



Family Violence  
& Family Law Brief

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**Implementing Children's  
Participation Rights in All  
Family Court Proceedings**

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Issue # 9 | *November 2021*



ALLIANCE OF CANADIAN  
RESEARCH CENTRES  
ON GENDER-BASED VIOLENCE

# **Implementing Children’s Participation Rights in All Family Court Proceedings**

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November 2021

*This Learning Brief is part of the Alliance of Canadian Research Centres' project "Supporting the Health of Survivors of Family Violence in Family Law Proceedings" - funded by Public Health Agency of Canada (PHAC)*

*At Simon Fraser University, we live and work on the unceded traditional territories of the Coast Salish peoples of the x<sup>w</sup>məθkwəyəm (Musqueam), Skwxwú7mesh (Squamish), and Səlílwətał (Tsleil-Waututh) Nations.*

### **Suggested Citation**

Martinson, The Honourable Donna; Raven, The Honourable Rose. (2021). Implementing Children's Participation Rights in All Family Court Cases. *Family Violence & Family Law Brief* (9). Vancouver, BC: The FREDA Centre for Research on Violence Against Women and Children.

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Production of this document has been made possible through a financial contribution from Public Health Agency of Canada. The views expressed herein do not necessarily represent the views of Public Health Agency of Canada.



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# Part One – Implementing Children’s Participation Rights in All Family Court Proceedings<sup>3</sup>

## Introduction and Overview

### *Children as Full Rights Bearers*

*The status of children has changed dramatically from the times when children were viewed as property ... Today children are viewed as individuals, who as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society’s full protection.*

Justice Sheilah Martin, Supreme Court of Canada, 2020 concurring judgment in *Michel v. Graydon*<sup>4</sup>

### *Children as Real Human Beings with Distinctive Rights*

*Courts should “think of the child as a real human being, with his or her own distinctive personality and rights, and not as an extension of the adults involved.”*

Lady Brenda Hale, Chief Justice of the United Kingdom Supreme Court<sup>5</sup>

### *Child Participation – it is about Empowerment, not Paternalism*

*For any right to be more than just a promise, an individual must have a means with which to enforce the right. For children, accessing enforcement measures is particularly problematic because of the dependence, lack of maturity and actual or perceived voicelessness. Access to justice for children is about building a system that recognizes these difficulties, but nonetheless gives children participatory rights. It is not about paternalism. It is about empowerment.*

Chief Justice of British Columbia, Robert Bauman, 2017 CLEBC Access to Justice for Children Conference<sup>6</sup>

### *Importance of a Rights-Based Approach*

*The rights-based approach is of particular importance in the discussion of children’s rights because of children’s often intense vulnerability, the frequent competition between children’s rights and those of adults, and the resulting ease with which a more paternalistic and needs-based approach can be adopted.*

*Children: The Silenced Citizens, Final Report of the Senate Standing Committee on Human Rights, April 2007*

The UN Committee on the Rights of the Child states that the “right of all children [under 18] to be heard and taken seriously constitutes one of the fundamental values of the UN Convention on the Rights of the Child.”<sup>7</sup> Obtaining children’s views and preferences in court processes is now common. However, less attention has been paid to the equally important requirement that children’s views be taken seriously and given due weight in accordance with the children’s ages and levels of maturity; the latter requires a much broader focus on children in court processes than has traditionally been the case. The UN Committee emphasizes the importance “of avoiding tokenistic approaches, which limit children’s expression of views, or which allow children to be heard, but fail to give their views due weight.”<sup>8</sup> This approach is directly relevant to the interpretation of the obligation to “consider” views and preferences of children now found in section 16(3) of the 2021 *Divorce Act*. Giving children’s views due weight requires considering them not in isolation, but in relation to all relevant evidence and all relevant child rights legal principles.

Our introductory quotes emphasize the importance of a rights-based approach that has a focus on implementation of rights; child rights, such as the right to have their views taken seriously, are meaningless if children do not have the ability to realize them. As Chief Justice Bauman put it so well, implementation is about empowerment of children, not paternalism. Critical to the UN Convention child rights approach is the requirement for safeguards and guarantees of rights in determining the best interests of children. The safeguards and guarantees apply to the right to be heard and to be taken seriously, a right that is directly linked to the determination of the child’s best interests. Our paper discusses the eight safeguards and guarantees identified by the UN Committee on the Rights of the Child. Obtaining the views of the child is only one of the eight safeguards. Appropriate legal representation when a child’s best interests are being formally assessed by courts is another, and it is one we suggest can be critical to the implementation of all of the safeguards in court processes. The remaining six are: establishing relevant facts; avoiding delays in decision-making; using qualified professionals; ensuring appropriate “legal reasoning” (taking children’s views seriously); review and appeal mechanisms; and using child rights impact assessments.

Part I of our paper, called *The Essential Role of Children’s Participation in Best Interests Decision-Making*, discusses: A. The Child Rights Approach of the UN Convention on the Rights of the child; B. the Legal Status of the Convention and General Comments in Canada; and C. the UN Convention Participation Framework. Part II is called *Practical Essentials: Implementing the Child Rights Safeguards and Guarantees in Court Processes*, and it provides a step-by-step approach to applying each of the eight safeguards and procedures. We have also a Guide/Checklist that outlines and details these steps (see Part 2 of this document). Part III is called *Special Considerations*, and it includes: Child Protection; Cross-Border Child Abduction Cases; and Relevant Intersectional Factors, including the girl child, sexual orientation, gender identify and gender expression, and children with differing abilities.

Our paper focuses on the UN Convention on the Rights of the Child and the child rights approach therein, while recognizing that there are important child rights found in other domestic and international laws. A useful reference in this respect, one which contains a list of resources, is

[Implementing Children’s Participation Rights in Family Law and Child Welfare Court Proceedings;](#)<sup>9</sup>

Other references to a child rights approach generally, as well as the UN Convention on the Rights of the Child and its legal status in Canada, include: 1) *Using Statutory Principles to Support Substantive Equality for Women and Children in Family Violence Cases;*<sup>10</sup> 2) *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation;*<sup>11</sup> and 3) the Canadian Bar Association comprehensive online *Child Rights Toolkit.*<sup>12</sup>

## I. The Essential Role of Children’s Participation in Best Interests Decision-Making

### A. *The Child Rights Approach of the UN Convention on the Rights of the Child*

Children in Canada have legal rights separate from adult rights under domestic and international law which apply to family law cases. These include the right to: 1) be safe, secure, and well; 2) participate in all judicial proceedings that affect them if they choose to do so; and 3) have their views taken seriously. However, children can have challenges knowing about those rights, enforcing those rights, and being treated as people with rights. Adults, and particularly adult professionals whose work impacts children, have obligations to assist them.

The [United Nations Convention on the Rights of the Child](#)<sup>13</sup> (the Convention), ratified by Canada in 1991, and the [United Nations Committee on the Rights of the Child](#), created by Article 43 of the Convention to implement the child rights in it through General Comments, address the challenges noted above. They recognize that though on their face many domestic and international laws include children in the definition of “persons,” in reality, children, because of their special circumstances, need a way of both: making clear what their rights are; AND making sure that those rights are implemented. The Convention and the General Comments apply a child rights approach to identification of and the implementation of child rights. The approach is relevant to the daily family law work of British Columbia (B.C.) judges, lawyers, and other professionals.

The General Comments that are particularly relevant to family law cases are: [General Comment 12](#) on “The right of the child to be heard,” 2009; [General Comment 13](#) on “The right of the child to freedom from all forms of violence,” 2011; and [General Comment 14](#), on “The right of the child to have his or her best interests taken as a primary consideration” (article 3 para. 1), 2013.

The General Comments identify four general principles, described as fundamental, which inform the interpretation of all Convention Articles and provide the overarching framework for a holistic approach:

- respecting and ensuring the rights in the Convention to each child without discrimination (Article 2);

- making the best interests of the child a primary consideration in all actions affecting the child (Article 3(1));
- the child’s inherent right to life (Article 6);
- the child’s right to express his/her/their views freely in all matters affecting the child, and those views being given due weight (Article 12(1)); and
- the child’s right to be heard in judicial proceedings affecting the child (Article 12(2)).<sup>1415</sup>

The Convention and the General Comments also provide a basis for understanding children’s lived reality, comparing that reality to their legal entitlements, and addressing differences (i.e., contextual analysis using substantive equality principles).

### *B. Legal Status of the Convention and General Comments in Canada*

The UN Convention and the General Comments of the UN Committee on the Rights of the Child have legal status in Canada, and both have been referred to by Canadian courts. For a recent example of a judge referring both to the Convention and General Comments in connection with the 2021 *Divorce Act*, see *S.S. v. R.S.*, a decision of the Ontario Superior Court of Justice.<sup>16</sup> It involved an interim parenting application in which exposure to family violence was an issue. Canadian laws and legal practices are presumed to conform to the Convention Articles. The Charter is presumed to provide protections at least as great as those found in the Convention. This Convention has generally not been directly incorporated into Canadian legislation. Canada continues to take the position that doing so is unnecessary as its laws conform with the Convention.<sup>17</sup> The General Comments provide authoritative direction on the interpretation of the Convention Articles in family law matters and are entitled to significant weight. They represent international child rights norms, which are well-founded and persuasive. In our view, they should be applied unless equally persuasive reasons are provided that they are not relevant and other viable options are identified to achieve the goals of the safeguards and guarantees.

The concurring judgment in *Michel v. Graydon*, in addition to describing children as full rights bearers, summarized the law relating to statutory interpretation as it applies to family law cases, stating that such interpretation must:

- Consider that the legislator is taken to know the social and historical context in which it makes its intention known (concurring judgment at para. 97).
- Consider the broader social framework as it is an approach called for in family law cases (concurring judgment at para. 88).

In addition, that judgment states it is presumed that the legislation takes into account Canada’s international obligations (concurring judgment at para. 130), and principles in International Conventions, such as the *UN Convention on the Rights of the Child*, help inform the contextual approach to the interpretation of the 2021 *Divorce Act* (concurring judgment at para. 103).

