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THE YOUNG CHILD'S CONSENT TO ADOPTION: CHALLENGES AND CHANGES

By Elizabeth Anne Wise Keshen

INTRODUCTION

In Ontario, a child seven or older who is being adopted must consent to the adoption, after receiving independent legal advice from the Office of the Children's Lawyer (OCL). The requirement of consent can only be dispensed with in specified and rare circumstances. The Ontario experience is unique, for two reasons: in every other jurisdiction in Canada and in the United States, the age of consent is higher, usually 12. In Ontario, the age of participation of children in most other proceedings governed by the *Child and Family Services Act*, R.S.O. 1990 (*CFSA*), which contains the adoption provisions, is 12. This article examines the challenges faced by the OCL in obtaining a young child's consent to an adoption, given the intricacies of adoption laws, and explores solutions that better reflect a child's ability to understand the implications of an adoption order. Two changes are suggested: raising the age of consent to 12, an age where children have a greater potential to understand the complexities of adoption, or, if the age remains at seven, amending the governing legislation to allow the court to dispense with the child's consent, if in the best interests of the child.

ONTARIO – THE ADOPTION LEGISLATION

The *CFSA* provides that an order for the adoption of a child who is seven years of age or older shall not be made without the child's written consent (*CFSA*, (s.137(6)).

For the consent to be valid, the child must be reasonably informed as to the nature and consequences of the consent and of alternatives to it, and must give the consent without coercion or undue influence. Accordingly, the legal advice must include a full explanation of the legal implications of an adoption on this particular child. Consent must also be given freely, therefore, it is necessary to ensure that the child's decision to agree to an adoption was not the result of any pressure.

Before consenting, the child must have an opportunity to obtain counselling and independent legal advice (*CFSA*, s.4(2)). The legal advice is provided by a representative of the OCL. Although not specifically mentioned in the *CFSA*, the *Family Law Rules*, O.Reg. 114/99 require the consent to be witnessed by a representative of the OCL, and an affidavit of execution and independent legal advice to be completed by the OCL. The *Family Law Rules* require a particular form (Form 34) to be used for a child's consent and for the affidavit of execution and independent legal advice.

An examination of both Form 34 and the *CFSA* shows the myriad of information that must be understood by the child. This includes:

- the child's right to obtain counselling;
- who else must consent to the adoption;
- how consent is withdrawn;
- the meaning of adoption (e.g. the adoptees become the legal parents, and the birth family is no longer the legal family);
- possible contact with the birth family;
- inheritance;
- divorce or separation of the adoptive parents;
- the nature of an adoption hearing; and
- disclosure of adoption information.

The child's name may be changed when the adoption order is made (*CFSA*, s.153). A child of 12 or older must consent in writing to a name change. A child of seven or older will therefore receive detailed information about the complexities of adoption, and is presumed, under the legislation, capable of understanding it. However, it is not until the child is 12 that he or she is given the additional right to consent to or refuse a change in name, which seems a relatively simple concept compared to the intricacies of adoption law.

After giving the child legal advice, the OCL reviews the consent form with the child, and then witnesses the child's signature if the child consents to the adoption. The form itself is not written in child-

friendly language, as it is a court form that has certain mandated requirements and must meet the needs of a diverse range of ages, so the OCL will often read out each sentence and then provide an explanation of what each sentence means.

In the accompanying affidavit of execution and independent legal advice, the lawyer swears or affirms that the explanation was given in language appropriate to the child's age. Therefore, the nature and effect of adoption must always be explained in detail, it is only the language and degree of detail that may vary according to the age of the child.

COMPLEX PRINCIPLES THAT THE CHILD MUST UNDERSTAND

The legal implications of adoption involve very complex issues that are often difficult for young children to comprehend. It is not enough to tell the child that the adoptive parents will become the child's "forever family". The full implications of an adoption must be explained in age-appropriate language. An examination of some of the concepts that a child as young as seven must understand illustrates just how difficult it would be for some children to fully understand the legal effect of adoption.

