Report on the failure of Ontario's Office of the Children's Lawyer to serve the best interest of children and families

In the matter
of
Mayfield v. Mayfield
Court File No. D38601/99 Ontario Superior Court of Justice
Justice J. Wein – April 18, 19, 23-27, 30 and May 1, 2001

By
The Family Justice Review Committee
Release date– March 15, 2002.

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Part One
Background and purpose of this analysis

In October of 2001, the case of Mayfield v. Mayfield was first brought to the attention of the Family Justice Review Committee with a request for third party analysis based on the best interest of children, families and community needs and expectations rather than a legal analysis which is normally based on complex case law. A first draft of this analysis was prepared in October of 2001 with this report being an update from the original draft document.

This report has been prepared with the following purpose:

- To evaluate the overall performance of the Office of the Children's Lawyer in this case as related to matters of concern to children and families in the community with a special emphasis being placed on those factors considered most important to children and families, based on information gathered from the court report.

- To determine the overall performance of the Office of the Children's Lawyer in relation to its efficient use of the taxpayer's funds in the performance of its services in this case, based on information gathered from the court report.

- Based on the findings of the Family Justice Review Committee in this case, to make recommendations that would reasonably address the problems identified in this report regarding the performance of the Office of the Children's Lawyer which would help this agency provide better services to children and families in the community which the public has the right to expect.

Part Two
Information used as the basis of this report

This report has been based on information contained in the reported case law file as filed with Quick Law. Details of this case are as follows:

Mayfield v. Mayfield

Between
Simon David Mayfield, petitioner (father), and
Samatha Curita Mayfield, respondent (mother)

[2001] O.J. No. 2212
Court File No. D38601/99

Ontario Superior Court of Justice
Wein J.

Heard: April 18, 19, 23-27, 30 and May 1, 2001.
Judgment: May 29, 2001.
(46 paragraphs.)

Part Three
Analysis of the information

Below, are specific references as reported from the case, together with comments and discussion about the selected case references. Only those references that are relevant to the performance of the Office of the Children's Lawyer have been selected for analysis in this report. Items printed in bold are extracted directly from the case as reported in case law.

Paragraph #3 & 4:

Following a motion heard on June 17th, 1999, Justice Seppi requested the Office of the Children's Lawyer to investigate and report on matters with respect to custody and access pertaining to the two young children of the parties. At the time when the report was requested it was noted by the Court that the parties agreed to have the Office of the Children's Lawyer make an investigation.

Following the request of Justice Seppi, an investigation was undertaken by a social worker engaged by the Office of the Children's Lawyer. Interviews and investigations were conducted commencing August 31, 1999. Accordingly, when the investigation was undertaken, the parties had been separated for just over 6 months, and the children were 3-1/3 years and 19 months old respectively: Emily was born on May 5th, 1996 and Chelsea was born on February 5th, 1998. The report was released on December 9th, 1999 by Ms. McSweeney.

Discussion
Paragraph #3 & #4 reveal that it took the Office of the Children's Lawyer 2½ months just to get started in the case and almost another 3½ months to complete their report. The Office of the Children's Lawyer took almost 6 months to complete their report, which in the end appeared to be highly flawed, incomplete and of limited value to the court. This type of poor services would be totally unacceptable in the private sector. Making families wait for such an extended period of time results in frustration, higher court costs as a result of delays and lawyers fees. Most importantly, such unnecessary delays can cause tremendous psychological damage on the children as a result of uncertainty and delays. These kinds of delays are definitely not in the best interest of the children.

Paragraph #5:

The matter returned to court on more than one occasion prior to trial. At one such appearance, on January 18th, 2000, counsel for the Father filed a critique of the McSweeney report by another social worker, Barbara Chisholm, as support for his request that another report be done. As it happened, the report was the first such report ever done by Ms. McSweeney, and the critique was highly critical of the procedure that she had employed in preparing it.

Discussion
Paragraph #5 clarifies that a qualified social worker with many years of experience, Barbara Chisholm was highly critical of the social worker's report from the Office of the Children's Lawyer.

This also reveals that the social worker report by Ms. McSweeney was her very first such report. It also seems that Ms. McSweeney's failed to disclose to the parties that this was her first report. Under such circumstances one would have thought that the Office of the Children's Lawyer would have assigned a more experienced worker to assist Ms. McSweeney on her first few reports for the agency to see that she was doing things right.

Paragraph #6

The Court endorsed the record:

> ***In my view it would not be appropriate to order a second assessment at this time. It is clear that Nicole McSweeney should have an opportunity to respond to Ms. Chisholm's critique. It is also clear that Ms. McSweeney's curriculum vitae would be very helpful to assist the Court. In my view Ms. McSweeney should be required to extend her report and interview [certain parties including the mother's new husband, both the paternal and maternal grandparents and potentially others including family friends and the children's nanny]. However, I hesitate to make this order in view of the appointment of the Children's Lawyer which may well have expired with Ms. McSweeney's report. If this endorsement is brought to the attention of the Children's Lawyer (Mr. Wilson McTavish) personally, perhaps something can be worked out.***
>
> ***If, however, the Children's Lawyer will not consent, the trial should in any event be expedited in my view. (emphasis added)***

Discussion
Paragraph #6 makes it clear that even the Court considered it appropriate for the Office of the Children Lawyer to properly include all parties with information relative to the circumstances to better help the court to determine the child's best interests. The judge also noted that he was concerned that the appointment of the Office of the Children's Lawyer may have expired which would possibly give the Office of the Children's Lawyer a reason for not expanding its report so that it would be more helpful to the court in determining the child's best interest.

