

Children's Rights and Participation in Family Law (BC)

WHAT THEY ARE; WHERE THEY COME FROM; AND HOW
AND WHY WE SHOULD PROMOTE THEM

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It has become fashionable to speak of children's rights lately, but I am still not entirely sold on the term. Yes, the convention is entitled the *UN Convention on the Rights of the Child*. Yes, the courts now often speak about access (parenting time)² and child support³ as being the right of the child. But my understanding of a "right" comes from law school and Lord Blackstone: there is no right without a remedy. What remedies do children have?

The inescapable fact is that for the most part children do not even know of, yet alone act on their supposed "rights." Others act for them – their parents; guardians; the courts; government. It is more accurate to say that children's rights mainly consist of the responsibilities that decision-makers have toward them.

Perhaps that is inevitable. The law has long considered children as inherently dependant on others, as legally disabled and unable to act on their own. There is much to say for that view, especially as regards younger children. The problem is that in family law the persons and authorities who are charged with protecting children's interests can be significantly impaired in their ability to do so. Parents are often too bound up with their own struggles and interests to clearly appreciate and protect those of their children. Courts rarely have any direct experience of the child before them. And government? Well, let's face it – children don't vote.

¹ This is essentially the paper I prepared for CLE for a course in May 2015, *Access to Justice for Children Conference*, co-chaired by Donna Martinson QC and our own Suzanne Williams. I have updated it for this course.

² *Young v Young* (1993) 84 BCLR (2d) 1 at para 59.

³ Though, ironically, it was only the minority in *DBS* (2006 SCC 37) that recognized what logically flows from this idea. If support is truly the right of the child, why is it dependent on an adult making an application, and why does the child lose the right to pursue retroactive support precisely on the day he or she becomes eligible to do so – when he or she becomes an adult?

This paper is a bit of a whirlwind tour of children's rights (and adult responsibilities toward children) in family law. If one thing emerges from it, though, I hope it is this. The deficiencies in recognizing children's rights, and discharging responsibilities toward children, can only be enhanced by engaging more directly with children.⁴ It helps parents refocus; it helps judges get a sense of the real person before them; and there is growing evidence that it can reduce conflict and encourage conciliation, which can ease the burdens on a much over-taxed family justice system.

A. BEST INTERESTS OF THE CHILD

In family law, the operating principle in all cases involving children is that decisions must be made in the best interests of those children. That principle derives from case law concerning operation of the *parens patriae* jurisdiction of the Supreme Court and from legislation governing the four general types of family case: adoption; divorce; provincial family law; and child protection. There is even legislation of general application: the *UN Convention of the Rights of the Child* and the *Law and Equity Act*. They all express the principle in similar terms, though the differences are worth noting⁵.

1. *Parens Patriae*

The genesis of *parens patriae* jurisdiction over children was summarized this way in *Re Eve* [1986] 2 SCR 388:

72. ... In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its rationale is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise. The *parens patriae* jurisdiction was later vested in the provincial superior courts of this country, and in particular, those of Prince Edward Island.

73. The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The courts have frequently stated that it is to be exercised in the "best interest" of the protected person, or again, for his or her "benefit" or "welfare".

⁴ See *Voice and Support: Programs for Children Experiencing Parental Separation and Divorce* (2004) Pauline O'Connor, especially section 4, at http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_2/index.html

⁵ For example, the *Adoption Act* and the CFCSA both list (a) the child's cultural, racial, linguistic and religious heritage and (b) the effect on the child if there is a delay in making a decision. The second is not in the FLA best interests section, though it can be found in s199. But the first is absent from the FLA altogether, which is curious. We know it is part of "best interests" anyway (*Van de Perre v Edwards* 2001 SCC 60); but as our experience with "family violence" is showing, having it expressly listed as a factor and defined seems to add emphasis and awareness.

That jurisdiction came to influence the common law regarding custody orders generally:

12. The law relating to the custody of children and the rights of parents where custody claims are involved has undergone progressive change since early in the nineteenth century when the parent, usually the father, had a right to custody of an infant child unless disqualified by reason of some serious circumstance, having to do with the welfare of the child, making him unfit to have custody. By legislative intervention and evolving case law the situation has changed. The law has moved, first, toward an increase in maternal rights; a progressive diminution of parental rights; and then, a corresponding increase in the consideration of the interest or welfare of the infant, as the significant factor in custody determination. This latter factor has become progressively more important until it may now be said that the welfare of the child is the paramount consideration when the courts address the problem.

