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What To Do When the CAS Comes Looking For Your Client: Fundamentals in Child Welfare Litigation

The Client's Story:
Drafting an Answer and Plan of Care

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Continuing Legal Education

Introduction

You have just discovered that the local Children’s Aid Society has applied to or is about to apply¹ to a court to determine whether your client’s child is in need of protection. What do you do? How do you advise your client?

The basic strategies are:

1. Ignore
2. Deny
3. Admit and qualify and explain
4. Admit and rehabilitate

Each course of action has strategic implications and practical consequences, both procedural and substantive. The initiating document, the application, outlines the Society case, the risk to the child(ren) and the reason the Society lacks confidence in your client to protect the child(ren) against the risks they have identified.

Your first step is a thorough review of the allegations with the client prior to drafting an Answer and Plan of Care ((also known colloquially as an “APC”). After reviewing the allegations with the client the next step is to draft an APC. The APC should contain the following information

1. The client’s answer to the Society’s allegations
2. The client’s plan of care for the child(ren) on a temporary basis
3. The client’s plan of care for the child(ren) on a long term basis

Although these elements are combined into one document the APC tends to be reactive to the Society’s allegations. Hopefully the client’s plan on both a short term and long term basis will be proactive.

Drafting an APC

An APC is broken into 5 distinct parts. The different parts are:

Part 1 – Information regarding the child(ren)

Part 2 – Facts that the client agrees with and doesn’t agree with

Part 3 – Facts that the client agrees with and doesn’t agree with on a status review

¹ Pursuant to the *Child and Family Services Act, R.S.O. 1990, c. C.11, as am*, there are 3 ways in which proceedings regarding the protection of a child can be commenced: (1) pursuant to s. 40(1) “a society may apply to the court to determine whether a child is in need of protection”, (2) pursuant to s. 40(2) a society can apply to a justice of the peace for a warrant to apprehend a child and take the child to a place of safety, (3) pursuant to s. 40(7) a society can apprehend a child, if they have reasonable and probable grounds to believe that a child is in need of protection and that there is a substantial risk to a child’s health and safety, without a warrant and bring the child to a place of safety.

Part 4 – Details of the client’s plan of care

Part 5 – Claims by Respondent

The information in Part 1 can be gleaned from reviewing the information about the child contained in the Society’s application materials. In order to ensure the accuracy of the information it is important that you review the information with the client during the initial interview and confirm its accuracy. If the information is inaccurate send written correspondence to the Society alerting them to the issues raised by the client.

Part 2 is the portion of the APC where your client is able to answer the allegations levelled by the Society. When assisting the client with drafting their answer in this section remember the basic strategies: (1) Ignore, (2) Deny, (3) Admit, qualify and explain, and (4) Admit and rehabilitate. Ignoring the Society’s Application will most likely result in the client’s child being made either a Society ward or a Crown ward for the purposes of adoption. Denying the allegations will generally not further your client’s case as a court cannot rely on blank denials when determining where and with whom a child should be placed on both an interim and permanent basis. A court needs evidence in order to make a proper determination. Therefore the best strategy is either to admit, qualify and explain or to admit and rehabilitate. Which strategy you choose will depend on the facts of the case. If your client has been in a long term relationship where they have suffered ongoing domestic abuse you will likely want to choose to admit, qualify and explain. If your client suffers from an addiction you would likely want to admit and rehabilitate. In either instance it is generally in your client’s interest to try and work with the Society as cooperatively as possible if the Society is open to such an approach.

Part 3 is similar to Part 2. The difference being that allegations, if in fact the Society has made any, generally will have arisen since the final order was made relating to the Society’s initial application. In some instances status reviews will be no more than a procedural formality because the Society has not raised any new concerns since the final order was made. In any event when you are drafting a APC in response to the Society’s application you will not be filling out this section.

