

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Date: 20050627  
Docket: 1615, 1738  
Registry: Nelson

IN THE MATTER OF  
THE CHILD, FAMILY AND COMMUNITY SERVICE ACT,  
R.S.B.C. 1996 c. 46  
AND THE CHILD:

[REDACTED], born [REDACTED]

IN THE MATTER OF  
THE FAMILY RELATIONS ACT,  
R.S.B.C. 1996 C. 128  
AND

[REDACTED]

AND

[REDACTED]

Before: The Honourable Judge Fabbro

Oral Reasons for Judgment  
June 27, 2005

Counsel for Director:

R.G. Stacey

Counsel for [REDACTED], the  
[REDACTED]

J.E.S. Hemphill

Counsel for Marcia Early, social  
worker:

P.D. Gartner

Place of Trial/Hearing:

Nelson, B.C.

[1] THE COURT: I will deal with the matter of the Director's witness, Marcia Early, and the issue of privilege that arose last time we were in court.

[2] This is an application for the granting of privilege by the mother to a witness called by the Director in these proceedings whereby the Director is seeking an order for continuing custody of the child, D.M.W. The witness, Marcia Early, has acted as advocate and provided support and guidance to the mother in these proceedings. She has worked in conjunction with the lawyer acting for the mother. The witness is employed at the Advocacy Centre and is a community based victim assistance worker and provides assistance to individuals with child welfare and other family issues, including custody. Her mandate is set out in Exhibit 4. She often acts as a contact person with social workers, doctors, lawyers and others involved in these matters.

[3] She concedes that arrangements and conversations with social workers concerning child access are not confidential, nor is her involvement at the integrated management meetings. She has testified that she does not assure her clients complete confidentiality, but advises them that their communications may be subject to the directions of the court. The code of ethics at the Advocacy Centre has a

confidentiality rule that applies, except in the event of child abuse.

[4] Ms. Early has retained counsel and opposes questioning by Director's counsel in areas where she has communicated with the mother in private and in confidence. It is submitted on her behalf that her value as an advocate in this community, aiding clients who are generally poor and underprivileged, would be compromised should she be required to reveal matters heard in confidence.

[5] The law on this issue provides as follows: Whether privilege attaches to a particular communication, a Canadian court ought to consider whether Wigmore's four conditions are satisfied. In *M.A. v. Ryan* [1997] 1 S.C.R. 157, the court held that it is now accepted that the common law permits privilege in new situations where reasoned experience and applications of the principles that underlie the traditional privileges so dictate. Privilege is now to be considered on a case-by-case basis rather than by category of class privilege.

[6] I conclude that the first and second category of Wigmore's conditions are clearly at play in this case. The third requirement that the relation must be one which in the opinion of the community ought to be seditiously fostered is

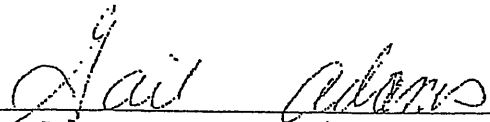
equally satisfied. In addition, I am not able to allow the Director's questioning of the witness without the risk of offending the principle of solicitor/client privilege at play here because of this witness's cooperation and aid to counsel for the mother.

[7] Legal Aid cutbacks is a real life reality that prompts advocates such as this witness to take on responsibility perhaps formerly carried on by counsel and her confidential communications are protected under the umbrella of solicitor/client privilege. The fourth requirement in *M.A. v. Ryan* is that the interests served by protecting the communications from disclosure outweigh the interests of pursuing the truth and disposing correctly of the litigation. This case concerns allegations of the mother's neglect in the care of the child and the interests of the child is paramount. The court should not also lose sight of the principles set out under this legislation that provides a presumption in favour of family. However, I am satisfied that the Director has other sources of information from which it is able to fully bring the relevant evidence necessary for the court to properly and correctly decide this case. The effect of forcing this witness to disclose confidential communications would have a serious effect on society and on those members of

society who are generally poor and underprivileged and rely on the Advocacy Centre and its people to aid them when they come into conflict with the courts. There are child abuse cases where it is essential to learn of the confidential communications even made to an advocate. This is not one of them.

[8]: Except then for those areas that were not thought to be confidential by the witness and mentioned above, I intend to offer privilege to the witness for the reasons given above. I was not convinced that those cases provided by counsel dispose of this issue in any other way. I am grateful to counsel for their submissions and cases that they have provided to the court.

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26 I hereby certify the foregoing to be  
27 a true and accurate transcript of the  
28 evidence recorded on a sound recording  
29 apparatus, transcribed to the best of  
30 my skill and ability.  
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G. A. Adams, Transcriber  
for Echo Services Ltd.

# TOP 10 THINGS I'VE LEARNED AS AN ADVOCATE

*By Amber Prince, staff lawyer, Atira Women's Resource Society,  
co-presenting with Liza McDowell, advocate, Downtown Eastside Women's Centre,  
on best advocacy practices at the BC Law Foundation Annual Conference for Advocates*

Oct 22, 2020

1. **Work - Life - Balance** is not just important but necessary. Insist on what you need to have it, and make no apologies for it.
2. **Empathy and active listening** go a long way to understanding what your client needs from you. See: Myrna McCallum's work on trauma-informed practice!
3. **Know your client's goal:** Knowing your client's goal is also key to understanding what your client needs from you.
4. **Be clear about what you can do:** If your client's goal is not realistic, or possible and / or you can't help them with it be really clear about that. They can always get a second opinion.
5. **Work through misunderstandings:** If you run into misunderstandings with clients see if you can come to a mutual agreement in writing for going forward.
6. **Acknowledge the injustice:** Whether it's in your power or within the law to do something for your client, it can still go a long way to acknowledge the injustice they are experiencing.
7. **Seek information and support when you need it** (and I still need lots of help!): E.g. Povnet, Clicklaw, Law Foundation Manuals. LSLAP Manuals, LSS resources, CASL, your Supervising Lawyer.
8. **Manage cynicism:** This work can make you cynical about the world, but don't let it immobilize you.
9. **Be kind to yourself** and keep in perspective that you are doing the best that you can with limited resources, in an often unfair / unjust world. I find Vikki Reynold's work very helpful.
10. **Remind yourself of why you do this work** (and I'm sure it's not for the money & glory!): Because you helped a person get a scooter to have mobility; Because someone trusts you enough to tell you their story; Because you helped someone stay housed.

## The top ten things that I have been taught by doing advocacy Liza McDowell

- I accept that my client has the problem and I have the challenge.
- I can relax when I accept that maybe the issue is bigger than my case load can hold right now. (accepting that the issue may need a lawyer)
- I have learned that sometimes my client's first loss is their least loss and to help them accept this, not with defeat but with self care.
- I have learned that asking for direction from my colleagues is a respectful way to assist my client.
- I have learned that I have to serve with compassion and sincerity; people can tell when I am not being sincere.
- I have learned that I can never make promises, ever.
- We should never take on a file that we are not prepared to complete or "take it the whole nine yards".
- Always, have your note pad ready. Be careful with your notes, someone may ask to see them.
- Listen to what someone wants.
- Finally, be kind to yourself. If you lose a case especially, be kind to yourself, you tried, and it is true in advocacy that you learn from your mistakes.