August 11, 2017

Via Fax: (416) 326-2699

Attn: Andrea Strom
Assistant Deputy Attorney General
Ministry of the Attorney General

&

Attn: Sara Weinrib – Counsel - Policy Division
Ministry of the Attorney General
McMurtry Scott Building
720 Bay Street
7th Floor
Toronto, Ontario
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Dear Ms. Strom and Ms. Weinrib:

Re: Katelynn Sampson Inquest Recommendations

#75, 76, 77, 78, 79, 82 and 85

Thank you for requesting FOLA's input on the above noted recommendations. You have advised that the Ministry of the Attorney General is interested in receiving our members views regarding recommendations #75, 76, 77, 78, 79, 82 and 85 as these recommendations propose changes to legislation, practices and procedures to increase children's participation in custody and access litigation.

To provide you with some feedback on the proposed changes, we have invited our members and family law representatives to provide us with their opinions and comments on these proposed changes, however, due to the tight deadline set for feedback, we were not able to widely survey our membership. Therefore, before any specific changes are made, we ask that more time be provided for consideration of these important issues to ensure that any changes are made in a thoughtful and sensitive manner in the best interests of the children they are meant to assist.

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Consultation Questions Re. Participation Provisions in the Children's Law Reform Act (Recommendations 75, 76, 78 and 79).

Consultation Question:

1. **Do *ss. 24 (2) (b)* and *64 (1)* of the *CLRA* provide sufficient direction regarding the requirement to consider children's views and preferences? Why or Why not?**

FOLA's Answer:

Sections *24 (2) (b)* and *64 (1)* of the *CLRA* do not provide sufficient direction regarding the requirement to consider children's views and preferences. *Sections 24 and 64* above do not specify that a child's views and preferences need to be heard in a safe, reliable and consistent manner or that the court must also consider the strength, consistency and independence of the stated views and preferences.

Section 24 (2) (b) of the *CLRA* states the following:

24. MERITS OF APPLICATION FOR CUSTODY OR ACCESS – (1) The merits of an application under this Part in respect of custody or access to a child shall be determined on the basis of the best interests of the child, in accordance with subsections (2), (3 and (4).

s. 24 (2) BEST INTERESTS OF CHILD – The court shall consider all the child's needs and circumstances, including,

(b) the child's views and preferences, if they can reasonably be ascertained;

Section 64 (1) of the CLRA states the following:

***Section 64 (1)* of the *CLRA* states the following:**

64. CHILD ENTITLED TO BE HEARD – (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.

Recommendations 75, 76, 78 and 79 are recommendations for changes to the CLRA to incorporate the United Nations Convention on the Rights of the Child into the purpose/interpretation sections of the CLRA and to make changes with respect to children who are subject of a non-parent custody proceeding.

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According to the United Nations Convention on the Rights of the Child, (of which Canada is a signatory) a court or other decision makers are directed to consider the views and preferences of the child where those views and preferences can reasonably be ascertained when decisions affecting the child are being made. While children should not be forced to "choose" with whom they reside; they should have a right to a "voice" in the process that is making these important decisions for and about them. It is important to amend *section 24 and section 64* to ensure that a child's views and preferences are heard in a safe, reliable and consistent manner and require the court to consider the strength, consistency and independence of the stated views and preferences.

When making an order for custody or access under the CLRA, the most important consideration should always be, "the best interests of the child." *Subsection 24 (2)* provides a very long and detailed list of factors that are effective guides for decision makers attempting to determine what the best interests of a child are. The views and preferences of children can be difficult to ascertain, and are only two factors out of the list of factors/criteria for the court to consider. None of the factors listed are given any precedence over the other because it is up to the decision maker to determine how much weight to give to evidence the parties have provided to satisfy these factors.