## *C. The UN Convention Participation Framework*

The UN Committee describes children’s overall involvement in processes of all kinds found in the Convention and the General Comments as participation.<sup>18</sup> In this section, we link children’s participation to the Convention’s four general principles, referred to above. We will begin with Article 2, non-discrimination – participation rights apply to all children and all types of cases. We then turn to Article 6 – the right to life, including the right to healthy development. Finally, we discuss Article 12 – the right to be heard, and Article 3 – best interests of the child, together with the safeguards and guarantees required to determine best interests. The UN Committee described the “inextricable links”<sup>19</sup> between Article 12 and Article 3, making it clear there “can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decision making”.<sup>20</sup>

### **Article 2 – Non-Discrimination**

Article 2(1) provides that:

*States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...*

By its terms, it applies to children’s rights to be heard and taken seriously. Because it applies to each child, it covers all types of cases, including those dealing with domestic violence, parental alienation, or both. As the Yukon Supreme Court stated in **B.J.G v. D.L.G.**:<sup>21</sup>

*...There is no ambiguity in the language used. The Convention is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children’s participation.*

The B.C. Supreme Court in **N.J.K v. R.W.F.**<sup>22</sup> cited this paragraph with approval. More recently, the Ontario Superior Court of Justice cited the same comments with approval in **Medjuck v. Medjuck**.<sup>23</sup> That court added that, generally, children capable of expressing their own views should be allowed to express them. The key issue is the weight to be given to the child’s views in light of the child’s age and maturity, and the other factors that inform the judicial assessment of a child’s best interests.<sup>24</sup>

## Article 6 – Right to Life and Healthy Development

Article 6 states:

1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

The CBA *Child Rights Toolkit* in its section on Life, Survival and Development makes the important point that “development” in Article 6 is to be interpreted in its broadest sense as a holistic concept, embracing the child’s physical, mental, spiritual, moral, psychological, and social development.<sup>25</sup> Being able to participate in decisions that impact upon their lives is a very important component of a child’s healthy development.

Children’s participation can be beneficial to them generally, and their participation can help reach more effective settlements and decisions for them. Conversely, not being able to participate if they wish to can impede healthy development. The B.C. Supreme Court in *N.J.K v. R.W.F.*<sup>26</sup> made this very point (citing *B.J.G v. D.L.G.*)<sup>27</sup>:

*[201] ...receiving children’s input can reduce conflict by focusing or refocusing matters on the children and what is important to them. Their participation in the decision-making process also correlates positively with their ability to adapt to new family configurations. Conversely, excluding children and adolescents may have adverse effects such as feeling ignored, isolated and lonely; experiencing anxiety and fear; been [being] confused and angry at being left out; and having difficulty coping with stress. Further, longer term effects of not consulting with children and adolescents can include loss of closeness in parent-child relationships; less satisfaction with parenting arrangements; less compliance with those relationships and more “voting with their feet”; and longing for more or less time with the non-resident parent...*

See also the Ontario Superior Court decision in this respect in *Medjuck v. Medjuck*.<sup>28</sup>

The benefits of participation and the harms that can be caused by non-participation were also canvassed in *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*.<sup>29</sup> In addition to addressing the considerations just mentioned, the authors refer to research that suggests that children’s direct participation can empower them to: develop a sense of social competence; understand the relationships between actions and decisions, and their consequences; develop responsibility and ownership of situations; develop skills in citizenship; and develop protective factors in their lives. The authors also note that such participation improves the quality of decision-making. Children often see things differently and at a much more practical level than adults, and their ideas can assist in reaching creative solutions.

## Article 12

Article 12 has two distinct parts. Article 12(1) provides that the child has two participation rights in all cases impacting the child. First, the child “capable of forming his or her own views” has “the right to express those views freely in all matters affecting the child”. Second, those views, once expressed, must be given due weight in accordance with the age and maturity of the child.

Article 12(2) makes it clear that the child has the right to be heard in all cases before the courts: “the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child...”

## Article 3(1)

Article 3(1) states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The Committee on the Rights of the Child describes the best interests of the child as a threefold concept: 1) substantive right; 2) a fundamental interpretative right; and 3) a rule of procedure (General Comment 14, para 6). Our focus is on the third, best interests as a rule of procedure. A significant part of General Comment 14 is devoted to Implementation of children’s rights. The UN Committee on the Rights of the Child describes legal guarantees and procedural safeguards which are essential to the enforcement/implementation of children’s rights. In General Comment 14, under a section called “Implementation: assessing and determining the child’s best interests,” the Committee states that two steps should be followed to assess children’s best interests. First, give the best interests of the child concrete content within the specific factual context of the case (para 46(a)). Second, to do so, “follow a procedure that ensures legal guarantees and proper application of the right” (para 46(b)). The best interests determination, it says, describes the “formal process, with strict procedural safeguards designed to determine the child’s best interests on the basis of the best interests assessment” (para 47).

The Committee then describes procedural safeguards under the heading “Procedural safeguards to guarantee the implementation of the child’s best interests.” Specifically, it says that, to ensure the correct implementation of the child’s right to have his/her/their best interests taken as a primary consideration, some child-friendly procedural guarantees “must” be put in place and followed. As such, the concept of the child’s best interests is a rule of procedure (para 85). The Committee then “invites” States and all persons who are in a position to assess and determine the child’s best interests to pay special attention to the following eight “safeguards and guarantees.”

The Committee then describes eight specific procedural safeguards necessary to determine children’s best interests, including their participation rights, in judicial proceedings.<sup>30</sup> These

procedural safeguards include, but are not limited to, obtaining children’s views. They are all found in General Comment 14:

1. prioritizing processes, avoiding unnecessary delay (time perception) (para 93);
2. obtaining children’s views (para 89-91);
3. establishing relevant facts (para 92);
4. using qualified professionals (para 94-95);
5. using appropriate judicial “legal reasoning” in decisions which (para 97):
  - apply child rights principles, including giving due weight to children’s views;
  - explain conclusions different from children’s views; and
  - are provided without delay.
6. providing mechanisms to revise or review decisions (para 98);
7. requiring governments to assess the impact of all laws and policies, including budget decisions, on children’s well-being (para 99); and
8. requiring all appropriate legal representation when children’s best interests are being formally assessed by courts, and particularly when there is a potential conflict between the parties (which is not uncommon in contested cases involving parenting issues) (para 96).

## II. The Essential Role of Children’s Participation in Best Interests Decision-Making

In this Part we provide more detail with respect to the eight safeguards and guarantees and suggestions/tips we hope will be helpful in applying them to family law cases. We consider legal representation last, as Safeguard Eight: Making Sure that Children Have All Appropriate Legal Representation When their Best Interests are Being Formally Assessed by Courts. It is, however, perhaps the most significant safeguard as it can be critical to actualizing all children’s rights and ensuring the implementation of the other seven safeguards.<sup>31</sup> We have integrated the participation principles described in Part I above.

### ***SAFEGUARD ONE: PRIORITIZE COURT PROCEEDINGS AND AVOID UNNECESSARY DELAY<sup>32</sup>***

#### **WITHIN THE FAMILY LAW PROCEEDING**

- The Supreme Court of Canada, in a family law (child abduction) case, has said that complacency towards judicial delay is unacceptable in all contexts.<sup>33</sup>
- Use all of the tools available to achieve and ensure, to the greatest extent possible, timely and cost-effective proceedings.
- Consider requesting one judge for all of the court proceedings, where appropriate.

## **IDENTIFY OTHER RELATED PROCEEDINGS (CRIMINAL, CHILD PROTECTION) AND COORDINATE WITH THEM**

- In family law cases the circumstances of the case can lead to not only family law proceedings, but also criminal proceedings, child protection proceedings, and, sometimes, immigration proceedings relating to the same family. They usually operate in silos. This has been identified often as a significant concern and dangerous disconnect in several articles and summaries.<sup>34</sup>
- Under section 16(3)(k) of the 2021 *Divorce Act*, the court SHALL consider any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security, and well-being of the child.
- Section 7.8(1) of that Act says the purpose is to identify those orders AND the coordination of proceedings.
- Section 7.8(2) states that the court has a duty to consider if any of a number of specific aspects of the other proceedings are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.<sup>35</sup>
- Provincial/Territorial legislation may include similar provisions.
- The individual proceedings most often operate in isolation/silos, with little or no information about either the existence of, or what is happening in, other proceedings. This can lead to a fractured approach to decision-making that affect the same children. Inconsistent approaches and inconsistent orders can increase the risk of harm to victims of violence, including children. The individual judges may be making decisions without relevant information available in other processes. Siloed processes can require children to be interviewed, unnecessarily, multiple times. Dealing with cases in silos can lead to unreasonable delays<sup>36</sup> (Many of these concerns are canvassed in *R. v. S.S.M.*<sup>37</sup>).
- Several solutions have been proposed, including an integrated court model, in which one judge hears all cases, separately, but on the same day (see the Toronto Integrated Court Model in the Ontario Court of Justice), use of a judicial coordinator, and better tracking of court files.<sup>38</sup>
- Consider using another proposal – judicial coordination and communication, in which communication, with the involvement of all the parties, takes place between judges and/or courts.<sup>39</sup>

## ***SAFEGUARD TWO: OBTAINING THE VIEWS OF THE CHILD – WHY, WHO, AND HOW<sup>40</sup>***

### **WHY CONSIDER THE VIEWS OF CHILDREN**

- As stated earlier, children capable of forming their own views have two rights under Article 12(1) of the *Convention*: to express those views freely in all family law matters affecting the child; and to have those views given due weight in accordance with the

age and maturity of the child.<sup>4142</sup> Doing so can be beneficial to children generally and help reach more effective settlements and decisions.

- There is a direct – “inextricable” – link between determining children’s best interests, as set out in Article 346, and hearing the child’s views and taking them seriously.<sup>43</sup>

## **WHO – WHICH CHILDREN?**

We have also explained that the right to express views/be heard in judicial proceedings applies to all children, no matter what the nature of the claim.

- With respect to claims of family violence, Article 19(1) of the Convention protects all children from all forms of violence while in the care of parent(s), legal guardian(s), or any other person(s) who have the care of the child.
- The child’s right to be heard has particular relevance in violence situations, and the participation right commences with very young children who are particularly vulnerable to violence.<sup>44</sup>
- The capacity required to be heard should be a low one – focusing primarily on cognitive capacity; other factors relating to capacity and maturity are usually best left to determining “due weight”.<sup>45</sup>
- There should be no age limits, and capacity must be assessed on a case-by-case basis.<sup>46</sup>
- There is a presumption of capacity.<sup>47</sup>
- A child has the right to choose whether or not to participate.<sup>48</sup>
- To exercise the right to participate, the child must have information and advice about the choices and their potential consequences.<sup>49</sup>

## **HOW TO OBTAIN CHILDREN’S VIEWS AND PREFERENCES**

Methods for obtaining children’s views and preferences will vary across the country. Canadian courts have supported several ways of obtaining children’s views<sup>50</sup>, including:

- Full parenting assessments.
- Evaluative views of the child reports prepared by a mental health professional.
- Non-evaluative views of the child reports prepared by a mental health professional or another trained person, including a lawyer.
- Judicial interviews (which can be in addition to other methods – see “Judicial Interviews” below).
- Affidavit evidence of a child (often not recommended) or various forms of hearsay evidence.