- from *King v Low* [1985] 1 SCR 87

“Best interests” and “welfare” have an expansive meaning:

[119] The primary consideration of the best interests test is the welfare of the child. See *Re McGrath*, [1893] 1 Ch. 143 at p. 148, cited with approval in *Catholic Children’s Aid Society of Metropolitan Toronto v. M.(C.)*, 1994 CanLII 83 (SCC), [1994] 2 S.C.R. 165.

[120] The welfare of the child is "not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense": see *Re McGrath*, supra.

[121] The best interests test has a "wide focus." This means that the "entirety of the situation" must be examined in order to determine a child’s best interests: see *Catholic Children’s Aid Society of Toronto v. M.(C.)* (1994).

[122] The best interests of a child are continuously evolving: see *Catholic Children’s Aid Society of Toronto v. M.(C.)*, supra. This means that different solutions may be required over time.

[123] The best interests of a child take priority over the desires and interests of the parent: see *Young v. Young* 1993 CanLII 34 (SCC), (1993), 49 R.F.L. (3d) 117 (S.C.C.) at p. 228.

- *Children’s Aid Society of Toronto v. C.G.*, 2012 ONCJ 423

It is also worth noting the phrase “a progressive diminution of parental rights” from *King*, because this is one of the significant differences between the Commonwealth approach and that in the United States. In America, a parent’s rights to bring up his or her child are constitutionally guaranteed under the Fourteenth Amendment; whereas in Canada, parents’ rights are always subordinated to the “best interests of the child” principle.⁶

2. Legislative history

⁶ *Children’s Aid Society of Hamilton-Wentworth v K* 1989 CanLii 4308.

The first legislation concerning custody of children in Canada was the *Matrimonial Causes Act* (UK) of 1857. It did not state any operating principle. The *UN Convention on the Rights of the Child* was adopted and opened for signature in November, 1989. Canada signed it in May, 1990 and ratified it the following year. But the best interests principle was first enunciated in the *Declaration on the Rights of the Child*, in 1959. The first mention federally was in the *Divorce Act* of 1985.

The first legislative provisions in BC to adopt the best interests principle were in the *Law and Equity Act* in 1974 and the *Family Relations Act* in 1978. The *Adoption Act* and the *Child, Family and Community Service Act* followed in 1996⁷.

So, while the “best interests” principle can trace its origins back several centuries, the current prevalence and understanding of the principle are relatively recent developments.

3. ***Divorce Act (s16)***

Factors

(8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

4. ***Family Law Act***

Best interests of child

37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, ***the parties and the court*** must consider the best interests of the child only.
[emphasis added]

(2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;

⁷ The *Provincial Court Act* (s3(3)(a)) and the *Vital Statistics Act* (ss4.1, 9 and 27) also mention it (as I am sure do a great many other acts not directly linked to family law).

- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

(3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

5. *Child, Family and Community Service Act*

The best interests of the child are referred to in a number of sections. It is cited as a factor to be taken into account in decisions concerning – as you might expect – protection orders (s41(2)(c)), continuing custody orders (s60(3)), and orders placing children in the permanent custody of someone other than the director (s54.01(6)(c)). It is also cited for decisions concerning the plan of care at a family case conference (s20(1)(b)), extending total time in care (s45(1.1)), and for a director deciding to intervene in a *Family Law Act* proceeding (s97.1). Best interests are defined in section 4.

Best interests of child

4 (1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:

- (a) the child's safety;
- (b) the child's physical and emotional needs and level of development;
- (c) the importance of continuity in the child's care;
- (d) the quality of the relationship the child has with a parent or other person and the effect of maintaining that relationship;
- (e) the child's cultural, racial, linguistic and religious heritage;
- (f) the child's views;
- (g) the effect on the child if there is delay in making a decision.

(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

6. *Adoption Act*

Purpose of the Act

2 The purpose of this Act is to provide for new and permanent family ties through adoption, giving paramount consideration in every respect to the child's best interests.

