

# Poor-quality reports prolonging custody battles: rulings

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For Law Times

Poor-quality reports from the Office of the Children's Lawyer are unnecessarily prolonging high-conflict custody battles by giving parents false hope that courts will adopt unrealistic recommendations, according to the judgments of two Ontario Family Court judges.

In *Deacon v. Haggith*, Ontario Superior Court Justice David Aston found a flawed OCL report released two months before trial effectively closed the door "on any out of court settlement by the parents." It was "ridiculous to think" that the mother in the case would accept the recommendations, Aston wrote in his Oct. 13 decision, while the chances of the court adopting them were "slim to none."

In a second case involving two self-represented parties, *Whidden v. Ellwood*, Ontario Superior Court Justice Alex Pazaratz criticized the OCL for allowing the submission of a report that "made no sense," despite a supervisor in the office identifying concerns about the investigator's conclusions ahead of time. When the mother disputed its findings, the OCL almost immediately withdrew the report and started the investigation process all over again.

"By then issuing a second and completely contradictory report, the OCL emboldened both parties to perceive they would have expert evidence supporting their position at trial," Pazaratz wrote in his Nov. 14 decision.

Family lawyer William Clayton, who acted for the mother in *Deacon*, says it's not the only time he has had problems with the involvement of the OCL.

"I've done about five or six cases in the last few years where the Office of the Children's Lawyer has bungled it badly," says Clayton, a partner in the London, Ont. office of Lerner LLP.

He says the cases are split between those when his clients benefited from faulty investigations and those where it damaged their positions.

The OCL appoints social workers to carry out the investigations under s. 112 of the Courts of Justice Act, and while the section allows them to make recommendations, it contains no requirement that they do so.

Clayton, who received his call to the bar in 1972, says the reports were introduced to get information, from a neutral source, about the children at the heart of a dispute before the court. However, they have come to be treated more like expert reports due to gradual "overreach by the OCL," he says.

"They feel compelled to do not only the fact finding but also to offer solutions. That's where the problem lies," Clayton says. "Many of them have degrees and masters in social work, but they are not psychologists or psychiatrists or medical doctors. They say things that they really shouldn't because they don't have the expertise."

According to Clayton, investigators are often focused on resolving conflict between the parents, and they rarely stray from some form of joint custody arrangement in their recommendations.

"The one thing investigators tend to do is they can become overly supportive of the perspective of one parent," Clayton says. "Sometimes, these reports end up promoting a trial, not settlement, by coming up with an unrealistic arrangement that one party is for sure not going to accept."

That was the case in *Deacon*, according to Clayton, which involved the parents of an eight-year-old child who split up when she was two months old. Allegations of sexual abuse and parental alienation had already featured in the bitter dispute over custody and child support before the OCL assigned an investigator to report on the case.



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The report, issued two months ahead of the scheduled trial, accepted the father's version of events, and recommended a "week about" residential schedule that would have given him more access to his daughter than he had ever requested. That gave him false hope that a judge would agree and pushed the case toward trial, according to Aston's judgment.

"It is ridiculous to think that Ms. Haggith would ever accept the 'parallel parenting' regime recommended by the report of the Office of the Children's Lawyer," considering the child had thrived in her care and they had only once spent more than a week apart during her lifetime, Aston wrote.

"At the same time it gave Mr. Deacon all the ammunition he needed to pursue his claims, not only for custody but for vindication and revenge," the judge added.

After a withering cross-examination by Clayton at trial, it became "abundantly obvious" that the report's author had based her assessment on a "fundamentally flawed factual foundation," according to Aston. Within hours of the completion of the author's evidence on the seventh day of the trial, the case had settled.

"If we hadn't had the OCL re-

port at all, we might have avoided the first week of the trial," Clayton says.

In his endorsement on costs, Aston gave the father credit for initiating the mid-trial settlement, acknowledging that it was hard to criticize him for going to trial on the strength of the report, however flawed. In the end, he fixed costs at \$50,000, about half of the amount the mother had wanted on a partial indemnity basis.

In *Whidden*, an OCL investigator got involved soon after the parents of a nine-year-old girl split up in the summer of 2014, following a domestic incident that resulted in the police attending.

According to Pazaratz's judgment, the investigator testified at trial that her OCL supervisor was on her back from the outset, accusing her of bias toward the father and pressuring her to recommend sole custody to the mother. The supervisor also directed her to change some of her recommendations, and even rewrote part of the report, the investigator said in evidence.

When the mother disputed the ultimate recommendation of joint custody, the OCL admitted several errors and assigned a new investigator to write a second report, who then recommended sole custody to the mother, according to Pazaratz's judgment.

Pazaratz found the supervisor's concerns were justified, labelling the first OCL assessor's investigation "superficial and incomplete."

"She glossed over serious issues of domestic violence and substance abuse," he wrote, adding that her recommendation of joint custody and equal time sharing "appeared to be based almost entirely on her own philosophical views. She appears to have ignored the extreme level of conflict between these parents; the total inability to communicate or make decisions together; and the child's heightened level of anxiety based upon her personal experiences."

However, the judge was less impressed by the OCL supervisor's decision to allow the first investigation to continue despite the obvious problems with it.

"Dubious reports shouldn't be released in the hope that maybe no one will file a dispute," Pazaratz wrote, urging the OCL to "demonstrate the courage to intervene" and reassign files if necessary, when investigative deficiencies become apparent.

And while supervisors have every right to review, the OCL must ensure that "administrative supervision of clinical investigators does not cross the line into editorial control or behind the scenes manipulation of reports" to maintain public confidence in the process, Pazaratz wrote.

"These reports cannot be properly weighed or tested if unknown supervisors influenced the narrative or recommendations," the judge added.

Allan Dare Pearce of Pearce Ducharme Family Law in Windsor, Ont. says the failure of the first OCL investigation raises questions about the adequacy of its training and selection process for assessments.

"It is also disturbing that an OCL supervisor, according to the assessor's evidence, would recognize her incompetence and seek to cover it up by ghosting part of her report," Pearce says. "If true, this coverup is even more troubling than the assessor's incompetence."

In a statement from the province's Ministry of the Attorney General, spokesman Brendan Crawley said that OCL regional clinical supervisors do not rewrite reports but "rather provide guidance and support to clinical agents undertaking the investigations."

In the wake of Pazaratz's decision, the OCL is "taking constructive steps to provide training to the in-house regional clinical supervisors so that similar situations do not arise in the future," Crawley said. **LT**