The Role of Legal Representation in Obtaining Views and Preferences

- A lawyer usually cannot “give evidence” about a child’s views and preferences, but instead facilitates the presentation of such evidence (see also legal advice/representation below).
- As discussed below under Safeguard Eight, the UN Committee on the Rights of the Child supports all appropriate legal representation when the child’s best interests are being formally assessed by courts.

### Steps and Basic Requirements Supported by the Committee on the Rights of the Child

The UN Committee on the Rights of the Child supports a five-step implementation process and nine basic requirements to support meaningful participation and avoid tokenism:<sup>51</sup>

- *Five-step implementation process.* (i) preparation, including being informed of the right to be heard and the process to be followed at the hearing; (ii) the hearing, the context of which must be enabling and encouraging; (iii) assessment of capacity; (iv) being informed about the weight given to the views of the child; and (v) complaints, remedies, and redress when the right to be heard and to have views given due weight is violated, including access to an appeals process in the context of judicial proceedings.
- *Nine basic requirements for the implementation of the right to be heard to avoid tokenism.* Participation processes must be: (i) transparent and informative — children must be provided with full and accessible information about their participation rights; (ii) voluntary; (iii) respectful; (iv) relevant to children’s lives; (v) child-friendly; (vi) inclusive; (vii) supported by appropriately trained adults; (viii) safe and sensitive to risk — children must be aware of their right to be protected from harm and where to get help, if needed; and (ix) accountable — a commitment to follow-up and evaluation is essential.

### Choosing the Method

Article 12(2) of the Convention states that the child has the right to be heard in judicial proceedings “either directly or through a representative or an appropriate body.” It also states that the participation must be in a “manner consistent with the procedural rules of national law.”

The UN Committee on the Rights of the Child:

- says that those responsible for hearing the child should inform the child about the matters, options, and possible decisions to be taken and their consequences;<sup>52</sup>
- recommends that the child should have a choice about how to participate and, wherever possible, the child must be given the opportunity to be directly heard in any proceeding and to be advised of that option;<sup>53</sup>

- says the representative can be the parent(s), a lawyer, or another person (inter alia a social worker);<sup>54</sup>
- cautions that there are risks of a conflict between the child and their most obvious representative – the child’s parent(s).<sup>55</sup>
- states that if the hearing is undertaken through a representative, then<sup>56</sup>:
  - accuracy of the views provided is critical: “...it is of the utmost importance that the child’s views are transmitted correctly to the decision maker by the representative.”
  - The method chosen should be determined by the child (or by the appropriate authority as necessary) according to “her or his” particular situation.
  - Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience working with children.
- emphasizes that “in a manner consistent with the procedural rules of national law”<sup>57</sup>:
  - it should “not be interpreted as permitting the use of procedural legislation which restricts or prevents the enjoyment of the fundamental right;” this means that, when rules of procedure are not adhered to, the decision of the court can be challenged and may be overturned, substituted, or referred back for further judicial consideration.

Proceedings must be accessible and child appropriate.

#### Timing – When to Obtain Children’s Views

- Children’s participation should begin early in the process and should form part of the decision-making processes at case conferences or other judicial settlement meetings, as well as in applications and trials.
- Participation is a process, not a momentary act.<sup>58</sup>
- Children should not be interviewed too often forensically, especially with respect to traumatic matters.<sup>59</sup>

### **CHILDREN’S PARTICIPATION THROUGH A JUDICIAL INTERVIEW**

#### Why meet with children

- A judicial interview can:
  - Support the UN Committee on the Rights of the Child’s view that children should be able to be heard directly by the decision-maker.
  - Enable children to be more involved and connected with the proceedings.
  - Make sure the judge has understood the views and feelings of the child.

- Make sure the child understands the judge’s task and the nature of the court process.
- Judicial interviews can take place in addition to other methods of obtaining views.

When to meet with children

- When appropriate, they can take place as part of a case conference and other settlement meetings, as well as during a trial. Usually the earlier it is done, the better.
- Though the consent of parents/guardians is not required, and a judge can meet with the child on the judge’s own initiative, the parents/guardians should have a chance to make submissions beforehand on both whether the interview should take place and how.
- Judicial meetings should be considered on a case-by-case basis as a way for children to participate directly in court proceedings.
- Consider the length and appropriate time of day for the child.

Where to meet with children

- Usually informally in a court room, though judicial interviews have been held in chambers and places like a school, park, or restaurant.
- Consider how the child will be brought to the interview.
- Judicial interviews should be child friendly.

Who attends

- If at a courthouse, usually a court clerk is there.
- Though the parents and their lawyers, if they have them, are not usually present, consider asking to include the child’s lawyer or other representative(s) of the child as part of the child’s right to participate (see, for example, s. 64(4) of Ontario’s *Children’s Law Reform Act*), or a lawyer retained through B.C.’s Child and Youth Legal Clinic.

What does it mean to hear from children?

Young persons are the greatest advocates for their right to participate in family law proceedings where decisions about their future are being made. The B.C. Family Justice Innovation Lab (funded by the Vancouver Foundation) established a Youth Voices Initiative which aims to support the well-being and resilience of young persons experiencing parental separation and divorce. The Lab is led by youth who are designing an online digital platform supported by a social media campaign to provide a forum for young persons to express their views, educate others, and provide input to justice system leaders and practitioners about how to ensure the child’s voice is heard in the justice system. Their Instagram page is @youth-voices-be. The views of some of the young persons involved with this organization are expressed in the following video entitled *Implementing the Voice of Youth Experiencing Parental Separation by Youth Voices*

*Initiative*, which was produced for a CLEBC Virtual Conflict Resolution conference in 2020:  
<https://vimeo.com/470389731/303baa9d8f>

In addition, in the resources section of this paper, there is a link to several shorter videos featuring young persons describing their experience with the family justice system. We reproduce the link here:

[https://www.youtube.com/channel/UCnKAbkPgNqNsGWW1p4LwFqw?view\\_as=subscriber](https://www.youtube.com/channel/UCnKAbkPgNqNsGWW1p4LwFqw?view_as=subscriber)

### ***SAFEGUARD THREE: ESTABLISHING RELEVANT FACTS INCLUDING THOSE RELEVANT TO THE CHILD'S VIEWS<sup>60</sup>***

#### **ESTABLISHING RELEVANT FACTS GENERALLY**

- Judges and other decision-makers require all relevant information relating to the child's best interests generally and, in particular, with respect to their present and future physical and mental safety, security, and well-being in order to make recommendations and/or reach decisions which are in the best interests of the child only.
- Sections 16(3) and (4) of the 2021 *Divorce Act* require consideration of both specific factors and other relevant factors.
- The Convention on the Rights of the Child and the UN Committee General Comments, together with Canadian laws, including *the Charter of Rights and Freedoms*, can be used to:
  - interpret those sections; and
  - to provide information about other relevant factors.
- Judges can obtain relevant information by asking neutral questions to determine which factors apply to the case before the court.<sup>61</sup>

#### **ESTABLISHING FACTS RELEVANT TO AND SUPPORTING THE CHILD'S VIEWS**

- When deciding the weight to be given to children's views (see Safeguard Five below), judges and other decision-makers need information relevant to those views including information that supports the child's views; information provided by parents in this respect, which may be presented from a partisan perspective, can be incomplete and/or unreliable.

### ***SAFEGUARD FOUR: THE NEED FOR QUALIFIED PROFESSIONALS<sup>62</sup>***

- Assessments of children's interests should be carried out by professionals who have expertise in matters related to child and adolescent development in a friendly and safe atmosphere.

- Parenting assessments should only be conducted by qualified professionals whose qualifications include the nature, prevalence, and potential consequences of family violence on the child’s safety, security, and well-being.<sup>63</sup>

***SAFEGUARD FIVE: JUDICIAL AND OTHER DECISION-MAKING  
(LEGAL REASONING) – INCLUDING HOW TO ASSESS THE WEIGHT  
TO BE ATTACHED TO A CHILD’S VIEWS<sup>64</sup>***

**THE DECISION-MAKING PROCESS – GIVING DUE WEIGHT TO A CHILD’S VIEWS**

- The UN Committee on the Rights of the Child states that:
  - The views of the child have to be seriously considered when the child is capable of forming their own view.<sup>65</sup>
  - If the child is capable of forming their own views in a reasonable and independent manner, the decision-maker must consider the views of the child as a significant factor in the settlement of the issue.<sup>66</sup>
  - Age alone cannot determine the significance of a child’s views as their level of understanding is not uniformly linked to their biological age. A child’s development can be affected by information, experience, environment, social and cultural expectations, and levels of support.<sup>67</sup>
  - Maturity refers to the ability to understand and assess the implications of a particular matter:<sup>68</sup>
    - Maturity in the context of Article 12 is the capacity to express views on issues in a reasonable and independent manner.
    - The impact of the matter on the child must be considered; the greater the impact of the outcome on the child’s life, the more relevant the appropriate assessment of the maturity of that child.
  - Consideration needs to be given to the evolving capacity of the child and the direction and guidance from parents.<sup>69</sup>
- In *Office of the Children’s Lawyer v. Balev*, the Supreme Court of Canada dealt with how to determine the weight to be placed on the views of children when a child objects in a child abduction case.<sup>70</sup> The court’s comments provide some guidance for other family law cases where due weight must be given to children’s views:
  - “Determining sufficient age and maturity in most cases is simply a matter of inference from the child’s demeanor, testimony, and circumstances ... In some cases it may be appropriate to call expert evidence or have the child professionally examined.”<sup>71</sup>

- “As in the case of age and maturity, the child’s objection should be assessed in a straight-forward fashion – without the imposition of formal conditions or requirements not set out in the text of the Hague Convention.”<sup>72</sup>
- “If the elements of (1) age and maturity and (2) objection are established, the judge has a discretion as to whether to order the child returned, having regard to the ‘nature and strength of the child’s objections, the extent to which they are authentically her own, or the product of the influence of the abducting parent, the extent to which they coincide or are at odds with other considerations relevant to her welfare, as well as the general [Hague] Convention considerations.”<sup>73</sup>
- Courts have recognized the significance of child participation in decision-making. In ***A.C. v. Manitoba (Director of Child and Family Services)***<sup>74</sup> the Supreme Court of Canada stated:

*The [Convention] describes “the best interests of the child” as a primary consideration in all actions concerning children (Article 3). It then sets a framework under which the child’s own input will inform the content of the “best interests” standard, with the weight accorded to these views increasing in relation to the child’s developing maturity [...] With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the “best interests” assessment is as variable as the child’s circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures.*

## **THE ACTUAL DECISION – EXPLAINED AND PROVIDED WITHOUT DELAY**

The UN Committee on the Rights of the Child states:<sup>75</sup>

- Decisions must be explained, stating explicitly:
  - the factual circumstances regarding the child;
  - what elements have been found relevant and how they have been weighted; and,
  - if the decision differs from the views of the child, the reason for that should be clearly stated.
- The decision should be provided in a timely manner, without delay.