Paragraph #7:

On a further pretrial motion held on February 5, 2001, it appeared that the Children's Lawyer had declined this request. After further submissions, the Office of the Children's Lawyer was ordered to up-date the report. The Order was stated in the following terms:

1) ***THIS COURT ORDERS that the Office of the Children's Lawyer, namely, Nicole McSweeney, shall do a brief update of her report dated December 1999 by interviewing Samantha Voth and her present husband, Robert Voth and Simon Mayfield and his new wife, Carol Mayfield.***
2) ***THIS COURT ORDERS that the parties may return to [the pre-trial judge] for further direction in regards to paragraph 1 herein.***

Discussion

The above direction of the court makes it very clear that the court wanted the Office of the Children's Lawyer to do certain things which the court felt may be relevant to the best interest of the child. The Office of the Children's Lawyer refused to abide by this order. (See Paragraph #8)

Paragraph #8:

At the opening of trial in this matter, I was advised by both counsel that the Officer of the Children's Lawyer had again "declined" the "request" to up-date the report. A letter from the Office the Children's Lawyer stated as follows:

> ***Although I have not yet received the order requesting the Children's Lawyer to update the Report of the Children's Lawyer, I have been advised by voicemail from Ms. Hillier that this was issued by the court recently. We have reviewed this matter carefully and we do not feel that an update would offer anything of substantial value in addition to what we have already done and therefore we are not consenting to conduct an update in this matter.***

There was no indication that the Court's specific request that the matter be reviewed by Mr. McTavish was ever drawn to his attention.

Discussion
Paragraph #8 makes it clear that the Office of the Children was outright refusing to comply with the reasonable Order of the court – even after they were ordered by the court. It would also seem that the lawyers from the Office of the Children's Lawyer's Office did not bother to consult with Mr. McTavish as they were requested previously to do by the court.

Paragraph #12:

Counsel for the Children's Lawyer persisted in repeating that the Courts of Justice Act gives the discretion to the Children's Lawyer to accept or decline any request from the Court or parties. The position of the Children's Lawyer is that "to do anything further on that file would require a fresh request". The counsel for the Children's Lawyer repeated:

> ***"If there is a fresh request it's vetted in the same way that the initial request would be vetted so that we may agree to get involved in the case or we may disagree and it's under the discretion in s. 112 .... In this case, there was an order made, I believe, requesting that we become re-involved in this matter. We refused to."***

Discussion
The above section makes it clear that the Office of the Children was making it decisions on the wording of the law which gave it this discretion, not the best interest of the children in the case. Assisting the court and the parties and helping to ensure that the best interest of the child was served was not the main factor why the Office of the Children's Lawyer did not want to do any more work on this file even though it was reasonable to conclude that the report of the social worker with Office of the Children's Lawyer may have been flawed.

Paragraph #14:

"A further report [from the Office of the Children's Lawyer] **might well have shortened the issues before the Court, provided great assistance to both the parties and the Court, and saved time, cost and trauma."**

Discussion

The above comment by the Court clearly indicates that clarification and updating of an earlier OCL report would have been very helpful to the court and to all the parties involved. Yet the Office of the Children's Lawyer refused to update their report. Paragraph 7 clearly shows that the court ordered the OCL to do an update of their report and in paragraph 12 the OCL clearly refused to cooperate with the court for the best interest of the child and all parties.

Paragraph 14:

The position of the counsel who appeared from the Office of the Children's Lawyer seemed to be based on a stubborn insistence on their power to determine whether or not to accept a referral, which undoubtedly exists, and a stubborn refusal to acknowledge a Court Order.

Discussion

The above comment by the Court clearly indicates that the court felt that the Office of the Children's lawyer was being stubborn against the Order of the court and against doing what it in the best interest of the child. It is clear that the Office of the Children's Lawyer would rather spend it resources fighting the will of the court rather than to just do a simple update on their report and to do something positive to help the child. The Office of the Children's Lawyer appears to be more concerned about legal procedures and protecting itself and its workers than it is about the interests of the children it is supposed to be helping. Clearly, in the eyes of the Office of the Children's Lawyer, the interest of child in this case comes last.

Paragraph #14:

"There was no real effort made to advise as to whether Mr. McTavish had reviewed the file as requested, or to explain the reasons behind the decision not to update the report in the modest manner Ordered. I was both surprised and deeply disappointed by this attitude and approach."

Discussion

The above comment by the Court indicates that the court felt that it was a reasonable request for the Office of the Children's Lawyer to update its out-dated report. Clearly, the Court was disappointed by the attitude and approach of the Office of the Children's lawyer. The Court also made mention that a previous court has requested that the matter be brought before Wilson McTavish for his input but that OCL workers had never made any effort to do what the court had previously ordered either.

Certain questions must be asked. Why did council with the Office of the Children's Lawyer not consult with Mr. McTavish on this case as requested by the court? Could it be because the Office of the Children's Lawyer was more concerned about covering up their social worker's unprofessional report and did not really want to make their worker accountable? Did workers not want Mr. McTavish to be aware of the lousy work they were doing?

Paragraph #15:

"For clarity, I reiterate that if the Office of the Children's Lawyer is ordered to up-date a report, then absent an appeal modifying, reversing or vacating such an order, on jurisdictional or other grounds, the Office of the Children's Lawyer must comply or be subject, in the normal course, to possible contempt proceedings."

Discussion

The above comment by the court shows that the court was not pleased with the Office of the Children's Lawyer for failing to respect the Court Order against the OCL. The Office of the Children's Lawyer has an army of high priced lawyers at their agency being paid by taxpayers. Surely at least one of them could have responded to the court Order in some formal way.

Paragraph #19:

It will only be in rare circumstances where such an Order, as opposed to a request, is made. The Court is and will continue to be highly cognizant of the resource restrictions of the Office of the Children's Lawyer, and it is logical to say that on the whole that Office is in the best position to determine which referrals should be acted upon. Nonetheless, the rule of law dictates that court orders be obeyed, and that did not occur in this case.

