

CANADIAN BAR ASSOCIATION
MINUTES OF MEETING

SECTION: FAMILY LAW NORTH

SPEAKER: ALANNA KUEHLEN, JAMESY PATRICK AND GILLIAN GOUGH

TOPIC: EVERYTHING YOU WANTED TO KNOW ABOUT CHILD PROTECTION MATTERS

DATE: OCTOBER 24, 2019

Alanna Kuehlen advised us that:

- a) family services matters were always dealt with in chambers on Tuesday mornings at 10:00 a.m.;
- b) although there used to be chambers both in the morning and afternoon, they no longer do such; they use the afternoons in order to book pre-trial conferences at 1:00 p.m., 2:00 p.m. and 3:00 p.m.;
- c) you need to have a finding of “child in need of protection” and section 11 sets out the grounds;
- d) section 11(b) is the one usually used which provides that the child is in need of protection if there is no adult able and willing to provide for the child and harm may occur;
- e) other sections deal with medical issues and domestic violence issues;
- f) if there is an issue after hours, Mobile Crisis can apprehend the child and then the Ministry of Social Services takes over the next business day.

Jamesy Patrick then advised us that:

- a) the parents might sign a section 9 agreement;
- b) the Ministry of Social Services will attach any previous section 9 agreement(s) to affidavit materials if the file later proceeds to court;
- c) if there is no agreement for services the Ministry has 30 days to get the matter to court; if it is an initial apprehension the Ministry has 7 days to apply to court; if there is an expired order the Ministry has 15 days to apply to Court;
- d) the Ministry usually files the initial apprehension and a summary for the Court as per the new Rules; this is not evidence but is just a summary of why the child had been apprehended.

Jamesy indicated that the Ministry has to specify what type of order is being sought. The types of orders are:

1. Supervision Order with the child remaining in the care of the parents; usually there are conditions placed on the parent; the child might also be placed with a non-custodial parent which would then be in place until that parent makes an application for custody under either the *Divorce Act (Canada)* or *The Children's Law Act, 1997*;
2. A Temporary Order up and including 6 months (the orders are usually for 3 to 6 months);
3. A Person of Sufficient Interest Order under section 37(1)(b); this is a placement with a third party who has been found to be a person of sufficient interest under section 23 of the Act; this is usually indefinite and is in place until a parent makes an application, although occasionally there is a set time for the PSI Order;
4. A Permanent Order under section 37(2) if the child is adoptable;
5. A Long Term Order to age 18.

Jamesy Patrick advised that some of the conditions that might be placed upon the parent under a Supervision Order or a Temporary Order would be for the parent's access to be supervised or what the parent needs to do to address issues, such as addiction issues.

She also advised that Permanent Orders do not provide for any type of visitation with the parent, so they have been seeing a decrease in the number of Permanent Orders made by the Court.

Person of Sufficient Interest and Long Term Orders can be varied, for example, if a parent has addressed addiction issues and can resume parenting.

Alanna Kuehlen then advised that with respect to service, the Ministry needs to serve both parents or get an order either dispensing with service or for substitutional service. They have started using service via Facebook more often because the judges have been pointing out that that is what is happening on family law files.

Alanna Kuehlen also advised that the Ministry is required to notify the Band if a Long Term Order or a Permanent Order is being requested, so the Band can investigate resources.

She also advised that usually the Ministry adjourns on the first appearance so that they can prepare the necessary affidavit material.

Manny Sonnenschein then asked why there is the necessity for an appearance if these matters are just automatically adjourned; Alanna Kuehlen advised that the legislation provides that the matter must be set for chambers within 7 days after apprehension.

Jamesy Patrick indicated that a parent will often ask for Legal Aid and the Ministry worker will provide contact information for such, so the parent usually needs an adjournment as well.

Manny then commented that this seemed to be a waste of time and could be very costly for any parent from whom a child had been apprehended.

Leslie Tallis then pointed out that when counsel are present, those matters are called first, so that reduces the legal cost to the parent.

Jamesy Patrick then indicated that usually parties on Family Services matters are represented by Legal Aid lawyers.

Jamesy Patrick then advised that if a parent will not agree to the Order that is being proposed by the Ministry, the matter is set down for pre-trial conference or a summary hearing. Practice Directory Number 5 provides for a summary hearing if a short term order is being requested. To date the Ministry has only seen 4 to 5 matters set for summary hearing; no examination in chief is allowed and there is just cross examination on affidavit evidence. She believes that there has been a small number of summary hearings because of the Legal Aid workload.

She advised that often there is a case conference held which results in a conclusion of the matter and that pre-trial conferences in Family Services matters are scheduled fairly quickly, as there are 3 scheduled every Tuesday.