***SAFEGUARD SIX: THE CHILD’S RIGHT TO HAVE THE DECISION REVIEWED FOR CORRECTNESS AND APPEALED IF APPROPRIATE***<sup>76</sup>

- A child who has participated in a court process has the right to have the court’s decision reviewed and appealed if appropriate.
- The UN Committee on the Rights of the Child states that:
  - the child needs to know about appeal/review procedures; and
  - they should be accessible to the child or by his or her legal representative.

***SAFEGUARD SEVEN: KEEPING GOVERNMENTS ACCOUNTABLE TO MAKE DECISIONS IN CHILDREN’S BEST INTERESTS***<sup>77</sup>

- Government decisions, including budget decisions, must not influence a judge’s obligation to make a decision in the best interests of a child.
- This includes prioritizing funding for such things as legal representation and supporting resources.

***SAFEGUARD EIGHT: MAKING SURE THAT CHILDREN HAVE ALL APPROPRIATE LEGAL REPRESENTATION WHEN THEIR BEST INTERESTS ARE BEING FORMALLY ASSESSED BY COURTS***<sup>78</sup>

**PURPOSE OF LEGAL REPRESENTATION FOR CHILDREN**

Generally

The Supreme Court of Canada has stated that the ability to access a lawyer to advance and protect legal rights without interference is a fundamental aspect of Canada’s legal system.<sup>79</sup>

Legal representation includes:

- general information about legal rights;
- confidential legal advice about how general rights apply in particular cases; and
- assistance in implementing, advancing, and protecting rights in court processes.

Legal Information and Legal Advice

For children, legal information includes information about:

- their legal rights generally;
- their rights to participate and the choices available;
- the way the court processes work; and
- the role of the judge.

This information can, but does not have to be, provided by a lawyer.

With respect to legal advice, where lawyers provide specific advice relevant to the child's specific circumstances, lawyers have professional obligations to, in a confidential setting:

- investigate facts;
- identify issues;
- determine client objectives;
- consider possible options; and
- develop and advise the client on appropriate courses of action.

For children in family law cases legal advice would include, for example:

- exploring relevant facts;
- exploring children's views;
- explaining that they have a right to both provide their views and have the court take those views seriously;
- advising them generally on potential options and their pros and cons, including options about presenting their views;
- suggesting appropriate options about how views should be heard and who should participate; and,
- more generally, explaining the child's options to advance and develop their rights in court processes, including settlement options.

#### Legal Representation in Court Proceedings

Learning about legal rights and obtaining legal advice from a lawyer will not assist the child in implementing those rights in the court processes if the lawyer cannot participate in settlement discussions and contested hearings/trials. A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds.

At a contested hearing/trial, the lawyer can participate on the child's behalf:

- in the presentation and testing of evidence;
- with respect to parenting assessments: 1) in the decision about whether one is necessary; 2) if it is, the qualifications of the expert and the method used; 3) its admissibility; and 4) the appropriateness of a critique report;
- in guarding against unreasonable delay; and

- by advancing and protecting children’s rights during final submissions, including submissions on the relevant law, how the child’s views are weighed, and the weight to be given to the parenting assessment in the context of all of the evidence.

Once the court’s decision is provided, a lawyer can also:

- explain the decision to the child;
- review the ultimate decision for correctness; and
- recommend appealing the decision if appropriate.

## **SUPPORT FOR LEGAL REPRESENTATION FOR CHILDREN**

- In 1974, the Law Reform Commission of Canada said consideration should be given to the appointment of independent legal counsel to represent the child where the interests of a child are directly or indirectly affected by a court proceeding.
- In B.C., the Office of the Representative for Children and Youth supports legal representation for children in family law and child protection cases.<sup>80</sup>
- Internationally, as already noted, the UN Committee on the Rights of the Child supports legal representation for children.<sup>81</sup>
- The UN High Commissioner for Human Rights supports free or subsidized legal (and other) assistance for children, saying children need it to effectively engage with the legal system.<sup>82</sup>
- The UN Human Rights Council also supports legal aid for children under the same or more lenient conditions as adults (including the right to challenge decisions with a higher judicial authority).<sup>83</sup>
- International human rights instruments, including the International Covenant on Civil and Political Rights, which Canada has ratified, recognize the right to a fair trial and due process, which includes the right to legal representation in both criminal and civil law matters. These instruments apply to children as well.

## **EXAMPLES OF JUDICIAL SUPPORT FOR LEGAL REPRESENTATION**

- The Supreme Court of Canada, in a family law case about the Hague Convention, *Office of the Children’s Lawyer v. Balev*,<sup>84</sup> dealt with an Ontario case where the Office of the Children’s Lawyer was appointed for the children during the original hearing, and that lawyer participated in the proceedings throughout the hearing. The Office of the Children’s Lawyer also reviewed the original decision, recommended an appeal, launched the appeal, and appeared and made arguments on the children’s behalf at all stages of appeal, including seeking leave to appeal to the Supreme Court of Canada and arguing the appeal before the Supreme Court of Canada. The Supreme Court accepted this extensive participation without comment. The Ontario Court of Appeal had also recognized that the Office of the Children’s Lawyer had become

involved at the court's request to help determine the children's wishes and represent their interests.

- In *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, the Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada denied)<sup>85</sup> provided a strong endorsement for legal representation for children in family law cases, including cases where there are allegations of alienation, emphasizing: how legal representation is fundamental to the proper functioning of the legal system;<sup>86</sup> and how important it is for children to be able to confidentially speak to a lawyer.<sup>87</sup> A lawyer was appointed for the children and appeared as their counsel throughout the entire court proceedings, including the initial hearings.
- In *A.B. v. C.D. and E.F.*<sup>88</sup> a 14-year-old transgender boy brought a family claim under the B.C. Family Law Act (FLA), applying for a Protection Order restraining his father from interfering in his treatment. He did so through his own lawyer, and that lawyer and co-counsel appeared on his behalf throughout. While the Court of Appeal allowed the appeal on some substantive issues, it upheld the hearing judge's order under s. 201(2)(b), which declared under the FLA that "pursuant to to para. 201(2)(b), AB is permitted to bring this application under the Family Law Act and to bring or defend any further or future proceedings concerning his gender identity."<sup>89</sup> The Court of Appeal stated that they would leave this paragraph of the judge's order "as is, with the declaratory language removed. Allowing a child to conduct a proceeding without a litigation guardian is a straightforward order of the court and requires no declaration."<sup>90</sup>

The Yukon Supreme Court, in *B.J.G. v. D.L.G.*,<sup>91</sup> has supported legal representation in the proceedings, not just legal advice, as a meaningful way to ensure that more than lip service is paid to children's legal rights to be heard throughout the court processes.

### III. Special Considerations

#### *SPECIAL CONSIDERATION ONE: CHILD PROTECTION*

- Children's rights to be heard and their to legal representation, as discussed above, are particularly important in child protection cases where children face both temporary and permanent separation from parents/guardians or other caregivers.
- For more information specific to children's rights and their implementation, see the CBA Child Rights Toolkit section on Child Protection.<sup>92</sup> Here are some particular matters to consider:
  - Although domestic legislation and the Convention recognize that the best interests of the child may necessitate separation from parents where there is abuse, neglect, or maltreatment, Article 9 of the Convention encourages Canada to respect the right of the child to maintain personal relations and direct contact

with parents on a regular basis, except if it is contrary to the best interests of the child.

- Child protection laws, regulations, and practices that provide for this intervention, particularly when the child is removed from the home, must conform with the child's *Charter* rights and, presumptively, the child's rights under the Convention.

## ***SPECIAL CONSIDERATION TWO: INDIGENOUS CHILDREN***

- The Convention contains Articles particularly relevant to Indigenous children:
  - Article 30: Children have the right to profess, practice, and enjoy their own religion, language, and culture.
  - Article 25: Children have the right to have their living arrangements regularly looked at.
  - Article 20-21: Children have the right to care and protection if they are adopted or in foster care.
- Consider the additional rights and interests of Indigenous children, including those found in the *UN Declaration on the Rights of Indigenous Peoples*,<sup>93</sup> the Recommendations of the Truth and Reconciliation Commission,<sup>94</sup> *An Act respecting First Nations, Inuit and Métis Children, Youth and Families*,<sup>95</sup> *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*,<sup>96</sup> and Indigenous laws and traditions.

For additional information, we highly recommend the comprehensive *Wrapping our Ways Around Them – Indigenous Communities and Child Welfare Guidebook*, Second Edition, 2021:<sup>97</sup> [https://www.nntc.ca/documents/WOW\\_Guidebook\\_2021\\_210214.pdf](https://www.nntc.ca/documents/WOW_Guidebook_2021_210214.pdf)

See also the Canadian Bar Association comments on Indigenous children in its Alternative Report to the UN Committee on the rights of the Child, Child and Youth Law Section, February 2020:<sup>98</sup> [https://www.nntc.ca/documents/WOW\\_Guidebook\\_2021\\_210214.pdf](https://www.nntc.ca/documents/WOW_Guidebook_2021_210214.pdf)

## ***SPECIAL CONSIDERATION THREE: CROSS-BORDER CHILD ABDUCTION CASES***

### **GENERAL CHILD RIGHTS FACTORS**

- Children's right to be heard and their right to legal representation are equally important in cases where there are allegations of cross-border child abduction.
- The UN Convention generally applies to these cases, and Article 35 provides children with protection against child abduction of, sale of, or traffic in children for any purpose or in any form.

