



NZLS EST 1869

FAMILY LAW SECTION NEW ZEALAND LAW SOCIETY

LAWYER FOR THE CHILD BEST PRACTICE GUIDELINES

ACTING FOR CHILDREN UNDER THE CARE OF CHILDREN ACT 2004 AND THE ORANGA TAMARIKI ACT 1989

1. INTRODUCTION

- 1.1 The appointment of a lawyer to represent a child occurs under the specific legislation the proceeding has been brought.
- 1.2 In all proceedings in the Family Court, the role of lawyer for the child as described in these guidelines is prescribed by section 9B of the Family Court Act 1980 and guided by the United Nations Convention on the Rights of the Child (UNCROC).
- 1.3 The welfare and best interests of the child is the paramount consideration of the Family Court in proceedings that involve children under these Acts.
- 1.4 Except in circumstances where a child is exercising his or her right of appeal, (sections 143 of the Care of Children Act 2004 (COCA) and section 341(2) of the Oranga Tamariki Act 1989 (OT Act), and in limited circumstances as prescribed by these Acts (section 31 of COCA), a child is not a party to the proceedings.
- 1.5 At all times the lawyer shall conduct him/herself in accordance with the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
- 1.6 These guidelines replace all previous guidelines issued by the New Zealand Law Society.

2. DEFINITIONS

- 2.1 The term 'child' includes child as defined in COCA and both 'child', 'children' and 'young person' as those terms are defined in the OT Act.
- 2.2 References to 'the lawyer,' unless otherwise stated, means a lawyer appointed by the Court to act for a child.
- 2.3 References to 'report writer' means any social worker or report writer from whom a report has been requested under section 132 or 133 of COCA or under section 178, 186 or 187 of the OT Act. 'Specialist report' has a corresponding meaning.

2.4 References to the Ministry for Children, Oranga Tamariki (MCOT) means the Chief Executive of the Ministry for Children.

3. OBJECT

3.1 The object of these guidelines is to promote quality and consistency of practice without fettering the discretion of the lawyer in carrying out their role or exercising his or her professional judgement in assessing the welfare and best interests of the child as required by section 9B of the Family Court Act 1980.

3.2 It is essential that the lawyer responds to the characteristics of each case and client.

4. GUIDING PRINCIPLES

4.1 A child has the right to competent representation from an experienced and skilled lawyer.

4.2 A child must be given reasonable opportunities to be heard (either directly or indirectly) in any judicial and administrative proceedings affecting them, as provided for by section 6(2)(a) of COCA, sections 5(d) and 11(2) and (3) of the OT Act and Articles 9.2 and 12.2 of UNCROC.

4.3 A child must be given a reasonable opportunity to express his or her views and any views expressed must be taken into account by the Court (section 6(2)(b) of COCA and section 11(2)(d) of the OT Act).

4.4 A child has the right to information about the case in which he or she is involved, including information on the progress and outcome of that case.

4.5 The manner of the discussion with the child shall take into account the child's age, maturity and level of understanding.

5. ROLE OF THE LAWYER FOR THE CHILD

5.1 The lawyer is to provide independent representation and advice to the child in a manner that the lawyer considers promotes the welfare and best interests of the child.

5.2 The lawyer has a duty to ensure that any views expressed by the child **to the lawyer** (and not expressed to another person, such as a psychologist, social worker or teacher), on matters affecting the child and relevant to the proceedings, are communicated to the Court.

5.3 Where a lawyer has been appointed to represent a number of children, the lawyer must be alert to the possibility of conflict. The lawyer may be obliged to seek separate representation for one or more children.

5.4 The lawyer has a duty to ensure that all factors relevant to the child's welfare and best interests, are before the Court.

5.5 The lawyer should remember that section 9C of the Family Court Act 1980 does not necessarily mean that a lawyer to assist the court will be appointed for the sole reason that the views expressed by the child may be in conflict with the lawyer's assessment as to the child's welfare and best interests.

5.6 The lawyer must be aware of, and actively manage, the risk of the child being exposed to systems abuse.

6. RELATIONSHIP WITH THE CHILD

6.1 The lawyer must meet with the child he or she is appointed to represent unless, because of exceptional circumstances, a judge directs that it is inappropriate for the lawyer to meet with the child (section 9B(2) and (3) of the Family Court Act 1980).

6.2 The lawyer should maintain appropriate professional boundaries with the child.

6.3 The lawyer must meet with the child and, if it is appropriate to do so, ascertain the child's views on matters affecting the child that are relevant to the proceedings.