Part 4 is crucial to your client’s overall success in responding to a Society’s application. The question basic question your client must answer is “what placement and terms of placement do you believe would be in the child(ren)’s best interest? In order to answer this question your client must answer the following specific questions:

- (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 daycare?*
- (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 child(ren)'s activity 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 interest.*

In order to be able to assist your client with answering these questions you may have to do some leg work on behalf of your client. In some cases you may have to search out community resources (i.e. early learning centres, after school programs) in order that your client can reassure the court that there are “eyes in the community” that will assist the client in looking after the children. Some clients may need assistance searching for and getting enrolled in addiction, mental health or parenting skills counselling depending on the scenario. In other cases you may require an assessment pursuant to section 54 of the *CFSA* to determine what services and/or counselling the client or child requires before a court order can be made returning a child to your client’s care.

The final part of the APC, Part 5, is the section where your client sets out what orders they are seeking. Generally a client will seek an order returning the child to their care and custody without any terms and conditions. However in some instances it may be advisable to seek an order returning the child to your client’s care and custody on a 6 months basis with certain terms and conditions. You would likely recommend this option to a client in a situation where the Society’s protection concerns were limited to a particular set of circumstances and that so long as the client removed themselves from those circumstances and could demonstrate to the satisfaction of the Society and a court that if the child were returned to their care they would find themselves in those circumstances again. Also in Part 5 the client has the option to seek costs against the Society for initiating their application.² While it is common place for counsel when drafting their client’s APC to include a claim for costs remember that “the test for the appropriateness of an award of costs against a Society is whether the Society should be perceived by ordinary persons as having acted fairly”³.

² The jurisdiction to award costs against a Society derives from section 131 of the *Courts of Justice Act, R.S.O. 1990, c. C-34*, as amended according to W.G. Rabley J in *Sarnia-Lambton Children’s Aid Society v. K.B.*

³ See *Hastings Children’s Aid Society v. J.L.* at para 46 referencing *Children’s Aid Society of Niagara Region v. W.D. 920040 15 R.F.L. (6th) 117 (Ont Div Ct)* and *Children’s Aid Society of Waterloo (Regional Municipality) v. C.(Z.B.), [1996] O.J. No. 42145*. For a good overview of the Society’s responsibilities and the considerations that should go into awarding costs against a Society see *The Children’s Aid Society of Toronto v. S.K. [2010] O.J. No. 6031*

Failure to File an APC

Subrule 10(1) of the Family Law Rules⁴ states that “a person against whom an application is made shall serve an answer on every other party and file it within 30 days after being served with the application”.⁵ In the case of an application by a Society under the *Child and Family Services Act* (hereinafter the “*CFSA*”) a parent, in most circumstances⁶, if they want the right to participate in the proceedings regarding the placement of a child must serve and file an APC⁷. However as Schnall J said in 2003

the parent’s do not have to participate. They may well sit back and do nothing but, in contested proceedings where the parent’s are opposed to the Society’s position, they will be, and should be, precluded from participating in the proceedings unless they file an answer on the merits.⁸

If a Respondent refuses or does not file an answer pursuant to the Family Law Rules then the Society can, much like a litigant in domestic family law litigation, move proceed on an uncontested basis.⁹

This course of action will rarely be in anyone’s *interests* let alone a child’s best interests. A court needs both evidence and framework in which to evaluate the evidence in order to adjudicate properly on what is in the child’s best interests, whether on an interim and final basis. The APC provides that framework. While the allegations are not in themselves evidence, they direct the court’s mind to the issues so as to provide context for an evaluation of the evidence

The evidence that the court requires cannot consist of just blanket denials by the client. If the answer is not obvious the question then becomes “*what evidence should counsel be looking to place before the court?*” after an application has been commenced by a Society.

Grounds for Apprehension

The APC responds to the allegations in the application. Some allegations are more serious than others. The APC both answers the specific allegations and describes the factual basis for the parent’s theory of the case.

⁴ R. 10, *Family Law Rules*, O.Reg. 114/99, as. am. Also see *Family and Children’s Services of St. Thomas and Elgin v. F.(W.)*, [2003] *W.D.F.L.* 163, 36 *R.F.L.* (5TH) 310 at para 159.

⁵ Subrule 33(1) of the Family Law Rules sets out a timetable for child welfare cases and confirms that the 30 day filing requirement under Rule 10 applies to child welfare litigation.

⁶ Section 51(2)(a) of the *CFSA* states that “where a hearing is adjourned, the court shall make a temporary order for care and custody providing that the child, remain in or be returned to the care and custody of the person who had charge of the child immediately before intervention”, which means in effect that the biological parents are not always the respondent’s in a Application a Society.