- Courts are increasingly considering the child’s perspective on all relevant issues, not just their views. See the Supreme Court of Canada decision in *Office of the Children’s Lawyer v. Balev*:<sup>99</sup>
  - The court considered the perspectives of children when determining habitual residence, creating a hybrid model, rather than just focusing on parental intention.
  - The majority provided guidance in determining how a child’s objections (Article 13 of the Hague Convention) should be determined and weighed (see Part II, Safeguard Five).
  - The appeal was launched by the children’s lawyer, who participated fully throughout on behalf of the children.

### **JUDICIAL COORDINATION AND COMMUNICATION IN CROSS BORDER CASES**

- Consider initiating or participating in judicial communication and coordination in any cross-border case.
- In a family law case, a judge may receive a request for communication from a judge in another jurisdiction or may wish to initiate such a communication.
- Consider the example of a communication between B.C. Provincial Court Judge B.K. Davis and Judge Laff of the Colorado District Court and the B.C. Supreme Court judgment referred to in it.<sup>100</sup>
- Direct Judicial Communication involves communication between judges, with the knowledge of the parties, often in a joint hearing – with the parties and their counsel present – for the purpose of coordinating and harmonizing the proceedings so that a resolution of all the outstanding issues can be reached in a just, timely, and cost-effective way.
- The communications do not relate to the merits of each case, and there are safeguards in place to ensure that the processes are fair and do not interfere with the judicial independence of either Court; a judge of one court does not make decisions which are within the jurisdiction of the other court. Joint hearings take place in open court, there is a record of the proceedings, the parties are notified, and the parties and their lawyers, if they have lawyers, can participate.<sup>101 102</sup>

### ***SPECIAL CONSIDERATION FOUR: RELEVANT INTERSECTIONAL FACTORS***

- When considering children’s rights and their implementation on a case-by-case basis, consider that a particular child may have particular attributes or circumstances, or a combination of them, that can make implementing their rights particularly challenging.

- The following topics are meant as examples of relevant topics.

## **THE GIRL CHILD**

- See this section of the CBA Child Rights Toolkit.<sup>103</sup>
- Gender and other intersecting forms of diversity must be taken into account to fully meet the needs of Canada's young people. Gender socialization, especially as it intersects with age, race, class, ability, and sexual orientation has a particular impact in a young person's life.
- The UN Commission on the Status of Women recommends referring to standards set in both the UN Convention on the Rights of the Child and UN Convention on the Elimination of all Forms of Discrimination Against Women, when issues pertaining to girls are indicated. Rather than looking at the articles in the UN Convention on the Rights of the Child in a gender-neutral manner, consider looking at their general provisions as offering a wide range of possibilities to address violations that are specific to girls. By reading the Convention on the Rights of the Child with the Convention on the Elimination of Discrimination Against Women, the distinctive needs of the girl child can be prioritized.
- Girls in vulnerable situations are particularly affected by violence, including Indigenous, African Canadian, and other racialized girls, and those with differing abilities; for Indigenous girls see, in particular, the final report of the Inquiry into Missing and Murdered Indigenous Women and Girls.<sup>104</sup>

## **SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION**

- See this section of the CBA Child Rights Toolkit.<sup>105</sup>
- All children and youth have the right to be free from discrimination because of sex, gender, sexual orientation, gender identity, and gender expression. This right is founded in Article 2 of the UN Convention on the Rights of the Child, as well as in the *Canadian Charter of Rights and Freedoms*, the *Quebec Charter of Human Rights and Freedoms*, and provincial and territorial human rights legislation.
- Legislative protection against discrimination based on sexual orientation has been in place for some time.
- As of 2017, gender identity or gender expression has been explicitly codified in all human rights legislation at provincial, territorial, and federal levels.
- In addition to forms of discrimination generally, there are a number of challenges children and youth face in this area.<sup>106</sup>

## **CHILDREN WITH DIFFERING ABILITIES**

- The UN Convention on the Rights of the Child protects children's rights to the highest attainable standard of health, which includes physical and mental health (see Article 24).

- The UN Convention on the Rights of People with Disabilities has been ratified by Canada. All of the rights therein apply equally to adults and children.
- Article 7 of that Convention deals specifically with children with disabilities and states:
  1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
  2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
  3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.
- There is a Committee on the Rights of Persons with Disabilities; its General Comment No. 3 deals with Article 6, Women and Girls with Disabilities.

# Part Two – Practical Guide/Checklist: Implementing Children’s Participation Rights in All Family Court Proceedings

## SAFEGUARDS AND GUARANTEES

The Honourable Donna Martinson Q.C.

The Honourable Judge Rose Raven

**Note:** This guide is complementary to Part One of this Brief, *Implementing Children’s Participation Rights in All Family Court Proceedings*. Part One contains additional information and all supporting references.

### ***SAFEGUARD ONE: PRIORITIZE COURT PROCEEDINGS AND AVOID UNNECESSARY DELAYS***

#### WITHIN THE FAMILY LAW PROCEEDING

- Use all the tools at your disposal to ensure, to the greatest extent possible, timely and cost-effective proceedings.
- Consider requesting one judge for all the court proceedings, where appropriate.

#### IDENTIFY OTHER RELATED PROCEEDINGS (CRIMINAL, CHILD PROTECTION, AND/OR IMMIGRATION) AND COORDINATE WITH THEM

- Determine whether there are criminal, child protection, and/or immigration proceedings relating to the same family under:
  - s. 16(3) and 7.8 of the 2021 Divorce Act.
  - Relevant provincial/territorial legislation.
- If yes,
  - Obtain relevant information, including court orders.
  - Consider steps to coordinate the proceedings to:
    - avoid conflicting outcomes and unreasonable delay; and
    - prevent the child from participating repeatedly.

### ***SAFEGUARD TWO: OBTAINING THE VIEWS OF THE CHILD – WHO AND HOW***

#### WHO – WHICH CHILDREN?

- ALL children who are capable of forming their own views can express their views, including cases involving allegations of violence and/or alienation.
- In deciding capacity consider that:
  - o The capacity required to be heard should be a low one – focusing primarily on cognitive capacity; other factors should generally be considered when deciding the weight to be attached to the views.
  - o There is a presumption of capacity.

- There should be no age limits and capacity must be assessed on a case-by-case basis.
- Provide the child with information and advice about their choices and potential consequences so the child can choose whether to participate and have a say in how they participate.

## HOW TO OBTAIN CHILDREN’S VIEWS AND PREFERENCES

### Methods Will Vary Across Canada

#### Examples could include:

- Full parenting assessments.
- Evaluative views of the child reports prepared by a mental health professional.
- Non-evaluative views of the child reports prepared by a mental health professional or another trained person, including a lawyer.
- Judicial interviews (which can be in addition to other methods – see “Judicial Interviews” below)
- Affidavit evidence of a child (often not recommended) or various forms of hearsay evidence.

### Role of Legal Representation in Obtaining Views and Preferences

- A lawyer usually cannot “give evidence” about a child’s views and preferences, but instead facilitates the presentation of such evidence (see also legal advice/representation below).

### Choosing the Method

- Consider that the child has the right to be heard in judicial proceedings, either:
  - directly; or
  - through a representative/appropriate body.
- Consider the UN Committee on the Rights of the Child recommendations that:
  - the child should have a choice about how to participate; and,
  - wherever possible, the child must be given the opportunity to be directly heard in any proceeding and advised of that option.
- Take steps to ensure that proceedings are accessible and child appropriate, considering the:
  - five-step implementation process; and
  - nine basic requirements recommended by the UN Committee on the Rights of the Child.

### Timing – When to Obtain Children’s Views

- Consider that participation should begin early in the process and should form part of the decision-making processes at initial case conferences or other judicial settlement meetings, as well as in motions and trials
- Remember that:
  - participation is a process, not a momentary act; and

- children should not be interviewed too often forensically, especially with respect to traumatic matters.

#### CHILDREN'S PARTICIPATION THROUGH A JUDICIAL INTERVIEW

- Consider requesting/facilitating a judicial interview, in addition to, or instead of, other methods, particularly if the child wishes to meet with the Judge at a:
  - case conference;
  - other judicial settlement meeting; or
  - hearing/trial.
- Note that the purpose of a judicial interview is often NOT to gather evidence or to have a child provide information about a factual matter. Instead, it can:
  - enable children to be more involved and connected with the proceedings;
  - ensure that the judge has understood the views and feelings of the child; and
  - ensure that child understands the judge's task and the nature of the court process.

### ***SAFEGUARD THREE: ESTABLISHING RELEVANT FACTS INCLUDING THOSE RELEVANT TO THE CHILD'S VIEWS***

#### ESTABLISHING RELEVANT FACTS

- Consider how the decision-maker, whether a judge, mediatory, arbitrator, or otherwise, will obtain ALL facts necessary to determine the child's best interests, as described in domestic law and the UN Convention on the Rights of the Child.

#### ESTABLISHING FACTS RELEVANT TO AND SUPPORTING THE CHILD'S VIEWS

- Take steps to ensure that, during arbitrations, mediations, judicial hearings, and the like, that the decision-maker has the information necessary to give due weight to, and to take seriously, the child's views.

### ***SAFEGUARD FOUR: THE NEED FOR QUALIFIED PROFESSIONALS***

- When deciding whether to obtain a parenting assessment:
  - Be clear about its purpose, given its cost, intrusive nature, and the time it takes. What does it add to what is known?
  - Determine what specific professional qualifications are required, including:
    - expertise in matters related to child and adolescent development; and
    - specific expertise about the nature, prevalence, and potential consequences of family violence on the child's present and future safety, security, and well-being.