When a child comes to the OCL to be interviewed, it is necessary that the child be told, before coming for the appointment, the purpose of the interview. Sometimes the child is being adopted by a stepparent, yet is unaware that the stepparent is not in fact the birth parent. It is often very difficult for the child to comprehend that one of the people who raised him or her is not in fact the parent under the law. If the child is not given this information before the interview, the OCL cannot meet with the child, as the legal implications of adoption cannot be fully explained if the child is unaware that the adoptive parent is not legally a parent.

A child must also understand that after the adoption, his or her birth family will no longer be the legal family. When a child remembers or will still be having contact with the birth family, this is a very complicated result to explain. For example, if a seven year old is being adopted by a stepparent after the death of a parent, and is still seeing the birth grandparents, the reality that those people will no longer be legally related to the child is very difficult for the child to grasp, and is often very upsetting. Similarly, a Crown ward who is being adopted by a foster family but still has access to a birth sibling will have difficulties understanding that the birth sibling is no longer his or her brother or sister. This may be explained to the child by saying that the person will always be related to them in their heart, but not according to the law. When a child is young, however, this explanation may satisfy but not fully inform them.

Basic inheritance advice must also be given to children. They are told, for example, that if the birth parent dies and they are not named in a will, they will not receive anything. If the adoptive parent dies and leaves money to their "children", they will inherit, or if the adoptive parent dies without leaving a will, they will likely receive something on intestacy. Again, for a child who is seven years old, it is very difficult to contemplate people dying, let alone understand how the property is divided upon death. Some children are being adopted due to the death of a parent or parents, so hearing this information could be extremely upsetting to them.

Another issue that must be explained to children is the disclosure of adoption information. A child is told how he or she or his or her birth family can find out information about each other in the future. This includes: disclosure of identifying information by the Office of the Registrar General; disclosure of non-identifying information if the adoption was arranged by a Children's Aid Society or licensee; a search by the Custodian of Adoption Information for birth relatives in certain situations of severe medical illness; and the Adoption Disclosure Register matching service run by the Custodian of Adoption Information. These are very complex concepts, which must be simplified significantly when imparted to very young children.

ASSISTANCE BY SOCIAL WORKERS

Social workers who are involved in the adoption process, whether by planning the placement or providing adoption counselling to children, are often of great assistance before the child's appointment with the lawyer. It is preferable that the concept of adoption not be introduced to children for the first time at the meeting with the lawyer. During adoption planning or counselling, it is helpful when the social worker shares and processes with the child basic information about the impact of an adoption, so that the child has some understanding of the effect of an adoption order before the interview with the lawyer. The social worker can, during these discussions, ensure that the child has sufficient details about his or her history to be able to understand the effect of the adoption on the relationships with the birth family. For example, if the child does not know that the

stepfather is not the birth father, or that he or she has other birth siblings, the child will not be able to know what relationships will be affected by an adoption order. These discussions with the child are especially valuable when the social worker has an established relationship with the child, as any concerns that arise can be processed clinically. The meetings the social worker has with the child are not intended to take the place of or supplement the independent legal advice, instead, the child has an opportunity to consider the issues and be aware of the important facts in his or her history before meeting with the lawyer.

DISPENSING WITH THE CHILD'S CONSENT

The court can dispense with a child's consent in limited circumstances – where obtaining the consent would cause the child emotional harm, or the child is unable to consent because of a developmental disability (*CFSA*, s.137(9)).

The situations in which a child's consent can be dispensed with constitute a dramatic reduction from the predecessor legislation, the *Child Welfare Act,* R.S.O. 1980 (*CWA*). Under that statute, the court could dispense with the child's consent if satisfied that, having regard to all the circumstances of the case, the consent would not be appropriate, or if, having regard to all the circumstances of the case, the court was satisfied that it was in the child's best interests to dispense with the consent (*CWA*, ss.69(6), (7)). When the *CFSA* was drafted, two important changes were proposed in relation to a child's consent to adoption: a) the age of consent should be raised to ten because of concern that seven might be too young to make the consent meaningful, and b) the circumstances under which consent could be dispensed with by the court should be made more specific and limited. The rationale for this was that the court, under the *CWA*, <u>needed</u> an overriding discretion to dispense with consent because the age of seven was so young, while if the age was higher, it was appropriate to allow for the dispensation of a child's consent in more limited circumstances. The Standing Committee on Social Development (1984) considered the proposed adoption provisions of the *CFSA* and recommended that the age of consent stay at seven, yet also decided that there should be a narrower test for the court to dispense with a child's consent (January 26, 1984, 13-14; February 21, 1984, 19-20; July 9, 1984, 35).