6.4 In deciding whether or not it is appropriate to ascertain the child's views, the lawyer should consider:

- (a) whether the circumstances are such that the child should not be interviewed on a particular occasion or in a particular environment;
- (b) that having met the child, the issues are such that the lawyer should not attempt to ascertain the views of the child for reasons pertinent to that child;
- (c) that although it is necessary to meet the child (to have an idea of who is being represented), the issues are such that it is not appropriate to ascertain the child's views.

6.5 The timing and venue for such a meeting, and any further meetings, should be at the discretion of the lawyer. However, the lawyer shall meet with the child at a time which ensures that the child's views are up to date at the time of the hearing so that they can be taken into account by the Court.

6.6 When meeting with the child the lawyer shall:

- (a) emphasise to the child that they do not have to express any view (section 9B(1)(b) of the Family Court Act 1980);
- (b) before any view is expressed by the child, tell the child that any views the child expresses must be communicated to the Court by the lawyer;
- (c) consider an appropriate process for disclosure of information the child would prefer to remain confidential; and
- (d) explain to the child that he or she is not responsible for any decision which will be made by the Court.

6.7 At the conclusion of the case the lawyer must provide advice to the child about:

- (a) the outcome of the case;
- (b) any right of appeal against a decision of the Court; and
- (c) the merits of pursuing any such appeal.

7. INTERVIEWING THE CHILD AT SCHOOL

7.1 When interviewing the child at school, attention is drawn to the New Zealand Law Society Lawyer for Child Protocol with Schools "*Lawyers for children appointed by the Family Court – A resource for schools and lawyers for children*" (see Appendix 1).

8. CASE MANAGEMENT

- 8.1 The lawyer should endeavour to move the case towards resolution, including where appropriate, in the lawyer's assessment of the child's welfare and best interests, assisting the parties to reach an agreement.
- 8.2 In all proceedings, except OT Act proceedings, if the lawyer considers there are care and protection issues that may justify MCOT involvement, the lawyer should take the necessary steps to refer the matter to MCOT directly or via a judicial referral.
- 8.3 The lawyer should be alert to the possibility of records held by the Court, the Police, MCOT and the Ministry of Justice that may be relevant to the proceedings, and where appropriate, obtain copies of those records.
- 8.4 In OT Act cases where there has been a referral to a Family Group Conference (FGC), the lawyer shall:
 - (a) be pro-active in ensuring an FGC is held as soon as possible; and
 - (b) be present at the FGC to ensure that the focus is on the best interests of the child.
- 8.5 If the lawyer ceases to act for the child, and proceedings continue in the Family Court, he or she must ensure that the new lawyer receives all relevant information held by him or her.

9. BRIEFS BY THE COURT

- 9.1 It is the task of the Court to set the brief for the lawyer.
- 9.2 Section 9B of the Family Court Act 1980 prescribes the statutory role of the lawyer.
- 9.3 The lawyer should not accept any brief that requires an assessment of the safety of the child.

10. JUDICIAL MEETING

- 10.1 A judge has discretion as to whether or not to meet with a child who is the subject of proceedings. Prior to a hearing, the lawyer shall advise the Court whether it is appropriate for the child to meet the Judge.
- 10.2 The lawyer shall advise the parties and the Court of the child's views about such a meeting.

11. RELATIONSHIP WITH THE PARTIES AND THEIR COUNSEL

- 11.1 Where a party to a proceeding is represented by his or her own lawyer, the lawyer should obtain the consent of the parties' lawyers before making direct contact with any party.
- 11.2 The lawyer should explain the role of the lawyer to the parties so they have an understanding of the role of the lawyer and in particular, that any communication with a party is not privileged, nor confidential.
- 11.3 Any information provided to the Court by the lawyer must be provided to all of the parties except in circumstances where the disclosure of information would be:

- (a) likely to place at risk the health (including mental health) and safety of a child or any other person;
or
- (b) in breach of the law or in breach of an order of the Court.

12. ROLE OF THE LAWYER IN NEGOTIATION BETWEEN THE PARTIES

- 12.1 The lawyer should explore alternative methods of resolution where it is clearly in the child's welfare and best interests to have his or her parents negotiate a settlement, rather than have the matter determined by the Court.
- 12.2 The lawyer should consider whether safety issues would prevent a negotiated outcome.
- 12.3 It is the role of the Court and not of the lawyer to make findings on safety and the assessment of risk. If issues are disputed the Court will need to make findings of fact. The lawyer must not compromise, for the sake of expediency, on issues where a finding of fact must be made.
- 12.4 The lawyer should ensure that parties have the opportunity to seek legal advice during any settlement negotiation.
- 12.5 When negotiation between parties takes place the lawyer should ensure that lawyers for the parties are given the opportunity to be present.