Subsection (2) (b) states that the child's views and preferences should be considered "if they can reasonably be ascertained." It does not require any "quality" for the child's views. It further does not address the problem that a child's best interests are not necessarily synonymous with the child's wishes. In addition, the older the child, the more an order as to custody requires the co-operation of the child and consideration of that child's wishes. Lastly, sometimes the child is too young to communicate his/her wishes, and sometimes the child/ren have been so influenced or conflicted by the wishes of their parents, that any expression of their wishes could be given very little weight. Because of these influences, I would suggest the something like the following wording be added to subsection (2) (b):

(b) the child's views and preferences, if they can reasonably be ascertained; and the strength, consistency and independence of the child's views and preferences;

Section 64 permits the child to play a direct role in the decision of the court, however, it neither places a duty on the judge to interview the child, nor identifies specific criteria that must be met before such an interview can take place. These are all matters for the discretion of the judge. Like my comments above regarding *section 24 (2) (b),* the views and preferences of a child are not to be confused with the child's best interests, and a judge must make an order that is practical. The weight to be attached to any expression of preference depends on the facts and is a function of age,

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intelligence, apparent maturity, and the ability of a child to articulate a view. Incorporating the words "strength, consistency and independence" into *section 64 (1)* would help in the same ways as adding them to *section 24 (2) (b).*

Consultation Question:

2. **What factors, if any, should inform children's opportunities to participate in custody and access matters? For example:**
   - **(i) Children's ages, levels of maturity, and abilities to express their views.**
   - **(ii) Whether there are any circumstances where providing these opportunities could harm children or expose them to further conflict (for example, cases where parental alienation, domestic violence, or other forms of child abuse or neglect are at issue).**
   - **(iii) Any policy rationales for affording different participation opportunities to children depending on whether applications are brought by parents or non-parents.**
   - **(iv) Any potential impacts of the proposed amendments on the administration of justice, including whether they could unnecessarily increase expense and delays for families involved in litigation.**

FOLA's Answer:

Additional Factors and Opportunities to Protect Children from Exposure to Conflict:

There are additional factors that should inform children's opportunities to participate in custody and access matters. Early involvement of the child's legal representatives (children's lawyers) and/or therapeutic professionals and the child's school attendance history and Ontario School Record (OSR) should be additional factors that could inform children's opportunities to participate in custody and access matters and help protect children from exposure to conflict.

As discussed above, to ensure that children have a full "voice" in the process, the decision makers need to know more than just the views and preferences of the child. Decision makers need to know how strong, consistent and independent the children's voices are. This can only be done if the professionals are involved earlier and more consistently in the custody/access negotiation and/or litigation process.

A child's voice in the process is not complete if it is expressed through one interview. In my experience working with the Office of the Children's Lawyer, we have been trained to interview the children multiple times, interview collaterals, (including but not limited to parents, other family members, teachers, doctors, therapists or other professionals involved in the children's lives). We also review medical records, Ontario School Records (OSR's), police records, CAS records etc. If there are clinical issues, we

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have a social worker assisting us, (Clinical Investigator) who can then speak more to the context behind the children's expressed views and preferences.

When a family separates, it is important to determine parenting arrangements without exposing children to harmful conflict. Sometimes however, it can take months or even years for separating parents or the court to resolve the custody/access and parenting issues. It is sometimes very late in the process before parents involve a professional to help determine the views and preferences of the child/ren, (after significant damage and or influence has already been done).

If parents are going to court regarding their custody/access issues, the children are most likely already being exposed to their conflict. "Reasonably ascertaining" the views and preferences of a child/ren should commence at the beginning of the litigation to ensure the children's safety and increase the reliability and consistency of the child's voice in custody and access litigation. In addition, prior to commencing litigation, all parents or participants in the custody/access matter need to be well educated on the harmful effects of exposing the children to conflict, adult and/or legal issues. Early intervention is key to "keep the children at the centre" and protecting children from conflict. An information program on this topic for parents at the beginning of litigation would be very helpful. I will speak more about this in FOLA's answer to Consultation Question 5.

Additionally, children spend a great deal of time in school and their Ontario School Records (OSR's) contain a wealth of information that will help any decision maker in determining a child's best interests. A child's school history, attendance records, report cards and/or additional documents, (e.g. Independent Education Plans and Strength/Needs Committee Reports) can provide much more than just a record of how the child is performing in school. Information about a child's school history and attendance records shows a parent's ability to provide the necessity of getting their child to school.

The Hincks-Dellcrest Centre (a child and family services agency in Toronto, ON) has written that "There is considerable research evidence indicating that truancy in children and young people is often a symptom of significant family dysfunction." There is a direct correlation between regular attendance and academic success and this should not be overlooked. There is also significant research that would support early intervention in these families to lower the social, economic, legal and psychological costs of the serious neglect or abuse that many of the children are suffering.