## ***SAFEGUARD FIVE: JUDICIAL AND OTHER DECISION-MAKING (LEGAL REASONING) - INCLUDING HOW TO ASSESS THE WEIGHT TO BE ATTACHED TO A CHILD'S VIEWS***

### THE DECISION-MAKING PROCESS – GIVING DUE WEIGHT TO A CHILD'S VIEWS

- Consider each of these statements from the UN Committee on the Rights of the Child:
  - The views of the child must be seriously considered when the child is capable of forming her/his/their own view.
  - If the child is capable of forming her/his/their own views in a reasonable and independent manner, the decision-maker must consider the views of the child as a significant factor in the settlement of the issue.
  - Age alone cannot determine the significance of a child's views as their level of understanding is not uniformly linked to their biological age. A child's development can be affected by information, experience, environment, social and cultural expectations, and levels of support.
  - Maturity refers to the ability to understand and assess the implications of a particular matter:
    - Maturity in the context of Article 12 is the capacity to express views on issues in a reasonable and independent manner.
    - Consider the impact on the child; the greater the impact of the outcome on the child's life, the more relevant the appropriate assessment of the maturity of that child.
- Consider the evolving capacity of the child and the direction and guidance from parents.
- Review and apply the relevant case law found in your jurisdiction together with the Supreme Court of Canada cases in our paper.

### THE ACTUAL DECISION – EXPLAINED AND PROVIDED WITHOUT DELAY

- Advocate/make submissions on behalf of the child to ensure that decisions are explained, and that the decisions state explicitly:
  - The factual circumstances regarding the child relied upon.
  - The best interests elements that have been found relevant and how they have been weighted.
  - The relevant child rights legal principles and how they have been applied.
  - The reasons, clearly stated, for the decision, if the decision differs from the views of the child.
- Take steps, including making submissions, to ensure that the decision is provided in a timely manner, considering the significant impact of the decision on the child's life.
- Take steps to ensure that the child is informed about the outcome, and how the child's views were taken seriously.

## ***SAFEGUARD SIX: THE CHILD'S RIGHT TO HAVE THE DECISION REVIEWED FOR CORRECTNESS AND APPEALED IF APPROPRIATE***

- Take steps to ensure that the child:
  - knows about the right to appeal;
  - is given advice about the likelihood of success; and
  - has assistance with the appeal, when appropriate.
- Consider that the UN Committee on the Rights of the Child states appeal/review procedures should be accessible to the child or the child's representative.

## ***SAFEGUARD SEVEN: KEEPING GOVERNMENTS ACCOUNTABLE TO MAKE DECISIONS IN CHILDREN'S BEST INTERESTS***

- Be aware that a child rights approach requires governments to do Child Rights Impact Assessments, with input from children, for all government decisions, including budget decisions.
- Consider advocating:
  - broadly, for increased funding to ensure that all child rights under the Convention are realized; and,
  - when appropriate, for increased government funding for independent legal representation for a child.

## ***SAFEGUARD EIGHT: MAKING SURE THAT CHILDREN HAVE ALL APPROPRIATE LEGAL REPRESENTATION WHEN THEIR BEST INTERESTS ARE BEING FORMALLY ASSESSED BY COURTS***

### PURPOSE OF LEGAL REPRESENTATION FOR CHILDREN

- Keep in mind that when a child's best interests are being formally assessed by courts, legal representation can be critical to the implementation of all the safeguards in court processes.

### Legal Information

- Consider the following legal information, which would benefit children in court processes:
  - their legal rights generally;
  - their rights to participate and the choices available;
  - the way the court processes work; and
  - the role of the judge.

### Legal Advice

- ❑ Consider the following benefits of a lawyer providing legal advice relevant to the child's specific circumstances. The advice could include:
  - ❑ Considering the child's views and advising on how their views will be taken into account;
  - ❑ Advising the child about options for presenting their views and the merits of each in the child's circumstances;
  - ❑ Exploring relevant facts generally and those supporting the child's views; and
  - ❑ Advising the child generally on potential court processes, including settlement discussions, and potential outcomes, including the advantages and disadvantages of each.

#### Legal Representation in Court Proceedings

- ❑ Consider that if the lawyer providing information and advice outside the court process cannot participate in settlement discussion or contested hearings/trials, the child's rights identified by that advice cannot be implemented.
- ❑ Consider the following benefits a lawyer can provide to a child, consistent with a child rights approach to their best interests:
  - ❑ A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds.
  - ❑ At a contested hearing/trial the lawyer can participate on the child's behalf:
    - ❑ in the presentation and testing of evidence;
    - ❑ with respect to parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility; and (d) the appropriateness of a critique report;
    - ❑ in guarding against unreasonable delay; and
    - ❑ by advancing and protecting children's rights during final submissions, including:
      - ❑ submissions on the relevant law;
      - ❑ how the child's views are weighed; and
      - ❑ the weight to be given to the parenting assessment in the context of all of the evidence.
  - ❑ Once the court's decision is provided, a lawyer can also:
    - ❑ explain the decision to the child;
    - ❑ review the ultimate decision for correctness;
    - ❑ recommend appealing the decision if appropriate; and
    - ❑ conduct the appeal.

# ENDNOTES

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<sup>1</sup> The Honourable Donna Martinson, Q.C., LL.M., has worked throughout her career to address discriminatory laws and practices against women and children to ensure that visions of “equality for all” in our justice system include equality for women and children. She has made invaluable contributions as a lawyer working as a Crown Prosecutor and in private practice, as a law teacher in Alberta and British Columbia, and as a judge with the British Columbia Provincial Court and then the British Columbia Supreme Court. She has continued advocating for equality and access to justice through her extensive post-judge volunteer work from July 2009 to the present: (1) as an Adjunct Professor at the School of Criminology at Simon Fraser University, through the FREDA Centre on Research on Violence Against Women and Children; (2) at the Peter A. Allard School of Law, University of British Columbia, through the Centre for Feminist Legal Studies; (3) as an Executive member of the national Canadian Bar Association Child and Youth Law Section, where she Chaired its UN Convention on the Rights of the Child Committee; (4) as founding Chair of the Canadian Bar Association, B.C. Branch, Children’s Law Section; and (5) as a member of the founding Steering Committee for Rise Women’s Legal Centre, and a Board member since it began in 2016.

<sup>2</sup> Judge Raven practiced family law with an emphasis on child welfare cases before her appointment to the British Columbia Provincial Court in 1996. This background led Judge Raven to recognize the importance of children’s rights. Judge Raven currently hears family, criminal and civil cases in the Vancouver Judicial District. Her interest in education led to her appointment to the editorial board of the British Columbia Family Practice Manual. She has presented at several Continuing Legal Education conferences. Judge Raven was a member of the B.C. Provincial Court Rules Revision Working Group. The work of this committee resulted in the enactment of new B.C. Provincial Court (Family) rules effective May 17, 2021. Judge Raven was appointed to the B.C. Provincial Court Family Law Committee in 2013, serving as Chair of that Committee between 2018 and 2020. She co-chaired the Family Law Boot Camp Project that produced materials, videos, and a curriculum to teach newly appointed Provincial Court Judges the fundamentals of family law.

<sup>3</sup> Please note that this paper is an updated and adapted version of the paper of the same name prepared by the authors for the CLEBC Access to Justice for Children Conference, March 6, 2020, Vancouver, British Columbia: <https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/ImplementingChildrensParticipationinFamily.pdf>

<sup>4</sup> *Michel v. Graydon*, 2020 SCC 24, at para. 77.

<sup>5</sup> Forward, May 31, 2017, in Helen Stalford, Kathryn Hollingswoth and Stephen Gilmore, editors, *Rewriting Child Rights Judgments*, Oxford and Portland, Oregon, 2017, at ix.

<sup>6</sup> [https://www.bccourts.ca/Court\\_of\\_Appeal/about\\_the\\_court\\_of\\_appeal/speeches/Speech\\_Why\\_Access\\_to\\_Justice\\_for\\_Children\\_Matters.pdf](https://www.bccourts.ca/Court_of_Appeal/about_the_court_of_appeal/speeches/Speech_Why_Access_to_Justice_for_Children_Matters.pdf)

<sup>7</sup> General Comment 12, para 2.

<sup>8</sup> General Comment 12, para 132.

<sup>9</sup> Coordinators, Professor Emerita Margaret Jackson and The Honourable Donna Martinson, Research Associations (with equal contributions made) Melissa Gregg, Chelsea Pang and Sarah Yercich, Funded by the BC Office of the Representative for Children and Youth, [The FREDA Centre for Research on Violence Against Women and Children](https://www.fredacentre.com/wp-content/uploads/RCY_FREDA_FinalLiteratureReview_26112020.pdf) November 2020: [https://www.fredacentre.com/wp-content/uploads/RCY\\_FREDA\\_FinalLiteratureReview\\_26112020.pdf](https://www.fredacentre.com/wp-content/uploads/RCY_FREDA_FinalLiteratureReview_26112020.pdf)

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<sup>10</sup> Martinson, The Honourable Donna, Jackson, Margaret, (2021) *Family Violence & Family Law Brief (5)*, Vancouver, B.C., The FREDA Centre for Research on Violence Against Women and Children. <https://www.fredacentre.com/the-2021-divorce-act-family-violence-family-law-brief-issue-5-martinson-jackson-june-2021/>

<sup>11</sup> The Honourable Donna J. Martinson and Caterina E. Tempesta, (2018) 31 Can. J. Fam. L. 151 at p. 162. <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1009&context=can-j-fam-l>

<sup>12</sup> The CBA Child Rights Toolkit (in the process of being updated) <http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit>

<sup>13</sup> 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>14</sup> Article 2.

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

#### Article 3(1)

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

#### Article 6

1. States Parties recognize that every child has the inherent right to life
2. States Parties shall ensure to the maximum extent possible the survival and development of the child

#### Article 12

1. State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Other Articles are of particular relevance to family law matters are:

Article 19: Protection from all forms of violence

Article 24: Right to the highest attainable standard of health

Article 27: Right to an adequate standard of living

Article 35: Protection from abduction

Article 36: Protection from all forms of exploitation.

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Article 14: Freedom of expression

Article 16: Right to privacy

Article 5 recognizes parents' (and others) responsibilities, rights and duties to provide direction and guidance to the child in the exercise of their rights consistent with the evolving capacity of the child.

Article 9: right not to be separated from parents, except by competent authorities and when in the child's best interests, and if separated, the right to maintain contact with both parents on a regular basis, except if contrary to the child's best interests.

Article 18(1) recognizes both parents' (and guardians') role: parents (guardians) are primarily responsible for the child's upbringing and development with the best interests of the child as their basic concern.