Best interests of child

3 (1) All relevant factors must be considered in determining the child's best interests, including for example:

- (a) the child's safety;
- (b) the child's physical and emotional needs and level of development;
- (c) the importance of continuity in the child's care;
- (d) the importance to the child's development of having a positive relationship with a parent and a secure place as a member of a family;
- (e) the quality of the relationship the child has with a parent or other individual and the effect of maintaining that relationship;
- (f) the child's cultural, racial, linguistic and religious heritage;
- (g) the child's views;
- (h) the effect on the child if there is delay in making a decision.

(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

7. *UN Convention on the Rights of the Child*

Article 3

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.

8. *Law and Equity Act*

Court to consider interest of child

52 (1) In proceedings involving the guardianship, custody, access to, contact with or support of a child the court must consider the best interests of the child.

(2) Subsection (1) does not apply in proceedings under the *Child, Family and Community Service Act* except as provided in that Act.

9. *Who gets to decide?*

In most instances, we are speaking about decisions made by the court. Interestingly, the *Family Law Act* emphasizes that the parties themselves have an obligation to the child and must act in that child's best interests. This includes all parties, not just parents and guardians. And of course the Convention binds governments and state agencies as well as the court.

10. Are we speaking about children generally or this specific child?

This may seem an innocent question, but it is not. In fact, getting it wrong is one of the easiest ways for children's rights to be side-tracked; because if you allow yourself to believe that what is best for children generally is best for any individual child, it allows you to accept that statements of general application or belief can become reliable legal prescriptions. For example, "Young children need their mothers" (the tender years doctrine); or "Children need both parents" (presumptions of equal parenting authority or time). It also gives you permission to avoid listening to children, because if general experience, belief, or societal norms tell you all you need to know, why risk involving the individual child him- or herself?

The common law is fortunately clear that the duty of the court is to consider the interests of the individual child before it:

44. ... Each child is unique, as is its relationship with parents, siblings, friends and community. Any rule of law which diminishes the capacity of the court to safeguard the best interests of each child is inconsistent with the requirement of the Divorce Act for a contextually sensitive inquiry into the needs, means, condition and other circumstances of "the child" whose best interests the court is charged with determining... The inquiry is an individual one. Every child is entitled to the judge's decision on what is in its best interests; to the extent that presumptions in favour of one parent or the other predetermine this inquiry, they should be rejected ...

- *Gordon v Goertz* [1996] 2 SCR 27

The commentaries on the Convention underscore this point (General Comment No. 14 (2013), Committee on the Rights of the Child, adopted at its 66th session (14 January – 1 February 2013), at para. 49).

British Columbia was one of the first jurisdictions to affirm that legal presumptions – even some very attractive and seemingly innocuous ones – are incompatible with the best interests principle:

[22] In *Anson* I opined that a joint custody and joint guardianship order would be appropriate "where both parents are excellent parents, there is a history of co-operation with respect to the parenting of the child and there is no valid reason to exclude a parent from having significant input into the raising of the child" (at 370). I have come to be persuaded that such a statement is as much a statement of legal or factual presumption as that of the majority in *Baker and Kruger*. It is now clear that legal and factual presumptions have no place in an enquiry into the best interests of a child, however much predictive value they may have. The Supreme Court of Canada has stated absolutely clearly that such presumptions detract from the individual justice to which every child is entitled.

- Madam Justice Huddart, writing for the Court of Appeal in *Robinson v Filyk* (1996) 28 BCLR (3d) 21

The *Family Law Act* now codifies this idea:

Parenting arrangements

40 ...

(4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:

- (a) that parental responsibilities should be allocated equally among guardians;
- (b) that parenting time should be shared equally among guardians;
- (c) that decisions among guardians should be made separately or together.

11. How does the court gather evidence to decide what a child's best interests are?

Well, primarily, the court looks to the parents for that information – and, not too surprisingly, they do not often agree. It would take a saint of a parent not to present (or perceive) the best interests of their child in a way that did not favour the result they were seeking. Third party witnesses like teachers, doctors, counselors and extended family members or family friends can seem to offer a wider or more objective perspective, but of course these witnesses are all chosen by the parents. So, while best interests is a welcome step away from a contest over parental rights, parents remain the primary filter through which those interests are assessed.