Report cards contain comments about the child's character, emotional health and behavior during class and in the school. IEP's and SNC Reports will provide important information about the special needs or services that a child is receiving. These

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documents also sometimes contain information about which parent is more involved in supporting the child in their education.

Policy Rationales and Potential Impacts:

There are policy rationales affording different participation opportunities to children depending on whether the applications are brought by parents or non-parents. Barring evidence to the contrary, parents should be given some deference and autonomy in developing their parenting plans in accordance with their values, economic realities, cultures and religious beliefs. Their custody/access consents and agreements should not be delayed or scrutinized by the court or a child representative.

The defining principle however, should still be "best interests of the child." In situations where the applications are brought by parents, and there are unresolved clinical issues like: estrangement; habitual absenteeism from school; ongoing high conflict; domestic or sexual violence concerns; past criminal convictions or current criminal charges, there should be no presumption that the children's voice or best interests have been determined and addressed through their parent's consent or agreement. A court should look deeper into the matter and use their discretion as to whether the child/ren need to have the opportunity to participate and have a voice in the process.

There should be a presumption that non-parents seeking custody of children will have different expectations to fulfil and there should be an "automatic" OCL appointment when a non-parent is seeking custody. The non-parent applicants should be expected to comply with any opportunities to have the children participate in the proceedings. In any event, the children should be visible and available to participate in the proceedings until the court is satisfied the children have participated to the extent of their ability subject to their age and level of maturity.

The proposed amendments could cause some delay and increase expense for families involved in litigation. The potential for delays or increased expense could be addressed or reduced if: all parents or participants in a custody/access matter were well educated on the harmful effects of exposing the children to conflict, adult and/or legal issues; and if the professionals are involved earlier and more consistently in the custody/access negotiation and/or litigation process.

If, however, there are resulting delays or increased expenses on the administration of justice because of the proposed amendments, that does not mean they were, "unnecessary." As stated in Katelynn's Principle, "the child must be at the centre." This principle has no meaning if the child is only "at the centre" when it is convenient to put them there, (i.e. when they don't cause delay or expense).

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Consultation Questions Re. Changes to Practices and Procedures (Recommendations 77, 82, and 85)

3. Are there any clarifications required regarding the responsibilities of neutral assessors under s. 30 (1) of the CLRA? Why or why not?

FOLA's Answer:

Yes, there are further clarifications required regarding the responsibilities of neutral assessors under *s. 30 (1)* of the *CLRA*. Recommendations 77, 82 and 85 are recommending that an assessor have an "obligation to directly obtain from the child their views and preferences" and are asking the MAG and Family Rules Committee to "amend forms and affidavits to provide for an option that includes ascertaining and recording the views and preferences of the child in a non-parental custody transfer." Further, they are recommending the MAG and OCL and the Family Rules Committee "develop a protocol instructing the courts to send court documents, for all non-parent child custody transfers, to the OCL to determine their role, if any, in each case." These recommendations are being made in order, "to ensure the child's rights are protected."

Although in many cases, neutral assessments will contain some reference to the children's stated views and preferences, (if there are any), there is no "obligation" for the assessor to obtain them. There should be a requirement for the neutral assessor to interview the child/ren and provide a summary of the interview in the assessment. Further, the assessor would need to comment upon the strength, consistency and independence of those expressed views and preferences and provide some context behind them.

Section 30 (1) says the following:

Assessment of Needs of Child – (1) The court before which an application is brought in respect of custody of or access to a child, by order, may appoint a person who has technical or professional skill to assess and report to the court on the needs of the child and the ability and willingness of the parties or any of them to satisfy the needs of the child.

In the Commentary section of the Act, it is explained that, "This section authorizes the court to appoint an qualified assessor to interview the parties, including the child, and prepare an assessment report regarding custody and access. The report is admissible in evidence and the assessor may be cross examined on the report. Costs are charged to each party in such proportion as the court deems appropriate. Each party may also adduce their own expert evidence at trial."

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Other than the addition discussed above, (i.e. the obligation to directly obtain from the child their views and preferences) there are no other clarifications required regarding the responsibilities of neutral assessors. There are further practice notes in the Custody/Access Guidelines, and there is a body of literature that has been published which sets out the clinical protocol for assessments of custody and access. Lastly, there is caselaw that also outlines what a "good assessment" requires. All the literature and case law adequately addresses the responsibilities of neutral assessors under *section 30 (1)*.