Discussion

The above comment by the court clearly shows that the Office of the Children's Lawyer did not obey the Order of the Court and technically was in contempt of a court Order. Even though the Office of the Children's Lawyer has many lawyers and all kinds of money from the taxpayers handed to them, they still seem to feel that they have special status and are above the law! Could it be that there is one law for the Office of the Children's Lawyer and different laws for everybody else? The whole issue was simply about updating a simple report, yet the Office of the Children's Lawyer wasted its valuable resources and those of the court arguing legal procedures rather than doing one simple task which would have benefited a child at the same time. Complying with the court Order would likely have used fewer resources than having the Office of the Children's Lawyer fight the Court Order. Again, it seems that the Office of the Children's Lawyer was more interested in protecting is workers and being unaccountable than about doing what is just and right for children and families.

Paragraph #44:

"The biggest problem with the report (OCL report) of course is that it was significantly out-dated and that the Office of the Children's Lawyer had refused to up-date it despite an Order of the Court"

Discussion

The above comment by the Judge clearly indicates that the court found the Office of the Children's Lawyer report to be problematic. The Court again states that the Office of the Children's Lawyer had refused to follow the Order of the court to update their report. In spite of the fact that the Court advised the Office of the Children's Lawyer that their report was outdated, the Office of the Children's Lawyer was not interested in doing what was the right thing for the child, that being to simply update their report. With the time of social workers and lawyers at the Office of the Children's Lawyer being paid for by taxpayers, it is difficult for an average person to imagine why the Office of the Children's Lawyer would not take a little bit of additional time to update their report. After all, the taxpayers would foot the OCL bill.

Part Four
Findings and Conclusions

Based on a review of the matters which are relative to the involvement of the Office of the Children's Lawyer as reported in this case, the following has been reasonably concluded:

1) That the Office of the Children's Lawyer has failed to provide services in a manner that would appear to best promote the best interest of the children or the family.

Comment
Most average, reasonable, law-abiding citizens in the community would have expected the Office of the Children's Lawyer to provide a simple update to its early report. It is in the best interest of children to have the most accurate and reliable information before the court so that the court can make the most informed decision. By refusing to update its report the Office of the Children's Lawyer has failed to ensure the best interest of children.

2) That the Office of the Children's Lawyer has failed to provide services in a manner that would appear to best promote the rights and protection of the children.

Comment
Most average, reasonable, law-abiding citizens in the community would have expected the Office of the Children's Lawyer to provide a simple update to its previous report. It is in the best interest of children to have the most accurate and reliable information before the court so that the court can make the most informed decision. By refusing to update its report the Office of the Children's Lawyer has failed to ensure the best interest of children.

3) That the Office of the Children's Lawyer failed to deliver its services in a reasonable time frame which in this case took 2 ½ months after the court Order for the OCL just to begin its work.

Comment
Most average, reasonable, law-abiding citizens in the community would have expected the Office of the Children's Lawyer to commence its services a lot sooner than 2 ½ months after being ordered to get involved. Workers in the private sector would have been able to commence work in a much shorter period of time. In family court proceedings, delays like this can have devastating impact on children and their families.

4) That the Office of the Children's Lawyer failed to complete its delivery of services in a reasonable time frame which in this case took 6 months from the time that the court ordered the agency to be involved until the time the agency released its report.

Comment
A time frame of six months is just too long and not acceptable in matters of such importance as child custody and access. Most average citizens in the community would have expected the Office of the Children's Lawyer to complete its work in a much more efficient timeframe than it did in this case. This is simply a case of government bumbling and inefficiency.

5) The Office of the Children's Lawyer has refused to comply with an order of the Court dated Feb 5, 2001. As a result of the refusal to obey the court Order, the Office of the Children's Lawyer was in contempt of the Court Order.

Comment
Most average, reasonable, law-abiding citizens in the community would have expected the Office of the Children's Lawyer to obey a Court Order just like everyone else is expected to. Does the Office of the Children's Lawyer have special privilege with the law that the average person does not?

6) That the Office of the Children's Lawyer has argued wording and procedures to thwart doing what reasonable people in the community would consider the best interest of the child, that being just to provide a more accurate and up-to-date report concerning the children involved in this case.

Comment
Most average, reasonable, law-abiding citizens in the community would expect the Office of the Children's Lawyer to put the interests of the children first before legal procedures and not the other way around, especially considering the minor nature of the request of the court.

7) That legal counsel with the Office of the Children's Lawyer failed to pass information on to Mr. Wilson McTavish, the head of the Office of the Children's Lawyer as they were requested and expected to do by the court as part of the Court Order.

Comment
It appears that communication and accountability is terribly lacking in this agency. People would get fired from their jobs in the private sector for causing such a breach in protocol. Lawyers with the Office of the Children's Lawyer are supposed to be high paid professionals yet they cannot seem to get their instructions right.

8) That more of the taxpayer's money was likely spent by the Office of the Children's Lawyer arguing in court why it should not update its previous report than would have been spent if it had just updated its previous report, as was requested by the court in the first place.

Comment
This is a blatant abuse of the taxpayers money and an clear example where the Office of the Children's Lawyer has failed to put it money where it belongs – protecting children in the Province of Ontario.

9) That the Office of the Children's Lawyer has, overall, tarnished its credibility and that of the Ontario Government by wasting tax dollars and failing to act in a responsible and accountable manner to the children and families of the Province of Ontario.

Comment
The performance of the Office of the Children's Lawyer in this court case is substandard in the terms of the private sector. Most average citizens would expect an agency of the Ontario Government to do things better, given the amount of taxpayer's dollars that are given to this agency and work handed to them on a silver platter by the family court system.