As a result, although it was the intention of the drafters of the legislation that the test to dispense with consent should be made more difficult only if the age of consent was raised to ten, this did not happen and the consent of children as young as seven could only be dispensed with in much more limited circumstances following the enactment of the *CFSA*.

Ontario courts dealing with applications to dispense with a child's consent under the *CFSA* have narrowly interpreted the circumstances when such an application will be allowed. At the same time, some courts have expressed concerns about the very young age at which children are required to consent to an adoption. The most recent and comprehensive case to date in this area is *A.C. v. V.A.* (2012). An application was brought to dispense with the consent of a 12 year old child to his adoption by his stepfather. The child believed the stepfather was his father, and the basis for the motion was that obtaining the consent would cause the child emotional harm, in that disclosure of this information would likely prove extremely upsetting to him. The court found that evidence to support a finding of emotional harm must be proffered by those skilled in making such determinations, such as psychiatrists or psychologists (paragraph 65). The judge hearing the motion must determine whether the applicant's concerns are self-serving or whether the child's emotional health is truly at stake (paragraph 75). Justice Phillips commented on the difficulties for the OCL in fully informing a young child about adoption law:

> The requirement under subsection 137(11) for the Office of the Children's Lawyer to be satisfied that a child is "fully informed" of what a child is consenting to raises questions. To what extent of the process is the child required to understand in order to be "fully informed"? Given the limited ability of many children at the age of seven (or older) to understand the true ramifications of adoption, how reliable is such a consent? (paragraph 110).

In the case, the judge dismissed the motion to dispense with consent, and stated that the adults should work together to devise a means of ensuring the child knows the truth.

In one recent case, where the OCL met with a child and was not satisfied that the child fully comprehended all of the implications of the legal concept of adoption, the court found a unique way of allowing the adoption to proceed without dispensing with the child's consent. In *C.A.S. of London and Middlesex (Re)* (2010), the court found that the seven year old child understood the concept of a "forever

home" and wanted to stay with this family. The court exercised its *parens patriae* jurisdiction (which is only exercisable by a Superior Court Judge, so a Judge at the Ontario Court of Justice could not make use of this remedy) and deemed the child's basic understanding of a forever home to constitute consent. Justice Campbell commented on the need for legislative reform in this area:

> Further, in s.137(9), the legislation limits the court to two narrow exceptions to the absolute requirement for the adoptee's consent: the risk of causing emotional harm, or an inability to consent due to a developmental disability. In the result, the legislation does not provide for the best interests of the child. The legislation fails to consider the emotionally immature eight year old or an as-yet undiagnosed learning-disabled child who is simply unable to grasp the risks involved or the implications or ramifications of the legal construct of adoption. As a result of either of those or many other examples, an order of adoption may not be able to be granted due to the restriction of judicial discretion as constrained by the Legislation. Given the tremendous importance of adoption to the lives of children, the legislation ought have allowed some discretion for these likelihoods. Legislative reform in this area would be welcome (paragraph 21).

Accordingly, courts are beginning to raise concerns about the young age at which children are required to consent, and the limited circumstances in which consent may be dispensed with.

ONTARIO – CHILDREN'S PARTICIPATION IN OTHER *CFSA* PROCEEDINGS

The paramount purpose of the *CFSA* is to promote the best interests, protection and well-being of children (*CFSA*, s.1(1)). The *CFSA* sets out a number of proceedings, designed to fulfill this purpose. Most set an age at which children are given participatory rights, and it is only for adoptions that the age is seven.