B. HEARING FROM CHILDREN

You would think that the best interests principle logically implies the right of children to be heard. How can you assess a child's best interests without hearing from that child? As Chief Justice Beverley McLaughlin said years ago:

“In order to find out what is in the best interests of the children, it seems logical to find out what the children think. After all, they and they alone know what life is like with one parent or the other.”⁸

But for many years now, courts have been reluctant to hear directly from children, considering that it would not be in their best interests to be involved in litigation in any way. It would only do them harm, or make them feel like they have to choose between their parents. Gradually, studies and experience have shown that the fears of involving children were greatly exaggerated and that, to the contrary, there can be great harm in *not* inviting children to participate or share their views.

The UN Convention contains both the best interests principle in article 3 as well as the principle in article 12 that in all proceedings affecting them, children must be given an opportunity to be heard. Furthermore, article 12 provides that if children express their views, decision makers

⁸ From the *Advocate*, September, 1992, p, 727, quoted *in re Le* [1999] BCJ No. 629, para 2.

must take them into account and even explain how those views affected the final result. The convention considers these two articles inextricably linked.⁹ Yet, even so, courts have preferred to hear *about* children rather than *from* them until very lately – and some still do.

1. As Parties

Under the *Family Law Act*, children who are married, parents, and 16 years of age or older may act as parties in their own right, without needing a litigation guardian (s201). The court is also free either to require a litigation guardian for such children, or to allow children younger than 16 to appear without one.

Under the *Child, Family and Community Service Act*, children over 12 years of age are entitled to notice of court applications (ss33.1, 34, 36, 42.2, 44, 46, 49, 55, 55.01, 57 or 58). They do not automatically become parties if they do appear, though they do have the right to apply to be added as a party.¹⁰ This is a bit odd, because it is hard to imagine what the point of notice and appearance is if it is not to take a position or make submissions. Nonetheless, in *Director v MK and PM* (unreported, BCPC Williams Lake 14-4624, May 19, 2015) Judge Church at least felt confident that there were ample opportunities for a child's wishes to be made known to the court, and even that the Director could appoint counsel for a child without the child being made a party¹¹. She felt that going the extra step and making a child a party was a discretion the court should exercise sparingly, though this reluctance may well have been influenced by the particular facts of the case. (It was the Director who was asking for the child to have party status, principally as a means of satisfying Ministry policy for appointing counsel for children, which was his main objective.)

Of course, before we even get into these details, children have to know they have these rights – to notice; to appear; to have a voice; to have the benefit of counsel; to apply to be recognized as a party. Section 70 provides that the child must be advised of his or her rights and to be

⁹ General comment No 12 (2009) from the Committee on the Rights of the Child.

¹⁰ My thanks to Katherine LeReverend for this correction, and the case cited. In a previous version of this paper I had mistakenly included children in the categories of entities, like native bands, who become parties simply by appearing.

¹¹ Paragraphs 18 and 19. I say “at least” because some have suggested that since the CFCSA does not have a counterpart to s211 FLA, there is no authority for the court to order views of the child reports. That would seem an odd result, since references to a child's views are all over the Act. Why would a court hamper its ability to receive those views? I think ss67 and 68 CFCSA, article 12 of the UNCRC and the court's inherent powers over its own procedure (see *Smythe* cited on page 10) should fill any perceived gap.

informed about and assisted in contacting the Representative for Children and Youth. Is this always done – and if it is not what are, or should be, the consequences?

Legal aid will fund some lawyers to provide independent legal advice for children in care. They can also provide referrals for some children who are parties to FLA proceedings, though they have to meet the same non-financial criteria as other clients (denial of parenting time or family violence). Duty counsel can offer some help, though unlike lawyers specifically cleared to act for or advise children, they may not have had criminal records checks done.

If children are parties and need a litigation guardian, *Supreme Court Family Rule 20-3* says the guardian must act through a lawyer, unless the guardian is the Public Guardian and Trustee. The Provincial Court rules do not have any provision for appointing litigation guardians, but in *Smythe v Bourgeois* 2008 BCSC 1847, the court held this sort of function fell within the Provincial Court's inherent powers over its own procedure. So, the Provincial Court can come up with its own criteria for appointing a litigation guardian and whether they must act through a lawyer.

2. Through their lawyers

In *Dormer v Thomas* (1999) 65 BCLR (3d) 290, Madam Justice Martinson outlined the options in this way:

[43] How can the court meet its statutory obligation to determine the best interests of the children? Much has been written about how children can be represented in cases like this. For a useful summary and discussion see: Alfred A. Mamo "Child Representation" in *Child Custody Law and Practice*, Chapter 4, *supra*.