10) That the Office of the Children's Lawyer placed a higher priority on the protection of its worker than it did on the protection of the children.

Comment
The Office of the Children's Lawyer should have re-evaluated the performance of its worker and ensured that the background and experience of the worker was made available to all parties early in the process. Obviously, this was not done. The Office of the Children's Lawyer could not be so naïve as to believe that this was the correct thing to do. Why does the Office of the Children's Lawyer refuse to disclose its workers resumes.

11) That the Office of the Children's Lawyer social worker, Nocole McSweeney, was negligent in not filing a curriculum vitae with her report which the court clearly indicated would have been helpful to the court proceedings.

Comment
Most average, reasonable, law-abiding citizens in the community would expect that social workers with the Office of the Children's Lawyer provide their backgrounds as is the practice with professionals who do assessments in the private sector. Why did Ms. McSweeny not want to make her credentials readily available? Were there things that the OCL and its workers wish to keep hidden from the court or from members of the public?

12) The Office of the Children's Lawyer has failed to promote accountability with its workers contrary to the best interest of the child and contrary to community standards and expectations.

Comment
Most average, reasonable, law-abiding citizens in the community would consider the performance of the Office of the Children's Lawyer in this case to be substandard. It was totally unacceptable for the lawyers and the social workers with the Office of the Children's Lawyer to turn their backs on the court and to turn their backs on the children involved. The Office of the Children's Lawyer turned its back on reasonable requests. This is and insult to the taxpayers and citizens of the Province of Ontario.

13) That the court could have benefited by the continued involvement of the Office of the Children's Lawyer, but that the court was left without the assistance as a result of this agency's refusal to provide any further assistance to the court.

Comment
Most average, reasonable, law-abiding citizens in the community would expect that the Office of the Children's Lawyer would do whatever it could to help the children involved, the court and the parties. Obviously this was not done.

14) Failure of the court to sanction the Office of the Children's Lawyer for its contempt of the court Order has likely contributed to a situation where the Office of the Children's Lawyer will be encouraged in the future to defy other Court Orders. The Office of the Children's Lawyer and its staff now know that the courts will do nothing if they violate court Orders.

Comment

Failure of the court to sanction the OCL has only further eroded the public's trust in the court system and in the Office of the Children's Lawyer. Why are other parties in court often sanctioned and sometimes forced to pay court costs for contempt of court. It seems that a double standard exist - a high standard for the ordinary citizens in court and another lower standard for the lawyers and social workers with the Office of the Children's Lawyer.

15) That the Office of the Children's Lawyer has permitted an inexperienced social worker make crucial decisions that could drastically affect the future of a child, possibly adversely, without putting adequate safeguards in place to prevent worker error.

Comment

Most average, reasonable, law-abiding citizens in the community would expect that less experienced workers should be monitored until their performance and experience met certain minimal standards of performance. Based on the fact that a very experienced social worker was highly critical of the Office of the Children's Lawyer's report, provides evidence that the OCL is lacking in quality standards for its social workers. It is well known that the Office of the Children's Lawyer will not publish any of its criteria.

16) That the Office of the Children's Lawyer has failed to uphold the principles of fundamental justice and has brought disrespect to the court and to the legal profession.

Comment

The conclusions in this case, clearly indicate that the Office of the Children's Lawyer failed in a number of area and clearly disobeyed an Order of the Court. Many could reasonably argue that the Office of the Children's Lawyer has failed to serve children, has failed to serve families and has failed to uphold the principles of fundamental justice which is enshrined in The Canadian Charter of Rights and Freedoms. There is little doubt that if the average citizen was to read the case and to read the critique of this case, that the average person would disapprove of the conduct of the Office of the Children's Lawyer in this case.

Part Five
Recommendations

Based on the conclusions regarding the involvement of the Office of the Children's Lawyer as outlined in this report, the following reasonable recommendations have been made:

1) **That the Office of the Children's Lawyer and all of its staff be required to follow any and ALL Orders of the Court which relate to any case that the Office of the Children's Lawyer has decided to accept. The Office of the Children's Lawyer should be even more compelled to follow court Orders as they are a government agency and that, in general, are expected by the citizens of the Province of Ontario to maintain the high standards of accountability.**

2) **That all social workers be required to provide their complete curriculum vitae with all parties at the beginning of their involvement with any children or families as part of an Order by the Court.**

3) **That all social workers who are new with the Office of the Children's Lawyer should be required to perform a minimum of 10 reports under the direct supervision of a more experienced social worker and that all such reports of the junior workers be scrutinized and co-signed as a joint report with a more experienced worker. Both workers should be held jointly accountable for the content and accuracy of the joint report.**

4) **That the Office of the Children's Lawyer publish criteria clearly defining what its agency considers to be in the best interest of children. As the Office of the Children's Lawyer is funded by taxpayers, children and parents in the Province of Ontario who may be affected by this agency should have the right to know exactly what criteria this agency uses when it conducts its investigations. In addition, all of the workers with the Office of the Children's Lawyer should be trained in how to use these criteria in their assessment reports to best ensure accurate and concise reports and reliable outcomes for children.**

5) **That the Office of the Children's Lawyer should encourage the contracting of its assessment reports to outside third parties using competitive market strategies to minimize the costs of providing services. The Office of the Children's Lawyer should be responsible for the establishment of standardized criteria used by these various outside third parties, so as to improve quality and limit exposure of the Ontario Government to present and future lawsuits as a result of flawed reports which potentially could result in physical and emotional harm to children or a violation of rights and freedoms under the Canadian Charter of Rights and Freedoms. Lawsuits could potentially be massive in the years to come as the outcomes of assessment reports become clearer.**

Indexed as:

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Ontario Superior Court of Justice
Wein J.