Most rights to participate in *CFSA* matters are accorded to children 12 years of age and older. These children may (subject to some exceptions where the child would be emotionally harmed):

- be a party to a temporary care agreement (s.29(2)(b));
- request a placement review by the Residential Placement Advisory Committee (s.34(6)(b));
- apply for a placement review by the Child and Family Services Review Board (s.36(1));
- consent to be dealt with under the protection provisions of the *CFSA* (s.37(2)(1));
- receive notice of and be present in court for child protection proceedings (s.39(4));
- receive a copy of an assessment report ordered during a protection proceeding (s.54(5));
- obtain independent legal advice before consenting to an order to be removed from the parent's care (s.55(a));
- apply for a review of the child's status in protection proceedings (ss.64(4), 65.1(4)); and
- receive notice of an application to make, vary or terminate an openness order (an order for post-adoption contact) (ss.145.1(2), 145.2(3), 153.1(5)).

In the case of *S.M. (Re)* (2009), Justice Katarynych commented on the differing ages in which children may participate in adoption and openness applications (which allow for post-adoption contact). A Crown ward who is being adopted is presumptively entitled to notice of an openness application and to be present at the hearing, and is required to consent to the order, but only if 12 years of age or older. Therefore, for a Crown ward who is between the ages of seven and 12: a) his consent is required for an adoption order, but not for an openness order, which is intended to preserve an emotional tie or relationship significant to him after the adoption, and b) he may be an active participant in the adoption hearing, but he is presumed not to be entitled to be present at the openness hearing. Justice Katarynych commented that the child may need both an adoption and an openness order, and stated that the age discriminations that emerge "may make no common sense to the over-seven-but-under-12-year old Crown ward" (paragraph 18(3)).

Therefore, the *CFSA* primarily regards the age of 12 as appropriate for granting full participatory rights to children in proceedings. It is only in adoptions that the age of seven is used, and even in relation to adoptions, the age of 12 is used for participation in issues around openness orders and input into a name change.

ONTARIO – WEIGHT GIVEN BY JUDGES TO YOUNG CHILDREN'S WISHES IN FAMILY LAW PROCEEDINGS

The court may make an adoption order, when it is in the child's best interests (*CFSA*, s.146(1)). "Best interests", in relation to adoptions, include a consideration of the child's views and preferences, if they can be reasonably ascertained (*CFSA*, s.136(2)(8)). When hearing the adoption application, the court must inquire into the child's capacity to understand the nature of the application, and shall consider the child's views and preferences if they can be reasonably ascertained (*CFSA*, s.152(3)). The legislation, by requiring children seven and older to consent to an adoption, seems to presume that the wishes of children of that age can be reasonably ascertained. If a child does not wish to be adopted and refuses to provide consent, then absent a successful application to dispense with consent based on very limited available grounds, the adoption cannot proceed. The child, by saying no to an adoption, essentially has a veto power.

This approach is contrary to the case law that has developed in relation to the weight to be given to young children's wishes in other family law proceedings. Generally, the courts are often reluctant to give significant weight to the wishes of young children when determining their best interests in other family law cases.

A child's views and preferences, or wishes, are factors for the courts to consider in determining a child's best interests, in both child protection and custody and access proceedings (*CFSA*, s.37(3)(9); *Children's Law Reform Act*, R.S.O. 1990, s.24(2)(b)). In custody and access cases, the views and preferences of children under the age of ten are generally not accorded significant weight by the courts. For example, in *Rice v. Abbott* (2006), the court held that the weight to be given to the expressed wishes of a nine year old child would be considered, but noted that the weight placed on those wishes "is dependant on a number of factors, including age, maturity and motivation" (paragraph 88). In the appeal decision of *Caron v. Brecknell* (2008), it was found that the trial judge did not err in not seeking the views and preferences of a seven year old with respect to a temporary order, as the wishes would not be given much weight because "the views and preferences of such a young child are not easily ascertained, and likely would not be a significant factor in this case" (paragraph 32). Similarly, in *Noble v. Boutillier* (2005), the court held, in considering a move by the mother, that the views and preferences of a child of seven "are of little weight" (paragraph 26). This is diametrically opposed to the situation in adoption cases, where children over the age of seven can stop a proposed adoption simply by refusing to consent, unless the court dispenses with consent.