Kim Visram asked whether an order could be made in chambers if the Ministry was seeking a short term order. The response was that this could not be done; only if the parents consent or if they do not show up in chambers could an order be made by the Court. As 3 pre-trial conferences are set every Tuesday, a pre-trial conference might be only 2 months down the road, rather than the longer wait time for regular family matters.

Neil McPhee made the comment that summary hearings are generally set for Wednesdays and could be set within a 1 month period.

Alanna Kuehlen advised that 90% of FSM matters resolve at the pre-trial conference stage.

Neil McPhee then commented that, if counsel had been appointed for the child, that counsel would also need time to prepare for the PTC and trial. Alanna Kuehlen advised that counsel

would already likely have been appointed but that there would be no PTC or section 9 agreement until counsel had been appointed.

Jamesy Patrick pointed out that the Ministry generally flags, right at the start, the files where they expect that counsel for a child will need to be appointed.

Alanna Kuehlen then advised that PTC court appearance memo is filed the Friday before the PTC and counsel for the parents are also required to provide a memo.

Jamesy then indicated that the Judges will often adjourn Family Service PTCs, particularly if the Ministry is seeking a long-term order or a PSI order.

Manny then asked if there was an ability to have an advocate appointed for the parents. Jamesy Patrick indicated that agency workers often attend as well as persons/Elders from First Nations Communities.

Gillian Gough is one of the lawyers to whom the Ministry files are referred to for trial, and she advised as follows:

- (a) When she receives a file, she then gets it set for a Management Pre-Trial Conference;
- (b) The court is currently setting Family Services trials for April and May trial dates;
- (c) She gathers all the files from the Ministry and prepares disclosure for the parents/parent's counsel;
- (d) If the parent is self-representing, the Practice Directive deals with undertakings to obtain affidavit evidence;
- (e) She provides information regarding resources for counsel for the parents;
- (f) She arranges for service on the parties; she personally serves the parties even if they are represented by counsel because counsel often does not stay on the file until trial, and the Ministry needs to be able to prove, at trial, that the parties or Band or children's counsel have all been served;
- (g) She keeps updated on what is happening with the Social Worker and with the parents;
- (h) She needs to know if a new Band member or family member has become available, because a PSI Order might be able to be worked out rather than proceeding to trial;
- (i) She prepares all the witnesses for trial, which would generally include the Family Service workers who are working with the parents, the childcare worker who is working with the child, community workers, caregivers, teachers, police officers and medical officers;
- (j) She needs to provide evidence to the Court regarding the placement and why she is seeking that type of order;

- (k) The *SF* case out of the Court of Appeal from 2009 talks about extensions of orders; the Court of Appeal held that the court cannot question a finding of “in need of protection” made in chambers; so, basically the Court is not rehashing orders that were previously made, and these orders are part of the historical narrative;
- (l) The *EKS* case of Justice McIntyre from 1996 sets out the factors that are to be considered which are basically the best interests of the children as per section 4 of the Act, but the parents’ wishes are also to be taken into consideration and of course the recommendation of the Ministry of Social Services is to be given weight; also section 3 of the Act indicates that the mandate is to try to keep families together;
- (m) If there is a reasonable prospect of a change in the parent’s behavior, some type of placement may be able to be worked out or a temporary order;
- (n) The *CT* case of Justice Elson from 2017 canvassed a PSI Order; he held that it was not as immutable as a Permanent Order but that he was not bound by a reasonable prospect of change;
- (o) If adoption is likely, the Ministry will seek a Permanent Order but if it is not likely then the Ministry will seek a Long Term Order;
- (p) The *BL* case 2012 SKCA 38 speaks of documents and admissibility; Judges usually allow the documents to be admitted, and ask the lawyers to argue weight rather than admissibility; this is usually because Legal Aid complains about double and triple hearsay;
- (q) section 28 of the Act refers to hearsay being admissible particularly regarding utterances of the children; the Act also speaks of ways that the children will be heard depending on the age of the child.

Penny Lynn Tallis then indicated that she, as counsel for the Ministry, has been receiving push back from the Judges regarding the trial binders. Some judges have indicated that the disclosure provided to the parents is not evidence and should not be included in the trial binders.

Neil McPhee raised a question about whether the actual trial was the “protection hearing” referenced in the Act. Alanna Kuehlen indicated that the hearing referenced in the Act was the first chambers date.

Charmaine Panko then raised concerns about section 9 agreements and whether parties should be having legal advice prior to signing such agreements.

October 31, 2019
Leslie G. Tallis
Secretary