<sup>15</sup> Other Articles are of particular relevance to family law matters are:

Article 19: Protection from all forms of violence

Article 24: Right to the highest attainable standard of health

Article 27: Right to an adequate standard of living

Article 35: Protection from abduction

Article 36: Protection from all forms of exploitation.

Article 14: Freedom of expression

Article 16: Right to privacy

Article 5 recognizes parents' (and others) responsibilities, rights and duties to provide direction and guidance to the child in the exercise of their rights consistent with the evolving capacity of the child.

Article 9: right not to be separated from parents, except by competent authorities and when in the child's best interests, and if separated, the right to maintain contact with both parents on a regular basis, except if contrary to the child's best interests.

Article 18(1) recognizes both parents' (and guardians') role: parents (guardians) are primarily responsible for the child's upbringing and development with the best interests of the child as their basic concern.

<sup>16</sup> 2021 ONSC 2137, in particular at paras. 25-36 and 45-51. As another example, the British Columbia Court of Appeal has commented on the legal status of the CRC in Canada in July 2018, in [J.E.S.D v. Y.E.P.](#), 2018 BCCA 286. With respect to the presumption of conformity, the Court said that it is well settled that international obligations can inform the interpretation of domestic statutes, even when those obligations have not been implemented in domestic law. If possible, courts will avoid statutory interpretations that place Canada in breach of its international obligations and will prefer interpretations that reflect the principles of international law: at para. 32. This is a rebuttable presumption that can be rebutted by the clear words of the statute under consideration. Where the provisions of the statute are not genuinely ambiguous or require clarification, it is inappropriate for the court to look to international law for guidance: at paras. 32 and 33. With respect to General Comments, the Court stated that while commentaries are not binding, they can shed light on the correct interpretation of the articles of the UNCRC: at para. 38.

<sup>17</sup> Martinson and Tempesta at pp. 169 to 170. For further consideration of the presumption of conformity with international law in the Charter context see *Quebec (Attorney General) v. 9147-0732 Quebec Inc*, 2020 SCC 32.

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<sup>18</sup> General Comment No. 12 (2009) *The right of the child to be heard*, deals with Article 12 of the UN Convention on the Rights of the Child. Para. 3 of the General Comment states: "...A widespread practice has emerged in recent years, which has been broadly conceptualized a "participation", although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes."

<sup>19</sup> General Comment 12, para 43.

<sup>20</sup> General Comment 12, para 74.

<sup>21</sup> *B.J.G v. D.L.G.*, 2010 YKSC 44 at para 3. (note: the Honourable Donna Martinson was the judge in that latter case)

<sup>22</sup> *N.J.K. v. R.W.F.* 2011 BCSC 1666, at para 201.

<sup>23</sup> *Medjuck v. Medjuck*, 2019 ONSC 3254 at para 31, also citing *B.J.G v. D.L.G.*

<sup>24</sup> At para 32. The Court added that in some cases the alienating behaviour of the parent "may be such that the child is not really capable of forming his or her own views": there is nothing in the Answer, or the evidence on this motion, to lead to that conclusion in this case.

<sup>25</sup> This reflects the views of the UN Committee found in General Comment 5.

<sup>26</sup> *N.J.K. v. R.W.F.* 2011 BCSC 1666, at para 201.

<sup>27</sup> 2010 YKSC 44 at paras 23 and 24.

<sup>28</sup> *Medjuck v. Medjuck*, 2019 ONSC 3254, at para 30.

<sup>29</sup> The Honourable Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 2018, 31, Can.J.Fam.L., 151 at 164-165.

<sup>30</sup> General Comment 14, paras 85-88.

<sup>31</sup> For a more in-depth look at how the safeguards and guarantees apply, see The Honourable Donna J. Martinson and Caterina E. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 2018 31 Can.J.Fam.L., 151. See also Caterina E. Tempesta, *Legal Representation as a Critical Aspect of the Child's Right to be Heard*, Master of Laws Thesis: Advanced Studies in International Children's Rights Leiden University of Faculty of Law, the Netherlands, 2018-2019 (available from the authors of this paper)

<sup>32</sup> General Comment 14, para 93.

<sup>33</sup> *Office of the Children's Lawyer v. Balev*, 2018 SCC 16 at para 82. The Court was dealing with a child abduction case under the Hague Convention and added that some cases can tolerate delay more than others. Hague Convention cases cannot. (The same concerns exist with respect to contested family law parenting issues, as opposed to, for example, business law decisions.)

<sup>34</sup> See, for examples:

The Hon. Donna Martinson and Dr. Margaret Jackson, *Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts*, January 2016.

The Honourable Donna Martinson and Professor Emeritus Margaret Jackson, *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases*, (2017) 30 Can. J. Fam.L. 11.

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Dr. Linda C. Neilson, [\*Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems\*](#) (Ottawa: Dept. of Justice Canada, 2013); Joseph Di Luca, Erin Dann & Breese Davies, [\*Best Practices where there is Family Violence: Criminal Law Perspective\*](#) (Ottawa: Dept. of Justice Canada, 2012); Nicholas Bala & Kate Kehoe, [\*Concurrent Legal Proceedings in Cases of Family Violence: The Child Protection Perspective\*](#) (Ottawa: Dept. of Justice Canada, 2013).

[\*Making the Links in Family Violence Cases: Collaboration among the Family, Child Protection and Criminal Justice Systems\*](#), Vol. 1, the Report of the Federal-Provincial-Territorial (FPT) Ad Hoc Working Group on Family Violence (Ottawa: Dept. of Justice Canada, November 2013).

Rachel Birnbaum, Nicholas Bala, and John-Paul Boyd, *The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?* International Journal of Law, Policy and the Family, 2016, 30, 158-178

<sup>35</sup> Duties

Court

7.8 (1) The purpose of this section is to facilitate

(a) the identification of orders, undertakings, recognizances, agreements or measures that may conflict with an order under this Act; and

(b) the coordination of proceedings.

Information regarding other orders or proceedings

(2) In a proceeding for corollary relief and in relation to any party to that proceeding, the court has a duty to consider if any of the following are pending or in effect, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so:

(a) a civil protection order or a proceeding in relation to such an order;

(b) a child protection order, proceeding, agreement or measure; or

(c) an order, proceeding, undertaking or recognizance in relation to any matter of a criminal nature. In order to carry out the duty, the court may make inquiries of the parties or review information that is readily available and that has been obtained through a search carried out in accordance with provincial law, including the rules made under subsection 25(2).

<sup>36</sup> See for example:

The Honourable Donna Martinson and Professor Emerita Margaret Jackson, Canadian Observatory on the Justice System's Response to Intimate Partner Violence, Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts (Research Project for the Canadian Observatory on the Justice System's Response to Intimate Partner Violence (14 January 2016) at 5 & 17, online at The FREDA Centre for Research on Violence Against Women and Children: <https://fredacentre.com/wp-content/uploads/Observatory-Martinson-Jackson-Risk-Report-FINAL-January-14-2016.pdf>

The Honourable Donna Martinson and Professor Emerita Margaret Jackson (2017). "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases." Canadian Journal of Family Law 30 (1): 11 at 56. <https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1011&context=can-j-fam-l>

<sup>37</sup> 2018 ONSC 4465 2018 and ONSC 5589

<sup>38</sup> In a consultation in 2015, involving some members of both the BC Provincial Court and Supreme Court, these initial possible approaches were discussed:

- 
- A software system that would allow data sharing about other proceedings between/among courts.
  - The use of court Rules to facilitate the sharing of information about other court proceedings. (The Provincial Court is in the process of revising its rules and the Rules Committee will consider this issue)
  - Carefully worded plain language court forms containing tick boxes which would require people using the court to provide information about other court processes.
  - Using, as a starting point, the requirements in the *Family Law Act* that judges and parents must consider other criminal and civil proceedings when deciding the best interests of a child. (S. 37(2)(j) of that *Act* requires that judges, lawyers and parents, when determining the best interests of a child, consider other civil and criminal proceedings affecting the safety, security and well-being of the child.)
  - Similarly, using as a starting point as well as the provision in the *Family Law Act* that a non-parent applying for guardianship must file an affidavit providing the relevant information (S. 51(2) of the *Act*).
  - A systemic rather than ad hoc cross-referencing of files.
  - Judges having the ability to appoint a lawyer for an unrepresented person when appropriate to assist that person in dealing with the challenges created.

<sup>39</sup> Formal communications and coordination efforts between courts when there are multiple court proceedings relating to the same family began as a means of addressing cross border cases. Its use has also been recommended as one way of coordinating cases when there is more than one proceeding within a jurisdiction:

- In May 2014 the national network judges (see the discussion, below under Special Considerations relating to cross border communication) passed a resolution supporting the use of judicial communication when there are multiple proceedings within a province.
- That resolution says that they support: 1) the extension of judicial communication from communication between judges in different jurisdictions to communication between judges within a province or territory; 2) adapting the existing judicial communication guidelines and the step-by-step procedures to apply to such communications; and 3) taking the matter back to their courts for consideration.
- The same processes and safeguards used in cross-border cases (again, see the discussion below under Special Considerations relating to cross border communication) could be used in coordination and communication between courts and judges when there are two different proceedings taking place in different courts within British Columbia, relating to the same family, and their domestic violence situation. The cases are not merged in any way; judges of one court do not make decisions which are within the jurisdiction of the other court. Rather cases would be coordinated and managed as they are in cross border ones.
- Doing so is one way of advancing the rights of children to participate meaningfully, and to have their rights and interests assessed in a just, timely, cost-effective manner.

<sup>40</sup> General Comment 14, paras 89-91.

<sup>41</sup> Article 12 states:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

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2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

<sup>42</sup> General Comment 12, para 15: Article 12 establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity.

<sup>43</sup> General Comment 14, para 43 and Comment 12, paras 70 – 74.

<sup>44</sup> General Comment 13, para 63.

<sup>45</sup> See *N.J.K. v. R.W.F.*, 2011 BCSC 1666, at para 202, citing *B.J.G v. D.L.G.*, 2010 YKSC 44. See also General Comment 12, para 21: it "is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views."

<sup>46</sup> General Comment 12, para 21.

<sup>47</sup> General Comment 12, para 20.

<sup>48</sup> General Comment 12, para 16.

<sup>49</sup> General Comment 12, paras 16 and 25.