Similarly, in child protection cases, a court may accord relatively little weight to the wishes of a very young child. For example, in *Children's Aid Society of the District of Thunder Bay v. J.S.* (2005), the Society sought Crown wardship of an eight year old child who wanted to return to the mother. The court stated:

> Although a child's preferences, if they can readily be ascertained, must be taken into account when considering best interests, those preferences cannot override what is in the overall best interests of a child. Children, especially children of a young age, cannot be expected to and should not make decisions on their own (paragraph 43).

The case of *Herniman v. Woltz* (1996) involved an application by a mother to change the name of a seven year old child. The court commented that the child is seven years old and it is difficult to accept that she understands the implications in changing her name, and that the wishes of the child, given her age, should be given little weight (paragraph 8). The court felt that the child should wait until she is older to make such a serious and permanent decision, and the matter should be delayed until she can play a meaningful part in the decision (paragraph 11).

If a child does not consent to an adoption, whether because of ambivalence or opposition, a court cannot grant an adoption order, save in very exceptional circumstances, even when the evidence is clear and unequivocal that such an order would be in the child's best interests. This difference in approach to the weight given to a child's wishes, depending on the type of proceeding before the court, demonstrates inconsistency in the principles applicable to determining what order in family law proceedings, that determines a child's future, is in the child's best interests.

OTHER CANADIAN JURISDICTIONS

Every jurisdiction in Canada requires that a child of a certain age or older consent to his adoption.

In Ontario, the age is seven; every other common law province and territory prescribes the age of 12 (Alberta: *Child, Youth and Family Enhancement Act*, R.S.A. 2000, s.59(1)(b); British Columbia: *Adoption Act*, R.S.B.C. 1996, s.13(1)(a); Manitoba: *The Adoption Act*, S.M. 1997, ss.12-13; New Brunswick: *Family Services Act,* S.N.B. 1980, s.76(1)(a); Newfoundland and Labrador: *Adoption Act,* S.N.L. 1999, s.10(1)(a); Northwest Territories: *Adoption Act*, S.N.W.T. 1998, s.23(1); Nunavut: pursuant to the *Nunavut Act*, S.C. 1993, s.29, the laws of the Northwest Territories were duplicated for Nunavut; Nova Scotia: *Child and Family Services Act*, S.N.S. 1990, s.74(1); Ontario: *CFSA*, s.137(6); Prince Edward Island: *Adoption Act*, R.S.P.E.I. 1988, s.22(a); Saskatchewan: *Adoption Act,* S.S. 1998, s.4(1)(b); Yukon: *Child and Family Services Act*, S.Y. 2008, s.103(1)). In Quebec, the age is ten, but if the child is under 14, the court may grant the adoption order even if the child refuses to consent (*Civil Code of Quebec,* L.R.Q., s.549).

The British Columbia legislation takes a blended approach. A child 12 or older must consent to the adoption, unless the consent is dispensed with by the court. If the child is between the ages of seven and 12, a person authorized by the regulations must meet with the child and prepare a written report indicating whether the child understands what adoption means and has any views on the proposed adoption and name change (British Columbia *Adoption Act,* s.30). This allows a court to have evidence of the child's views, but falls short of requiring the child to provide written consent.

THE UNITED STATES EXPERIENCE

In the case of *A.C. v. V.A.* (2012), Justice Phillips noted the higher age at which children are required to consent to adoption in the United States:

> A fundamental difference noted among the different pieces of adoption legislation is the age of which a child's consent is required. Ontario's age of consent is seven or more. It is clearly much lower than other jurisdictions, specifically the United States where half of the states require the consent of the child 14 years of age or older (paragraph 110).

Most jurisdictions in the United States require that older children consent to their adoption. As of April 2010, the age of consent was as follows:

- twenty-five states, plus the District of Columbia and the Virgin Islands – 14;
- nineteen states, American Samoa and Guam – 12; and
- six states, the Northern Marina Islands and Puerto Rico – ten. (Child Welfare Information Gateway, 2010, p. 3).