Heard: April 18, 19, 23-27, 30 and May 1, 2001.
Judgment: May 29, 2001.
(46 paragraphs.)

Counsel:

Gary Joseph and S. Jack, for the petitioner.
S. Hillier, for the respondent.
D. Moyal, for the Office of the Children's Lawyer.

Rulings on Social Workers' Assessments:

Jurisdiction To Order An Update And
Admissibility Of Critique As Expert Evidence

1 **WEIN J.**:— Prior to the hearing of this custody trial, the Office of the Children's Lawyer was requested pursuant to s. 112 of the Courts of Justice Act to investigate and report on matters with respect to custody and access of the parties' two children.

2 Two issues relating to this report have arisen during the course of the trial proceedings:

1) (a) Can the Office of the Children's Lawyer be ordered by the Court to update such a report?

(b) If so, when should such an Order be made?

2) Is the critique of the report prepared by another social worker admissible in evidence at the trial?

Issue 1 - Update of Social Work Report of the Children's Lawyer

3 After the separation of the parties in February 1999, an action was brought in the Superior Court of Justice for a divorce and for corollary relief. Following a motion heard on June 17th, 1999, Justice Seppi requested the Office of the Children's Lawyer to investigate and report on matters with respect to custody and access pertaining to the two young children of the parties. At the time when the report was requested it was noted by the Court that the parties agreed to have the Office of the Children's Lawyer make an investigation.

4 Following the request of Justice Seppi, an investigation was undertaken by a social worker engaged by the Office of the Children's Lawyer. Interviews and investigations were conducted commencing August 31st, 1999. Accordingly, when the investigation was undertaken, the parties had been separated for just over 6 months, and the children were 3-1/3 years and 19 months old respectively: Emily was born on May 5th, 1996 and Chelsea was born on February 5th, 1998. The report was released on December 9th, 1999 by Ms. McSweeney.

5 The matter returned to court on more than one occasion prior to trial. At one such appearance, on January 18th, 2000, counsel for the Father filed a critique of the McSweeney report by another social worker, Barbara Chisholm, as support for his request that another report be done. As it happened, the report was the first such report ever done by Ms. McSweeney, and the critique was highly critical of the procedure that she had employed in preparing it.

6 The Court endorsed the record:

> In my view it would not be appropriate to order a second assessment at this time. It is clear that Nicole McSweeney should have an opportunity to respond to Ms. Chisholm's critique. It is also clear that Ms. McSweeney's curriculum vitae would be very helpful to assist the Court. In my view Ms. McSweeney should be required to extend her report and interview [certain parties including the mother's new husband, both the paternal and maternal grandparents and potentially others including family friends and the children's nanny]. However, I hesitate to make this order in view of the appointment of the Children's Lawyer which may well have expired with Ms. McSweeney's report. If this endorsement is brought to the attention of the Children's Lawyer (Mr. Wilson McTavish) personally, perhaps something can be worked out.
> If, however, the Children's Lawyer will not consent, the trial should in any event be expedited in my view. (emphasis added)

7 On a further pretrial motion held on February 5, 2001, it appeared that the Children's Lawyer had declined this request. After further submissions, the Office of the Children's Lawyer was ordered to up-date the report. The Order was stated in the following terms:

> [1] THIS COURT ORDERS that the Office of the Children's Lawyer, namely, Nicole McSweeney shall do a brief update of her report dated December 1999 by interviewing Samantha Voth and her present husband, Robert Voth and Simon Mayfield and his new wife, Carol Mayfield.
> [2] THIS COURT ORDERS that the parties may return to [the pre-trial judge] for further direction in regards to paragraph 1 herein.

8 At the opening of trial in this matter, I was advised by both counsel that the Officer of the Children's Lawyer had again "declined" the "request" to up-date the report. A letter from the Office the Children's Lawyer stated as follows:

> Although I have not yet received the order requesting the Children's Lawyer to update the Report of the Children's Lawyer, I have been advised by voicemail from Ms. Hillier that this was issued by the court recently. We have reviewed this matter carefully and we do not feel that an update would offer anything of substantial value in addition to what we have already done and therefore we are not consenting to conduct an update in this matter.

There was no indication that the Court's specific request that the matter be reviewed by Mr. McTavish was ever drawn to his attention.

9 Even if it can be said that the Office of the Children's Lawyer was confused initially because they thought that the original Order was a "request" to up-date, it was obvious that on receipt of this Order, they ought to have informed themselves appropriately and made a further response.

10 Given the length of time that had passed since the original report was done, and given the tender age of the children involved, and most importantly in the context of the direct order of the pre-trial motions judge on February 5, 2001, I advised counsel on April 18th to convey the Court's instructions to the Office of the Children's Lawyer, that they up-date the report by the following Monday when the trial was scheduled to continue, failing which they were to appear in court to advise the Court concerning the circumstances relating to their failure to up-date the report. On April 23, at the recommencement of the trial, the counsel for the Office of the Children's Lawyer appeared in response to that direction. The position of counsel for that office was that the Court must have been "confused" concerning the interpretation of s. 112 of the Courts of Justice Act. That section is as follows:

> 112. (1) In a proceeding under the Divorce Act (Canada) or the Children's Law Reform Act in which a question concerning custody of or access to a child is before the court, the Children's Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child's support and education.
>
> (2) The Children's Lawyer may act under subsection (1) on his or her own initiative, at the request of a court or at the request of any person. 1987, c. 1, s. 7(1).
>
> (3) An affidavit of the person making the investigation, verifying the report as to facts that are within the person's knowledge and setting out the source of the person's information and belief as to other facts, with the report attached as an exhibit thereto, shall be served on the parties and filed and on being filed shall form part of the evidence at the hearing of the proceeding. 1984, c. 11, s. 125(3); 1987, c. 1, s. 7(2).
>
> (4) Where a party to the proceeding disputes the facts set out in the report, the Children's Lawyer shall if directed by the court, and may when not so directed,

> attend the hearing on behalf of the child and cause the person who made the investigation to attend as a witness. 1984, c. 11, s. 125(4)

11 It is apparent on the face of that Section that while the initial decision as to whether or not to do a report lies in the discretion of the Children's' Lawyer, the Court has the power to direct that the Children's Lawyer and the person who prepared the report attend in Court. Nothing in that section or in s. 89(1) governing the appointment of the Children's Lawyer exempts the Children's Lawyer from following direct orders of the Court. It must as well be noted that the section requires that the report be received as evidence, and this requirement has relevance in my view to the potential requirement for updating.