⁷ Attached as Appendix “A” is a copy of an APC

⁸ *Family and Children’s Services of St. Thomas and Elgin v. F.(W.)* supra at para 347.

⁹ See *Family and Children’s Services of St. Thomas and Elgin v. F.(W.)* supra at para 347.

“Careful consideration of the parent’s case is critical to a proper adjudication of a child protection application”¹⁰ These words from Justice Katarynych should be imprinted on counsel’s mind. They should inform the drafting of the APC. It’s the first chance to tell the client’s side of the story. Make it a clear, accurate tale.

In cases which start with an apprehension the Application will set out the grounds for apprehension and the reasons why the child cannot be protected in the home. To a certain extent the factual matrix will overlap with the material required for the temporary hearing.

In most cases, if there is an apprehension, a Society’s application will be accompanied by a motion for temporary placement¹¹ of a child either in the care and custody of the Society or with the last care giver prior to the apprehension subject to conditions.¹² If this is the case the Society’s motion materials will likely disclose additional grounds for the apprehension¹³ and will give you the first glimpse of the evidence the Society will be relying on to support their position that a child is in need of protection.¹⁴

In either event if the Society’s materials do not disclose proper or sufficient grounds¹⁵ to support a Society bringing an application it is an option to bring a motion¹⁶ seeking a dismissal of the Society’s application because:

(1) a “child’s best interests are presumed to lie with...(a) parent”¹⁷

¹⁰ See *Catholic Children’s Aid Society of Toronto v. T.S.*, [2002] O.J. No. 959 at para. 9.

¹¹ If you are faced with a Society motion for temporary care and custody on a first appearance you will not likely have any materials prepared in response. In that case it is important that you seek an access order pursuant to s. 51(5) of the *CFSA* that maximizes the amount of contact with the child. When seeking an access order it is important that you request specified access or at least a minimum amount of access (i.e. twice a week for two hours). Further you should ensure that any order made placing a child in the care of the society is made on a without “prejudice basis”.

¹² If the Society apprehends a child they have an obligation to come before a court, within 24 hours or as soon as practicable if the child is apprehended and brought to a place of safety that is a place of open detention pursuant to s. 46(2) of the *CFSA* or otherwise within 5 days if a child is apprehended pursuant to s. 46(1) of the *CFSA*, for an order regarding the child’s care and custody under s. 51(2) of the *CFSA*.

¹³ In *Children’s Aid Society of the City of Kingston and County of Frontenac v. J.M.S.* at paragraph 18 Robertson J stated that “the society has a duty to ensure their pleadings are fair and balanced.”

¹⁴ Rarely will a client be in a position to neither prepare materials in response to a Society’s motion for placement of a child after an apprehension nor will a client likely to be in a position to bring a temporary care and custody motion seeking to have the child placed in their care immediately after an apprehension. As a result as Robertson J said at paragraph 17 in *Children’s Aid Society of the City of Kingston and County of Frontenac v. J.M.S.* “the first post-apprehension hearing is routinely little more than an administrative adjournment.”

¹⁵ “The Society has a duty of fair disclosure of relevant evidence in a timely manner. This includes evidence helpful to the parent. See *Children’s Aid Society of the City of Kingston and County of Frontenac v. J.M.S.* at paragraph 17.

¹⁶ The motion should be brought if possible at the first appearance even if the motion has to be brought orally. The test you have to meet is “do the facts presented in the Society’s affidavit constitute reasonable and probable grounds to believe that there is a risk of likely harm to the child”. Bringing the motion will not prejudice your client’s right to bring a temporary care and custody motion pursuant to subsection . 51(2) of the *CFSA* at a later date if you are not successful in having the Society’s Application dismissed because it has not met its onus on credible and trustworthy evidence as set out in *Children’s Aid Society of Ottawa-Carleton v. T.*, [2000] O.J. No. 2733.

¹⁷ See *Catholic Children’s Aid Society of Toronto v. T.S* supra at para 9.

- (2) child protection proceedings are a very serious assault on a family's integrity, a "gross intrusion into a private sphere of family life"¹⁸
- (3) few state actions can have a more profound effect on the lives of both a parent and a child than an application by a Society¹⁹.