The majority of states provide broad discretion to waive the consent (American Bar Association Child Custody and Adoption Pro Bono Project, 2007, p. 380). For example, in 16 states and the Northern Mariana Islands, the court may dispense with consent if it is in the child's best interests (Child Welfare Information Gateway, 2010, p. 3-4).

SUGGESTED CHANGES

Adoption consent poses a dilemma. On the one hand, children have a right to have their views considered in important decisions affecting their lives. On the other hand, giving them a right means that it must be capable of being effectively and knowledgeably exercised.The complexity of adoption law means that exercising this right is extremely difficult for the very young children that the OCL is mandated to provide with independent legal advice.

There currently exist a number of problems with requiring the consent of children as young as seven:

- the law of adoption must be explained comprehensively, and may be quite complicated for very young children to fully understand;
- the court has very limited ability to dispense with this requirement;
- children seven and older have a veto power in relation to an adoption; they therefore have an absolute right to have their wishes determine the outcome, except in the limited circumstances where the court may dispense with their consent. This is contrary to the case law in other areas of family law;
- the age of consent is inconsistent with the age for children's involvement in other proceedings, even within the same statute; and
- no other jurisdiction in Canada or the United States uses such a young age of consent. This may be a legislative recognition that children who are very young are unable to understand all of the legal implications of adoption.

To resolve these issues, two solutions are appropriate. The first is to raise the age of consent to 12. This is consistent with the age limit for other *CFSA* proceedings, as well as the approach taken by the rest of Canada and the United States. It would also meet the concerns of judges who have expressed concerns about the young age at which children are required to consent. Judges could address concerns about the wishes of children whose written consent is not required in these ways:

- Judges have the authority to request that the Children's Lawyer provide legal representation to children. For example, in the case of *M.A.C. v. M.K.* (2008), which was an application to dispense with a parent's consent to an adoption, the court concluded that it had jurisdiction to request that the Children's Lawyer provide a lawyer to represent a child under rule 4(7) of the *Family Law Rules,* O.Reg. 114/99 and section 89(3.1) of the *Courts of Justice Act*, R.S.O. 1990. The court could utilize the same authority to ask for counsel for the child, to assist with determining the child's views and preferences and the context to those wishes, if the circumstances of the case were such that the judge felt such input would be helpful.
- Ontario could also adopt a model similar to that in British Columbia, so that the child's views are before the court by way of a required report, but they are one factor for the court to consider.

If the age of consent remains low, the legislation should be amended to allow the court to dispense with the requirement if in the best interests of the child. This is in keeping with the predecessor legislation, the *CWA*. An examination of the proceedings before the Standing Committee of Social Development indicates that it was the intention of the drafters to limit the circumstances in which consent could be dispensed with because the age of consent was being raised, yet the age of consent remained at seven. Allowing consent to be dispensed with if this would be in the child's best interests would lower the threshold test, and would allow more flexibility for judges to look at each individual child's circumstances.

Providing independent legal advice to children who are consenting to an adoption is some of the most rewarding work done by lawyers who represent children on behalf of the Children's Lawyer, as it enables counsel to be involved in what is usually a happy time in the children's lives. It is important, however, that children be at an age when they can fully understand the legal implications of an adoption, if they are required to provide their written consent and the adoption cannot proceed without it, save in very exceptional circumstances. By raising the age of consent, but providing mechanisms by which courts can still obtain additional input about the views and preferences of the children in appropriate circumstances, or by allowing the courts to dispense with the consent in broader circumstances, the law would then require children's consent at an age or level of development when they are capable of being fully informed.

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ABOUT THE AUTHOR

Elizabeth Anne Wise Keshen, BA, LLB, obtained her degrees from the University of Toronto and has been a lawyer at the Office of the Children's Lawyer, a branch of the Ministry of the Attorney General, since 1984. She oversees the provision of independent legal advice by the Children's Lawyer to children of seven and older and minor parents consenting to an adoption. She also provides legal representation to children in custody and access and child protection proceedings, and presents applications for payments out of court on behalf of minors. Ms. Keshen is a member of the Children in Limbo Task Force, which is a multi-disciplinary group that looks at issues of permanency for children involved in the child welfare system.

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