<sup>50</sup> See for example, *N.J.K v. R.W.F.*, 2011 BCSC 1666, where the court stated:  
[204] ... there are many ways in which children's views can be obtained, depending on the age and the maturity of the child and the particular circumstances of the case. In appropriate cases the court may decide to interview the child...Evidence of the child can be presented by either parent, or by a lawyer or other representative of the child, or by witnesses as to what the child has said to the person about his or her wishes, or by an expert report ...

<sup>51</sup> These summaries are taken from Martinson and Tempesta, *Young People as Humans* at pp. 181-182, citing General Comment 12, paras 40-47 and General Comments 12, 134.

<sup>52</sup> General Comment 12, para 25. See also para 41.

<sup>53</sup> General Comment 12, para 35.

<sup>54</sup> General Comments 12, para 36.

<sup>55</sup> General Comment 12, para 36.

<sup>56</sup> General Comment 12, para. 36.

<sup>57</sup> General Comment 12 paras 38 and 39.

<sup>58</sup> General Comment 12, para 13.

<sup>59</sup> General Comment 12, para 24.

<sup>60</sup> General Comment 14, para 92.

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<sup>61</sup> For further discussion of this issue, see the Honourable Donna Martinson and Professor Emerita Margaret Jackson (2017). "Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases." *Canadian Journal of Family Law* 30 (1): 11 at 56.

<https://commons.allard.ubc.ca/cgi/viewcontent.cgi?article=1011&context=can-j-fam-l>

<sup>62</sup> General Comment 14, paras 94-95.

<sup>63</sup> For more information on this topic see, the Honourable Donna Martinson and Professor Emerita Margaret Jackson, *Family Violence and Parenting Assessments: Law, Skills and Social Context*, 2019.

<http://www.fredacentre.com/wp-content/uploads/2010/09/Martinson.-Jackson-Family-Violence-and-Parenting-Assessments-Report-Highlights-and-Report-Brief.pdf>

<sup>64</sup> General Comment 14, para 97.

<sup>65</sup> General Comment 12, para 28.

<sup>66</sup> General Comment 12, para 44.

<sup>67</sup> General Comment 12, para 29.

<sup>68</sup> General Comment 12, para 30.

<sup>69</sup> General Comment 12, para 31.

<sup>70</sup> 2018 SCC 16 at paras 79-81.

<sup>71</sup> BALEV at para 79.

<sup>72</sup> Balev at para 80.

<sup>73</sup> Balev at para 81.

<sup>74</sup> 2009 SCC 30 at paras 92-93.

<sup>75</sup> General Comment 14, para. 97.

<sup>76</sup> General Comment 14, para 98.

<sup>77</sup> General Comment 14, para 99.

<sup>78</sup> General Comment 14, para 96, which states:

**Legal Representation**

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

<sup>79</sup> [\*Canada \(AG\) v. Federation of Law Societies of Canada\*](#), 2015 SCC 7.

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<sup>80</sup> Long-time B.C. Children’s Representative, Dr. Mary Ellen Turpel-Lafond, was a strong advocate for children’s legal representation. Bernard Richard, her successor, described the concern in 2017: “In B.C., lawyers are only ever rarely provided for children or youth in child protection or child custody matters – in complete violation of Canada’s commitment to the principles of the Convention.” See Bernard Richard, Keynote Address, *The UNCRC as Foundational to Competency in Work with Children*, CLEBC, CBABC Children Law Section Access to Justice for Children: Child Rights in Action, Speaking Notes.

The exact same sentiment was expressed by the present Representative, Dr. Jennifer Charlesworth, speaking in Vancouver in honour of National Children’s Day, on November 20, 2018 as well as at the CBABC Children’s Law Section program, “Legal Representation for Children” on June 26, 2019. Her office is presently undertaking an investigative project expected to lead to a Special Report to the Legislature on legal representation for children and youth.

<sup>81</sup> See General Comment 14, para 96:

#### Legal Representation

The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by court and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

<sup>82</sup> In December 2013 the UN High Commissioner for Human Rights, in a report to the Human Rights Council on Access to Justice for Children, supports legal and other appropriate assistance for children, saying: (A/HRC/25/35)

40. As children are usually disadvantaged in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults. Free and effective legal assistance is particularly important for children deprived of their liberty.

...

43. While the right to free legal assistance is not explicitly provided for in international law outside the criminal law context, access to legal and other assistance in these matters is essential for ensuring that children are able to take action to protect their rights...

<sup>83</sup> The Human Rights Council, in March 2014, in “Rights of the child: access to justice for children” also supports legal aid for children:” (A/HRC/25/L.10)

The Council:

9. *Reaffirms* the need to respect all legal guarantees and safeguards at all stages of all justice processes concerning children, including due process, the right to privacy, the guarantee of legal aid and other

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appropriate assistance under the same or more lenient conditions as adults, and the right to challenge decisions with a higher judicial authority.

...

10. *Stresses* that children should have their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parent or other legal guardian.

<sup>84</sup> 2018 SCC 16.

<sup>85</sup> 2018 ONCA 559.

<sup>86</sup> See:

[46] The unique role of the Children’s Lawyer is fundamental to the proper functioning of the legal system...

[53] In summary, the role of the Children’s Lawyer is fundamental to the proper functioning of our system of justice...

<sup>87</sup> See:

[70] The Children’s Lawyer not only represents the child’s interests; she provides a safe, effective way for the child’s voice to be heard. For her to do this, she must provide a promise of confidentiality. Children must be able to disclose feelings and facts to the children’s Lawyer that cannot or will not be communicated to parents. Children’s interests can be averse to that of their parents. Feelings of guilt and betrayal that may influence a child require a safe person to speak to.

<sup>88</sup> 2020 BCCA 11.

<sup>89</sup> At para 38.

<sup>90</sup> At para 144.

<sup>91</sup> 2010 YKSC 44 at paras 47 and 48. The Court stated that the child should be: informed, at the beginning of the process, of their legal rights to be heard; be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials; have a say in the manner in which they participate so that they do so in a way that works effectively for them; have their views considered in a substantive way; and be informed of both the result reached and the way in which their views have been taken into account. The reasoning in that case has been applied in British Columbia to appoint counsel in *Friedlander v. Claman* 2020 BCSC 1244 and *Goldsmith v. Holden* 2020 BCSC 1501.

<sup>92</sup> See the CBA Child Rights Toolkit:

<http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/legalAreas/Child-Protection>

<sup>93</sup> See the United Nations Declaration on the Rights of Indigenous Peoples:

<https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>

<sup>94</sup> See the Truth and Reconciliation Commission of Canada: <https://www.rcaanc-cirnac.gc.ca/eng/1450124405592/1529106060525>

<sup>95</sup> An Act respecting First Nations, Inuit, and Métis children, youth and families (S.C. 2019, c. 24):

<https://laws.justice.gc.ca/eng/acts/F-11.73/index.html>

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<sup>96</sup> See The National Inquiry's Final Report entitled *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*: <https://www.mmiwg-ffada.ca/final-report/>

<sup>97</sup> See the Aboriginal Communities and the Child, Family and Community Services Act (CFCSA) Guidebook, *Wrapping our Ways Around Them*: [https://cwrp.ca/sites/default/files/publications/en/wowat\\_bc\\_cfcsa\\_1.pdf](https://cwrp.ca/sites/default/files/publications/en/wowat_bc_cfcsa_1.pdf)

<sup>98</sup> See the Canadian Bar Association Child and Youth Law section (2020) *Alternative Report on the UN Committee on the Rights of the Child* (at p. 22): <https://www.cba.org/CMSPages/GetFile.aspx?guid=fdb96dc7-35e0-4b6d-8918-40ba6607582a>

<sup>99</sup> 2018 SCC 16.

[42] Finally, the hybrid approach holds that instead of focusing primarily or exclusively on either parental intention or the child's acclimatization, the judge determining habitual residence under Article 3 must look to all relevant considerations arising from the facts of the case at hand (see also paras 43-46).

<sup>100</sup> Judge Davis' case, referred to above, was *N.B. v. L.E.*, 2009 BCPC 0395, a custody case in which the convenient forum was the issue. He and the Colorado District Court Judge engaged in an open court discussion. Judge Davis ultimately concluded that BC was the convenient forum. In doing so he referred to the B.C. Supreme Court case, *Hoole v. Hoole*, 2008 BCSC 1248, and said that "the ability to avoid multiplicity of hearings and court orders is such an advantage to child custody proceedings. I can see little disadvantage utilizing such a procedure."

<sup>101</sup> The communications are normally coordinated through a designated "network" judge in each of the Provincial and Supreme Courts in the provinces and territories. Each judge is a member of a national network of judges.

<sup>102</sup> There are national *Recommended Practices for Court-to-Court Judicial Communications*, referred to as Judicial Communications Guidelines, for direct communication between courts. There are also Step-by-Step Communication Procedures.

See Martinson, *Judicial Coordination of Concurrent Proceedings in Domestic Violence Cases*, NJI, 2012.

<sup>103</sup> See the CBA's Child Rights Toolkit, *Special Considerations for the Girl Child*: <http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Girl-Child>

<sup>104</sup> See The National Inquiry's Final Report entitled *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*: <https://www.mmiwg-ffada.ca/final-report/>

<sup>105</sup> See the CBA's Child Rights Toolkit, *Sexual Orientation, Gender Identity and Gender Expression*: <http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Sexual-Orientation-Gender-Identity-and-Gender-Expr>

<sup>106</sup> See the CBA Child Rights Toolkit section. Issues commonly encountered include:

- Physical, sexual and emotional harassment, cyberbullying and violence
- Privacy concerns related to sexual orientation, gender identity and gender expression
- Barriers to obtaining identification documents reflecting gender identity
- Denial of access to medical and sexual health information and care
- Denial of access to facilities, services, programming, and social opportunities that accord with a child or youth's gender identity or expression, including group homes and youth justice facilities, appropriate washroom, change room and locker room access, and access to supportive affiliations like gay-straight alliances
- Denial of appropriate safety and dignity protection in the school context, including respect for chosen names and gender pronouns, and protection from harassment, bullying and violence (See Canadian Human

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Rights Commission, [LGBTQ2I+ Rights](#): 36% of trans youth report being physically threatened or injured at school)

- Erasure of representation and lack of positive role models in educational materials
- Rejection and estrangement from family
- Barriers to name and sex designation change, including obtaining parental consent
- Parental disputes and litigation over support for children's gender identity and gender expression
- Social rejection and exclusion, including extremely high levels of homelessness