12 Counsel for the Children's Lawyer persisted in repeating that the Courts of Justice Act gives the discretion to the Children's Lawyer to accept or decline any request from the Court or parties. The position of the Children's Lawyer is that "to do anything further on that file would require a fresh request". The counsel for the Children's Lawyer repeated:

> If there is a fresh request it's vetted in the same way that the initial request would be vetted so that we may agree to get involved in the case or we may disagree and it's under the discretion in s. 112 .... In this case, there was an order made, I believe, requesting that we become re-involved in this matter. We refused to.

At that time, I noted orally:

> There is no confusion. There was not a second request under 112. There was in fact an Order of [the Superior] Court. It may have been that a 'not inappropriate' response from your office would have been that, given the circumstances, it would have been preferable to have another request and you would request, in responding to the Order, that there be consideration given to the possibility of another request under s. 112. But that didn't occur. There was a Court Order. The response to a Court Order, as I understand it, is compliance or the potential for contempt.
> I am very familiar with and most sympathetic to the limited resources of your office. I am familiar with the very good work done under less than ideal conditions by people in your office, and I make no criticism. Nonetheless, the fundamental principle that Court Orders must be obeyed remains, and so there is no "confusion".
> In this case, my concern is that either a delay will be occasioned by not having up-to-date information before the Court, or the Court will be placed in a situation of having to decide the difficult question of custody in the absence of full information ....

13 When counsel twice further persisted in suggesting that the Court was confused, she was again advised that failure to respond to a Court Order could result in proceedings such as a show cause for contempt.

14 At that stage, the trial had commenced, the parties were ready to proceed, a difficult situation causing stress on the children as well as both of the new custodial families was persisting, and in the absence of simple compliance with the direction of the Court, the Court was left without the assistance that the Office of the Children's Lawyer is mandated to provide. A further report might

well have shortened the issues before the Court, provided great assistance to both the parties and the Court, and saved time, cost and trauma. The position of the counsel who appeared from the Office of the Children's Lawyer seemed to be based on a stubborn insistence on their power to determine whether or not to accept a referral, which undoubtedly exists, and a stubborn refusal to acknowledge a Court Order. There was no real effort made to advise as to whether Mr. McTavish had reviewed the file as requested, or to explain the reasons behind the decision not to update the report in the modest manner Ordered. I was both surprised and deeply disappointed by this attitude and approach.

15 For clarity, I reiterate that if the Office of the Children's Lawyer is ordered to up-date a report, then absent an appeal modifying, reversing or vacating such an order, on jurisdictional or other grounds, the Office of the Children's Lawyer must comply or be subject, in the normal course, to possible contempt proceedings.

16 After careful consideration, and not without a great deal of hesitation, I have now determined not to require the Office of the Children's Lawyer to show cause why it ought not to be cited for contempt in this case. I base my decision on the following:

(a) First, even if only based on wilful stubbornness, there does seem to be a confusion (to use counsel's own words) in the Office of the Children's Lawyer, or at least in one counsel in that office, concerning their obligation to comply with Orders of the Superior Court.

(b) Secondly, nothing in the guidelines issued by that office or in its checklists or policy statements suggest that a court order is not binding on that office, so this is undoubtedly not a general policy error.

(c) Third, in this particular case, the Office of the Children's Lawyer was not given an opportunity to make submissions either before or after the order was made on February 5, 2001. If that opportunity had been given, and if the Order had nonetheless been disobeyed, this would have been a case where a show cause hearing would have been required.

(d) Fourth, and equally importantly, there is a jurisdictional issue to be determined. I expect that this issue was what counsel was inelegantly endeavouring to raise by calling the Court "confused". She was clearly not prepared to properly argue this legal issue and did not seek to file materials to assist the Court. In these circumstances I will not further comment on the issue, beyond noting that as the court is required to receive any report into evidence, the clear power to control its own processes does seem to me to provide a power in at least exceptional cases to direct that evidence so received by mandate be of some use and relevance.

17 In the future, until this issue is clearly decided, I expect that in most cases the court will follow the usual procedure of making a second request where there is a perceived need to up-date a report. The Office of the Children's Lawyer may under the legislation either accept or decline a request. As a matter of common sense if not statute, in circumstances where the request is declined,

the Office of the Children's Lawyer should briefly set out its reasons for so declining, to assist counsel and the Court in determining any further steps to be taken.

18 In exceptional circumstances, as here, the Court may determine that it is appropriate to order that a report be up-dated. Such an Order should normally, absent exigent circumstances, only be made after the Children's Lawyer has been given an opportunity to appear and make submissions relating to the appropriateness of the Order.

19 It will only be in rare circumstances where such an Order, as opposed to a request, is made. The Court is and will continue to be highly cognizant of the resource restrictions of the Office of the Children's Lawyer, and it is logical to say that on the whole that Office is in the best position to determine which referrals should be acted upon. Nonetheless, the rule of law dictates that court orders be obeyed, and that did not occur in this case.