4. Are there any practices or procedures – including amendments to court procedures or forms – that would assist in ascertaining and recording children's views, in response to recommendation #82? For example:

(i) Are any practical or policy changes required to ensure the child is aware of the opportunity to provide her views or preferences?

(ii) Who would be responsible for providing the court with the child's views for consideration (for example, the applicant, the respondent, either/both, a third party, or the child herself if age appropriate)?

(iii) How should a child's views or preferences be ascertained (for example, if a court form is proposed, should it be open-ended or provide directed questions)?

(iv) What safeguards, if any, are needed to ensure that ascertaining the child's views would not intensify forms of conflict or abuse (for example, by encouraging parental alienation)?

FOLA's Answer:

There are practices and/or procedures – including amendments to court procedures or forms that would assist in ascertaining and recording children's views. Assessments are very expensive and time-consuming endeavors. In a day and age where many people choose to be self-represented in court, those same people will not likely have the means to access this type of professional/qualified assessment, (they range in cost from $3,000 to $30,000.00 +).

In the name of "proportionality," the rising costs of litigation, and protecting children from conflict and exposure to the legal issues there should be other options made available to families that don't require an in-depth investigation and/or assessment. The following two options are just suggestions for procedures and forms that would assist in ascertaining and recording children's views.

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A "Children's Brief" or "Children's Report" could be developed that could combine some directed questions and leave room for open-ended commentary that would give a voice to the child. It could include information about: the child's views and preferences; the child's concerns; the child's experiences. The brief or report should not be completed by the Applicant or the Respondent. The report should only be completed by a third party who has had the opportunity to directly interview the child more than one time, (either a Representative of the OCL if deemed appropriate, or a privately retained children's lawyer or social worker). This report should not be an affidavit and there should be opportunity to update or amend it, if there have been changes.

Another form that may be developed could be inspired from the Form 34, "Child's Consent to Adoption." When the child is 7 years old or older, they require a meeting with an OCL to explain the legal ramifications of the adoption, (and if appropriate, the child signs a Form 34). The OCL has a list of issues and a full and detailed script that they use to explain everything to the child. The OCL makes notes about what the child understood. Lastly, the OCL completes and swears an "affidavit of execution and independent legal advice" whereby they confirm they explained to the child: "the nature and effect of adoption under the law of Ontario; the nature and effect of this consent; the circumstances under which this consent may be withdrawn; the nature and operation of Ontario's adoption disclosure register, in language appropriate to his/her age to the best of [the] OCL's knowledge and skills."

A combination of these forms into one form may be sufficient to ensure the children have a voice in the matter and their rights are being protected. Again, as stated above, the most important safeguard that needs to be in place is that this type of "brief" or "report" or "consent" be completed early in the process, (to potentially protect the children from exposure to conflict and minimize the parents or non-parents influence on the children's views). This process could be initiated or triggered with the first application and have an age requirement, (like the adoption process). This type of procedure and form would assist in ascertaining and recording children's views and assist the court and/or the parents/applicants to determine the children's best interests. It could further increase the confidence in the decisions made by the courts and by the parents.

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5. Are there any practices or procedures – including amendments to court procedures or forms – that would more generally support the implementation of other recommendations?

FOLA Answer:

The Mandatory Information Program (MIP) and the Family Law Information Centre's (FLIC's) are ideal places to make amendments to the procedures and practices to generally support the implementation of other recommendations. These are sometimes the first opportunities for potential litigants to receive information and they sometimes perform an informal "triage" function. It is very important that all family court FLIC offices are adequately staffed and the appropriate information is available for distribution and direction.

As stated repeatedly throughout this document, early intervention is key to "keep the children at the centre." The Mediation Centre in Barrie use to run a "Parenting for Separated Families" program that was very helpful for parents dealing with separation and divorce. It provided parents with information on child development and how they are affected by separation and conflict. It gave them tips on how to behave appropriately and effectively with their ex. It also encouraged mediation. It was free to parents, and parents attended separately, (like the MIP). Developing and supporting this type of program in conjunction with the MIP could be very helpful in ensuring all parties receive the same information in an efficient and cost-effective manner.