However when considering whether to advise a client to bring a motion to dismiss a Society's application it must be kept in mind that the test during the initial court proceeding is always whether the child is in need of protection. Section 57 of the *CFSA* makes clear that you are getting into very dangerous ground as an application to dismiss a Society application is in effect a summary judgment.²⁰

If you determine that the Society's Application discloses proper or sufficient grounds look to see whether the Society, in the case of an apprehension, has brought their case before a court within the timeframe prescribed by under subsection 46(1) of the *CFSA*. If the Society has not complied with subsection 46(1) in the case of an apprehension then it is possible to bring a motion to dismiss a Society protection application for want of jurisdiction.²¹ Success is likely to be a pyrrhic victory. If the grounds still exist on the date of the dismissal the Society will be required to re-apprehend.

If neither of the first two options is available the only option left open to the client short of refusing to participate in the proceedings is to serve and file the APC you have drafted. Note that there is a line for the signature of the party at the bottom of the APC. Ensure that your client sign. Also ensure that you have thoroughly reviewed the APC and that the client understands it

As Katarynych J said "the parent who takes who takes issues with all or any part of the Society's claims is required to make that opposition known to the court by filing an answer to these claims"²². When drafting a client's APC keep in mind that the family law rules, as mentioned above, govern the service and filing.

Late Filing a Client's APC

If the client's APC is not filed in time then the provisions of subrule 10(5) of the Family Law Rules apply. If this happens

1. The client is not entitled to participate in the proceedings in any manner
2. The client is not entitled to notice of any further steps in the litigation
3. The court is permitted to proceed with the case in the client's absence

¹⁸ See *Winnipeg Child and Family Services v. K.L.W.*, [2000] S.C.R. 519

¹⁹ See *New Brunswick Minister of Health and Community Services v. J.G.*, [1999] 3 S.C.R. 46

²⁰ It will be the rare occasion when a client will be in a position to bring a motion for the dismissal of the Society's Application it is not unheard of. For an example of a case where the client was in a position to bring a motion for the dismissal of a Society's Application see *Children's Aid Society of London and Middlesex v. E.V.F.S.*, [2004] O.J. No. 1216

²¹ See *Kenora-Patricia Child & Family Services v. G.(J.)*, 2001 Carswell Ont 2100

²² *Catholic Children's Aid Society of Toronto v. T.S* supra at 18

However a court does have the discretion under subrule 33(3) of the Family Law Rules to lengthen the time for serving and filing a client's APC. If this is the case bring a motion citing subrule 33(3) of the Family Law Rules requesting an extension of time. In most case neither the Society nor the other responding parties' will oppose a request for an extension. If any party does oppose the request you will be required to demonstrate that allowing a client who is out of time an extension to file their APC is in the child's best interests.²³ The factors to be considered by a court in determining what is in a child's best interests are set out in subsection 37(3) of the *CESA*.

The threshold for establishing that it is in a child's best interest to grant an extension of time to a party to file an APC is very low.²⁴ When drafting your motion keep in mind that the family law rules are guidelines and not inflexible "iron rails"²⁵. If you can establish that there is an "air of reality"²⁶ to your client's plan then it is likely that you will be able to establish that it is in a child's best interests to grant an extension of time to file an APC.²⁷ Such an approach is consistent with the principle that decisions about children's best interests should be based on as complete as possible an information package.

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²³ See *L.B. v. Children's Aid Society of Toronto*, (2004), 132 A.C.W.S. (3d) 509, [2004] W.D.F.L. 478, [2004] O.J. No. 2964, 2004 CarswellOnt 2869 (Ont. S.C.)

²⁴ See *Jewish Family & Child Service of Greater Toronto v. P.(M.J.)*, 2012 ONCJ 66.

²⁵ See *Catholic Children's Aid Society of Toronto v. T.S* supra at para 20.

²⁶ See *Children's Aid Society of Toronto v. C.(Z.)* [2004] O.J. No. 2964

²⁷ A good example of a case where a person was able to satisfy a court that an extension of time was in the best interest of the child is *Children's Aid Society of Windsor-Essex v. B.(B.)*, 2008 ONCJ 191.