20 I trust that this will clear up the confusion that exists in the Office of the Children's Lawyer.

21 In summary, in this case, the initial request came from the Court under s. 112(2), with the agreement of both parties. The Court made a further request for an up-date, which was declined by the Office of the Children's Lawyer as is their prerogative. However, following the subsequent order of the Court, made by the pre-trial judge, it was entirely inappropriate for the Office of the Children's Lawyer to simply treat the Order as if it were subject to being overridden by a decision of that office. The Office of the Children's Lawyer is not an appellate court, or a body that stands above the law. If that Office wished to dispute jurisdiction, it must do so in Court. Patently, it must abide by Court Orders that are made unless and until reversed.

ISSUE 2:

Critique Of The Social Work Report:

22 A practice has developed whereby opposing counsel in family law custody or access cases frequently file a critique of an assessment report to counter the impact of such a report. While it is obviously not either practical or desirable in most cases to have either the children or the parties subjected to two sets of interviews by separate assessors, nonetheless the issue arises concerning the appropriateness and admissibility of such critiquing reports.

23 In this case, counsel for the Father sought to introduce at trial the critique done by Barbara Chisholm of the McSweeney report. In argument concerning the admissibility of this critique, both counsel ultimately agreed that the rule for admissibility of expert evidence in family law cases is the same rule as is applicable in other cases. Accordingly, it was agreed that the four-part test originally set out in R. v. Mohan, [1994] 2 S.C.R. 9, 89 C.C.C. (3d) 402, as refined in subsequent cases, was applicable. Mr. Joseph made a brief alternative submission that the test in family law cases ought to be a lesser test of "helpfulness", but later acknowledged that he was really arguing that the application of the test should be less stringently applied, at least in cases where the issue concerned a question relating to the best interests of the child. He argued that the Court ought to endeavour to ensure that all possible helpful information be introduced. He agreed, however, that if he could not meet the Mohan test as so interpreted, his application to introduce this evidence would fail.

24 There is no doubt that in family law cases, the rules of evidence often seem to be only loosely applied, if not ignored entirely. With respect to the receipt of "expert critiques" of social work assessment reports, a general practice seems to have been developing that such critiques be introduced by the party who wishes to dispute an assessment report.

25 In the cases to which I was referred, such critiques have been frequently introduced without consideration of the question of admissibility.

26 In Lee v. Kim, [1999] O.J. No. 1252 (Gen.Div.), on a motion for a stay pending appeal against a custody transfer order, the Court noted that the trial judge had heard evidence from Barbara Chisholm, the expert whose evidence is sought to be introduced in this case. She had provided a critique of the first two reports of the Children's Lawyer, without interviewing the child or the parties. No comment was made on the motion for a stay concerning the admissibility, relevance or weight accorded to that report.

27 In Burgess v. Burgess [1997] B.C.J. No. 2536, on a motion for an order compelling the applicant to attend for a medical examination, it was simply noted that "nothing prevents the respondent's expert from filing a critique of the applicant's expert's conclusions". (emphasis added)

28 In Walsh v. Walsh [1996] O.J. No. 3970, (1996) 20 O.T.C. 77, affirmed (1998) 39 R.F.L. (4th) 416 (C.A.), in a trial where variation of custody was being sought, it was noted that the Court permitted the calling of an expert to critique the report given in an court ordered assessment by another expert. In the critique, the expert had had no contact with the child or parents and could not therefore attack the actual recommendations. As is the situation before me, the expert was critical of many aspects of the manner in which the assessment was conducted. The Court referred to the evidence of the critiquing witness in weighing the assessment report.

29 In Cardinal v. Cardinal (1988), 17 R.F.L. (3d) 23, (Alta. Q.B.), [1988] A.J. No. 839, on an appeal from a Provincial court order relating to custody, it was argued that a home study report ought to have been released to allow one of the parties to show the report to an expert for the purposes of critique and possible rebuttal. The Court on appeal held that it was reasonable that the appellant would want to enlist the aid of an expert witness to counter the effect of the very unfavourable report and that allowing such a witness to have access to the report would not have been harmful to the children or parties. The Court held that the restriction on circulating the report was not of decisive importance but it should have been permitted to be released to an expert witness.

30 It appears that in these and other cases, with increasing frequency, parties opposed to the content of an assessment report have adopted the tactical approach of hiring an expert to do a critique. Ms. Chisholm in this case testified that she had done between 75 and 100 of such critiques.

31 However, the practice has sometimes been discouraged by this Court. In Moodie v. Moodie [1995] O.J. No. 1137 (Gen.Div.), the Court noted that the second report had, as its primary purpose, critiquing the assessment report. Insofar as the critiquer testified that he felt he could come to a conclusion in an assessment for custody and access without talking to one parent, the Court expressed shock, and rejected that use of the report.

32 In C.M. v. G.M. (1992), 40 R.F.L. (3d) 1, [1992] O.J. No. 1164 (U.F.C.), in determining a custody matter, the Court reviewed the evidence of an assessment report and a critique of that report. Without considering the issue of admissibility of the critique, it was noted that notwithstanding the impressive credentials and expertise of the critiquer, the evaluation of the assessment report had such an incomplete and faulty base of information that it was of little assistance to the Court.

33 Finally, in Huxtable v. Huxtable (unreported, File No. 39980/99, Apr. 17, 2001), (Ont. S.C.J.), on a custody trial, the Court considered an assessment report which recommended joint custody, with the mother having primary residence. A critiquing expert was subsequently retained by the mother. As in the case before me, the critiquing expert did not meet with the parties. Her only function was to review and critique the assessment report. The main difference between Huxtable and the within case is that the critiquer in Huxtable was not present when the assessing doctor testified. The Court found that the critiquer had no basis for the conclusion that a comprehensive assessment had not taken place, and noted that a written report does not set out everything that takes place during the course of an assessment. In summary, the Court found the critiquer's testimony to be "singularly unhelpful".