One other implication on family law or family law practice that could result from the pressure to increase opportunities for the children to have a voice in the process is that there could be an increase in the use of "judicial interviews" for children. Speaking from a child advocate point of view, if the Judges have no prior experience interviewing children, they should undergo focused training and education before there is widespread use of this process. There should be a check-list for the judge before they call a child in to chambers to give his or her views on custody or access. For example, as stated in *Dudman v. Dudman, [1990] O.J. No. 3246 (Ont. Prov. Ct. (Fam. Div.)),* a child should not be called to give his or her views if:

(a) The child did not want to come to court and was fearful of being brought there;
(b) Bringing the child to court would be a traumatic experience;
(c) The professional opinion evidence was that any answer more than "I don't know" would be designed to please the parent that the child believed was asking; and

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(d) One of the family members also said that the child would say in court what he thought people wanted to hear and it would depend on who was asking the questions.

6. In your opinion, what are the advantages or disadvantages of the current scope of the OCL as defined in sec. 89 (3.1) or s. 112 of the CJA? What practical implications or considerations should be considered in expanding this scope?

One of the most practical considerations that the MAG and Family Rule Committee could make to expand the scope of the OCL is by providing a role for OCL in family mediation. Currently, the *Courts of Justice Act* provides representation for children under *sec. 89 (3.1)* and *sec. 112*.

The Office of the Children's Lawyer has been providing legal representation in court proceedings for over 30 years. The role of child's counsel as an advocate for the child in court is well established. As set out in *L.C. v. Catholic Children's Aid Society of Metropolitan Toronto*, [1993] O.J. No. 1823 (Ont. Ct. (Gen. Div.)) and *Ontario (Official Guardian) v. Strobridge*, [1994] O.J. No. 1247, 4 R.F.L. (4th) 169 (Ont. C.A.), when acting as a legal representative, the Children's Lawyer has full power to "act as though there were a party to the proceedings." They have the right to make a full and independent investigation of all the circumstances relating to the best interests of the child and ensure they are protected by: raising claims; gathering and presenting evidence and being entitled to have production and discovery according to the rules; to appear and participate at trial, including the right to examine and cross-examine witnesses, call evidence and make submissions to the court; advocate for the court to interpret the evidence in a manner that is favourable to the child-client; and to take such appeal proceedings as are deemed appropriate.

In recent years however, the use of alternative dispute resolution (ADR) mechanisms like family mediation has increased dramatically resulting in many family law cases being diverted outside the court process. This is generally recognized as a positive direction for family law matters. There is a need however, to ensure that the children's voice is not lost in this process.

This issue is similar to the increasing role of OCL in Child Protection ADR. *Section 20.2 (3)* of the *CFSA* specifically contemplates the involvement of child's counsel in child protection ADR. It says, "*If a society or a person, including a child, who is receiving child welfare services proposes that a prescribed method of alternative dispute resolution be undertaken to assist in resolving an issue relating to a child or a plan for the child's care, the Children's Lawyer may provide legal representation to the child if in the opinion of the Children's Lawyer such legal representation is appropriate*."

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Like in Child Protection ADR, there is an important role for Child's counsel in custody/access family mediation or other ADR proceedings. Child's counsel could speak for a child who can't participate in the process, but whose voice needs to be heard. In mediation proceedings, the Mediator/Facilitator is supposed to remain neutral at all times, so, in some cases, it may not be sufficient or appropriate for the mediator to speak with the child and then share the child's views with the group. In addition, a child's counsel can advance issues that aren't important to anyone else involved in the mediation and possibly provide the group with legal information that may shape the settlement reached.

Despite all these positive reasons for an OCL to be involved in family mediation, there is no way for families to access the services of the OCL unless they initiate court proceedings. Families would have to retain the services of a private lawyer or social worker to bring the children's voice to the table. Amendments to the *Family Law Rules*, *CLRA* and *FLA* (similar to the *CFSA*) are needed to allow for the request for appointment of OCL in family mediations or ADR.

Before making any changes, the Ministry should thoroughly investigate the potential scope of the effect of the amendments and how the judiciary will interpret and apply them. Aside from this, overall, FOLA thinks this consultation is positive and could create some valuable additions to the family justice system in Ontario.

Thank you for the opportunity to provide feedback on this issue. If you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

Sonya Jain
Family Law Chair
Federation of Ontario Law Associations

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