienation International*, I made the point that the advocacy role (i.e. not a best interests mandate such as for a custody evaluator or guardian ad litem) associated with children's counsel is the most problematic way to get the "voice of the children" before the court. While counsel is expected to assess the independence of the children's views and express any reservations to the court (and assess the capacity of their "client" to instruct on these contentious issues), this is rarely done faithfully.

So, the inevitable task of counsel acting for a targeted parent is to oppose the children's counsel role and instead ask for a forensic review or testimony by therapists and other service providers. What follows is the typical set of submissions in this regard. There is thorough jurisprudence to support each assertion and some of the best judicial observations I have found are included as indented quotes.

1. The views and preferences of an alienated child are not independent views and preferences, even if they are strong and consistent. It is an error of logic to equate strength and consistency of views with the truth or credibility of those views. Little to no weight can be given to the views of an alienated, manipulated, and influenced child. With alienated children, you cannot be sure if you are really listening to the child or to the aligned parent. The child might passionately believe in what he or she is saying and defend it, but the information comes from somewhere else. In such circumstances, the appointment of child's counsel would not be in the child's best interests.
2. In declining to appoint counsel, the court may consider that the views and preferences of an alienated child are not independent:

> *With respect to the children's views and preferences, where they can be ascertained, the difficulty in an alienation case is determining who… is really speaking through the child's words, and whose views the child is really presenting. If I accept that there has been parental alienation in this case, as I do, then the children's preferences are not her own, but are those of her mother or other maternal family as she has been convinced.*

3. A children's wishes report is properly denied where there would be little value because of concerns of influence. Further, the extent of a fact-finding investigation necessary to determine the veracity of the children's views is often beyond that completed or would

require extensive additional evidence from those with direct knowledge of the state of the children as opposed to hearsay.

4. Despite all the rhetoric of the "voice of the child," the ultimate analysis is that of best interests. This is the case under Article 3 of the United Nations Convention on the Rights of the Child (the "Convention"). The Convention does not specify that children as of right should have counsel and a "seat at the table at their own parents' divorce." In fact, Article 9 of the Convention supports children having fundamental relationships with both parents, and Article 19 requires contracting states to protect children from emotional abuse.

5. Article 12 of the Convention recognizes the importance of considering issues of weight and recognizes the freedom of contracting states to set their own national procedural rules to implement the Convention. There are more preferable ways to hear the "voice of the child" than the appointment of counsel—which should be the least preferred because it necessarily triangulates the children into the parental dispute.

6. Introducing counsel for the children will serve only to further polarize the parties and the children. Counsel for a child is to be a zealous advocate, not a guardian acting in the child's best interests. Where alienation is found, the child's views have been accepted to be the views of the alienating parent. In such circumstances, the appointment of child's counsel would not be in the child's best interests.

7. Alienated children stuck in a "loyalty-bind" may not have the capacity to instruct counsel on matters relating to custody/access involving their parents. The expert evidence and broad-based investigation necessary to resolve concerns with capacity to instruct would not be available on a motion where there is not the full evidentiary record of a trial.

8. The appointment of independent counsel for children in private custody/access litigation is not to be done as a matter of course. The reason why is succinctly stated as follows:

> *This remedy should not be available only for the asking. In as much as it implicates the children very directly in the entire litigation, it is a very blunt instrument indeed. It can cause untold harm to impressionable children who may feel suddenly inappropriately empowered against their parents in a context where the children should be protected as much as possible from the contest being waged over their future care and custody. All actions involving custody and access over children should be governed by one paramount consideration: no one should be allowed to act in a way that might endanger their well-being. The test of "the best interests of the children" as insipid and fluid as it might be, still remains the benchmark against which any person wishing to interfere in their lives should be measured.*

9. Previous findings of alienating behaviors and failure to comply with therapeutic orders and input from many other professionals in the case can lead to a determination that

ascertaining the wishes of the children through counsel was not necessary for the court to determine their best interests. Further, counsel is not needed where the children's input would simply mirror the assertions of the favored parent and family or where the court has made findings that the children had developed an unexplained distorted reality of their life that was implanted in their minds and psyches.

10. Appointing counsel for the children would carry the risk of polarizing the children further in the dispute. Where they had already been exposed to countless therapeutic and social work interventions, exposing them to more professionals may exacerbate the difficulties for the children associated with the litigation and parental conflict.
11. Appointing counsel might also cause a delay that would not be in the best interests of the children.
12. Where the child was already in therapeutic treatment, the appointment of counsel would simply draw the child back into the situation where he or she had to choose between his or her parents.
13. Where the current proceeding was focused on compliance with an existing court order, there is likely no need for counsel to advance the children's wishes—a court order is presumptively in the children's best interests until varied.
14. Some insightful judicial observations are:

    "Elevating JR [the child] to becoming a principal actor in his parents' dispute by appointing a legal representative is not in this child's best interests, nor is directing a VOCR to be prepared. The former risks further exposure of the child to conflict while the latter suffers from the intrinsic limitation of parental pressure or manipulation. [footnote omitted]"

    "Requesting counsel for a child who has so clearly been conscripted by a parent to meet his needs, is to risk sacrificing the child's own needs. Children are to be protected by the court as much as possible. In the heat of litigation it is easily forgotten that every child deserves the love of both parents. A parent who offers such love on terms—that the other parent be denied—is no parent, and deserves no quarter in the litigation [emphasis added]."

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    "Little weight may ultimately be given to the children's positions if their preferences are the result of the mother's deliberate attempts to ruin the children's relationship with their father."

    "In my view, the OCL is unnecessary to adequately determine the views and preferences of the children. The children have been extremely vocal about never wanting to see their father again. They have been extremely vocal about their alignment with their mother."

"Representation of the children in the proceeding would exacerbate a situation where the children are far too empowered, far too engaged and far too impacted by the conflict and potential alienation evidenced in the proceeding. Ultimately their position will be of little assistance to the court if their views and preferences stem from the mother's interference in their relationship with their father."

"Further, representation at this stage could potentially delay the ongoing investigation, and would certainly delay the implementation of an access regime."

15. Ultimately the court needs to weigh whatever advantages involving counsel might have against the disadvantages.

In Part 3 of this series, we will examine how to refute input from children's counsel. Part 4 will focus on important insight from a recent case about the limits of advocacy concerning children and the duties of children's counsel to the court and the administration of justice.

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