34 None of these cases deal directly with the issue of admissibility of this type of evidence, which is clearly introduced solely as expert evidence where the critiquer has not done an independent assessment. Prior to the decision in Mohan, the general standard for admissibility of expert evidence was the relatively low threshold of "helpfulness". Even then however a judge still had to be satisfied that the trier of fact might not have sufficient knowledge of, or experience in human behaviour to draw an appropriate inference from the facts. Subsequent to Mohan, the Court in effect had been asked to function as a "gatekeeper", keeping out novel scientific evidence. The standard of helpfulness was explicitly rejected as being too low a threshold for admission and the issue of admissibility was to be determined against four specific criteria, which had the effect of raising the threshold of admissibility for all kinds of expert evidence.

35 The four factors upon which the admissibility of all expert evidence depends are: relevance, necessity in assisting the trier of fact, the absence of any other exclusionary rule, and a properly qualified expert.

36 I find that there is no issue with respect to three of these four criteria. Barbara Chisholm is unquestionably qualified, and her curriculum vitae indicates that in matters relating to custody and access, she has a depth of experience that undoubtedly would make any assessment report she prepared highly credible. There is no rule of evidence that would otherwise prevent the admissibility of her expert report. Evidence on this issue is clearly relevant since the manner in which the report was prepared will clearly bear on the weight that the Court ought to give to it.

37 As in many cases relating to the evidence of a proposed expert, the critical question relates to necessity. As stated in R. v. Abbey, [1982] 2 S.C.R. 24 at 42, 68 C.C.C. (2d) 394, expert opinion evidence will be necessary when it can provide "a ready made inference which the judge and jury due to the technical nature of the facts are unable to formulate". With respect to this aspect of the test, the decision of the Supreme Court of Canada in R. v. D.D. (2001), 148 C.C.C. (3d) 41 (S.C.C.), reiterates the Mohan criteria in the context of psychiatric evidence concerning the significance of the failure of a complainant in a sexual abuse case to make timely disclosure. The Court repeated

that due regard must be given to the dangers traditionally associated with expert evidence and the requirement of necessity.

38 While those dangers may be more apparent in a criminal trial, or in a situation where a jury is trying a case, it must not be forgotten that expert evidence is time consuming and expensive. The practice of calling unnecessary evidence of experts which does not meet the test of necessity should be discouraged for the benefit of the parties to litigation. It may well appear that an unreasonable expectation has arisen in family law custody cases that there should be a critique of an assessment report as opposed to a separate independent assessment where appropriate and counsel may feel that their own submissions will therefore be seen as inadequate to the task.

39 As well, it must be borne in mind that even where the requirements relating to the admissibility of expert evidence are met, the evidence may be rejected if its prejudicial effect on the conduct of the trial outweighs its probative value. In my view, this may occur in a case where the assessment report versus critique becomes a weighing of the expert credentials rather than a reasoned assessment of the content of the report including any limitations in the process undertaken in creating the report.

40 The essence of the critique of Ms. Chisholm on the custody/access report from the Office of the Children's Lawyer related to process issues. The process was said to be generally correct but incomplete in that each parent was interviewed only once whereas Ms. Chisholm indicated that social work standards required at least two full interviews with each party so that initial anxiety could be overcome and a real opinion could be obtained. She was critical of the standards used by the Office of the Children's Lawyer.

41 As well, it was said that collateral sources including the grandparents and other friends were missing from this report. Further, it was said that there was no indication that the assessor sought to understand the background of each parent or the reasons for the marriage break-up. Ms. Chisholm did not agree that the evidence of the assessor augmenting this point overcame this objection. Finally, Ms. Chisholm found it important that the father was not given an opportunity to address allegations relating to his emotional status and history of depression and the impact on his parenting ability.

42 With respect to the content of the report, the critiquer suggested that there were gaps relating to an understanding of what went wrong in the marriage, an illogical leap of faith in terms of what the fathers taking comfort from his children meant and finally, how the mother's unexplored status and new relationship supported her parenting ability.

43 None of these things are beyond the scope of common sense. Several were the subject of direct evidence, for example the evidence of Dr. Frank concerning the positive intent of his statement that the Father took comfort from his children, and Dr. Frank's view that the assessor had misinterpreted this comment. All of these points could easily have been and in fact were articulately argued by counsel for the father based on answers to questions asked in cross-examination and simple logical inference. The biggest problem with the report of course is that it was significantly out-dated and that the Office of the Children's Lawyer had refused to up-date it despite the Order of the Court.

44 While I would not go so far as to say that a critique of an assessment report could never meet the test for admissibility in a custody case, I am confident in ruling that in this case the necessity aspect of the test is not met. I would go so far as to say that in most cases, it is simply not necessary or appropriate to have the parties bring forward the evidence of a collateral critique. A social work critique may of course be done to assist counsel in formulating questions for cross-examination of the assessor or to assist counsel in developing an argument concerning the weight to be attached to an assessment report but it will rarely, if ever, be "necessary" to introduce the critique as original evidence or to call the critiquer as a witness. The expense in most cases could better be spared or applied to an independent assessment.

45 For these reasons, as previously indicated at trial, the evidence of Ms. Chisholm is ruled inadmissible.

46 It should be noted that because the issue of admissibility of this evidence was raised by the Court rather than by opposing counsel, in fairness to the Father's case, an opportunity was given to counsel for the Father to recall any witnesses including Ms. McSweeney for further cross-examination, or to call additional witnesses not on the witness list.

WEIN J.