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The Case Against Children's Counsel – Part 2

A review of arguments against appointing an attorney for the child.

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IN PART 1 OF THIS SERIES OF FOUR ARTICLES on dealing with children's counsel (January 2019), 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 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.

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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 focussed 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 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 VOCCR 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].”

“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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