13. OTHER PROFESSIONAL ISSUES

- 13.1 Before accepting any appointment the lawyer should be satisfied that he or she is able to give the time which the case requires.
- 13.2 Appointment of the lawyer is personal. The lawyer should not delegate substantive steps in the fulfilment of the brief to a non-lawyer for the child. Where an agent is to be briefed, the agent is to be properly instructed and must be listed on the current court-approved lawyer for child list.
- 13.3 The lawyer must be aware of issues including gender, ethnicity, sexuality, culture, religion and disabilities, in dealing with issues in any particular case.
- 13.4 The lawyer must undertake professional supervision appropriate to the nature and extent of their lawyer for child practice.
- 13.5 The lawyer must undertake a minimum of 20 hours of active lawyer for the child practice and a minimum of 3.5 hours of verified continuing professional development (CPD) and 6 hours of non-verified CPD in areas specific to practising as a lawyer for the child within each CPD year. A CPD is defined in Rule 3.1(i) of the Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education – Continuing Professional Development) Rules 2013.

14. LAWYER FOR THE CHILD AND REPORT WRITERS

- 14.1 The report writer is the Court's witness.
- 14.2 The lawyer and the report writer may not always agree on the conclusion reached in the psychologist's report.

- 14.3 Where a specialist report is obtained under COCA, the lawyer may give or show the report to the child only if the Court orders. The lawyer shall make a recommendation to the Court on this issue. However, in every case the lawyer should explain to the child the purpose and contents of the report, unless the lawyer considers that to do so would be contrary to the welfare and best interests of the child.
- 14.4 Where a report is obtained under the OT Act, the lawyer may give the report to the child unless the Court orders that the whole or any part of the report not be disclosed to the child (section 192 OT Act). The lawyer shall, before giving a report to the child, make a recommendation to the Court on this issue.
- 14.5 The lawyer should liaise with the registry once a hearing date has been set to ensure that the court has advised its witness of the hearing date and has provided the report writer with a copy of all updating affidavits and reports if these have been filed after the psychologist was first briefed.
- 14.6 The lawyer should check the availability of the report writer prior to the setting down of a hearing and ensure the report writer is aware of the hearing date (once it has been set) and that the report writer is available.
- 14.7 The lawyer should liaise with the report writer over the timing of when they need to attend the hearing.
- 14.8 The lawyer should ensure that notes of evidence are made available for the report writer if the lawyer considers it appropriate, or at their request, subject to Court direction.
- 14.9 The lawyer should communicate with the report writer to identify issues that the report writer may be questioned on or that are likely to arise. The lawyer for child and the report writer should not discuss how the questions may be answered.
- 14.10 The lawyer should also communicate with the report writer and advise of possible proposals for settlement that the report writer may also be questioned about.
- 14.11 The lawyer should check with the court that it has advised the report writer of the court's decision and that the court has provided a copy of the decision to the report writer at the conclusion of the proceedings.
- 14.12 If there is a procedural issue that arises during the hearing, the lawyer will explain it to the report writer.

15. LAWYER FOR CHILD REPORTS

- 15.1 The lawyer may need to make written reports to the Court from time to time. These reports should be based on their meetings with the child and documents filed with the Court and avoid introducing evidence.

16. ROLE OF LAWYER FOR THE CHILD IN PREPARATION FOR AND AT A HEARING

- 16.1 If the lawyer wishes to call any person as a witness, the lawyer must ensure, prior to the hearing that the proposed witness knows of the hearing and is available. Nothing in this paragraph shall excuse the lawyer from complying with Rule 48(1) (evidence by affidavit) and Rule 52D (restrictions on steps to be taken after notice of hearing date given in non-COCA cases) of the Family Court Rules 2002.

- 16.2 At the hearing the lawyer should take all steps necessary to ensure that the Court can make the best possible determination of the welfare and best interests of the child. This will include:
- (a) identifying all relevant issues which need to be determined in regard to the child's welfare and best interests;
 - (b) ensuring that the Court has all the necessary information that is relevant to the welfare and best interests of the child, including the views of the child relevant to the proceedings;
 - (c) calling evidence where appropriate (other than any Court's witness);
 - (d) cross-examining to ensure that all relevant issues are fully explored, having regard to the time limits imposed by Rule 416ZF(2) of the Family Court Rules 2002 in COCA proceedings;
 - (e) making submissions on behalf of the child;
 - (f) not giving evidence.

17. GUARDIANSHIP (WARDSHIP) OF THE COURT – section 31 of COCA

- 17.1 The lawyer should not make an application to the Court for wardship, nor accept an appointment as agent for the Court.
- 17.2 The lawyer should be aware that making an application for guardianship (wardship) will expose the lawyer to *inter partes* costs and the mandatory cost contributions award.

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