[44] Three models are frequently referred to in the literature and cases dealing with legal representation for children: the *amicus curiae*, the litigation guardian and the child advocate.

[45] An *amicus curiae* (friend of the court) is viewed as a neutral officer of the court whose role is to facilitate an informed judicial decision in custody and access proceedings and who ensures that all relevant evidence is before the court.

[46] A litigation guardian is appointed to protect the interests of the child and must decide what is in the best interests of the child and submit an informed opinion of those interests to the court. The opinion of the guardian need not be the same as the wishes of the child.

[47] A child advocate is in fact an advocate on behalf of the child. This is the more traditional role that lawyers play. The advocate must present and attempt to advance the child's wishes.

[48] There has been a debate about which "model" is best for children. A variety of approaches have been taken by the courts. By way of example only, the Ontario Court of Appeal in *Strobridge v. Strobridge*

(1992), 42 R.F.L. (4th) 169, interpreted the role of the Children's Lawyer in that province, and concluded that the role is that of a child advocate.

[49] The legislature in British Columbia has adopted an approach that is not the same as any of the three models, but is closest to the litigation guardian model. The *Family Relations Act* allows the Attorney General to appoint a lawyer to be a family advocate (s. 2(1)). That lawyer "may intervene at any stage in the proceeding to act as counsel for the interests and welfare of the child." (s. 2(2))

[50] It will be noted that the family advocate is not appointed by the court but by the Attorney General. Funding is made available for this purpose. The family advocate may or may not intervene in the proceedings. Nor is the family advocate a child advocate of the kind envisioned by the Ontario Court of Appeal in *Strobridge*. Southin J., as she then was, held that the children are not the family advocate's clients in *Gareau v. Supt. of Family and Child Services for British Columbia et al* (1986), 1986 CanLII 1046 (BC SC), 2 B.C.L.R. (2d) 268 at 271:

Are the children his clients? I think not. He is appointed to act as counsel for their interests and welfare, but nothing in the Act warrants the conclusion that he is to take instruction from them even if they are of an age of sufficient maturity to give instructions...

[51] Southin J. also pointed out (at p. 271) that once a family advocate is appointed, it is the advocate alone, and not the Attorney General, who decides the course to follow.

[52] In British Columbia a judge of the Supreme Court could appoint an *amicus curiae*, a litigation guardian, or a child advocate, based on the court's *parens patriae* jurisdiction. This is an inherent jurisdiction to act in the best interests of children. The recommendation to appoint a family advocate is a fourth option.

[53] I am not convinced that it is appropriate to decide, in a vacuum, that one model is better for children than another. Rather, the circumstances of each case should dictate which approach will best meet the ends of justice for the children in question. Factors such as the age and maturity of a child and the child's capacity to instruct counsel, will have a bearing on which approach is best. It may be that in some cases the role of counsel will have to be a fluid one, one that changes as the case proceeds.

Section 2 of the *Family Relations Act* has not been carried over into the *Family Law Act*. Indeed, the office of the family advocate had been de-funded many years before. Judge Brecknell bemoaned that fact but concluded that doing so was not a denial of children's Charter rights, nor did it give the Provincial Court power similar to *parens patriae* jurisdiction to appoint a lawyer for a child (*S v S*, 2004 BCPC 354). The current replacement for the family advocate is the Representative for Children and Youth. That office can advocate for children within government and provide advice for children, but cannot appear as their lawyer in court.

Section 203 of the FLA allows both courts to appoint a lawyer for a child if "(a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and (b) it is necessary to protect the best interests of the

child.” This is not a government funded lawyer, but the court can allocate the cost between the parties or make one party pay.

Prior to this section, some parties chose to fund a lawyer for a child themselves. In *CLM v DJM* 2010 BCSC 657, Justice Butler considered this expense as a disbursement in a taxation of costs:

[15] Given the unique nature of the disbursement, I am of the view that it would be helpful to set out the factors that may come into play in deciding who should pay the fee in cases of this kind. In my view, they include the following:

- a) previous court approval: whether the presence of the child advocate received prior court approval;
- b) neutrality of appointment or funding: whether the child advocate was chosen and/or funded by one of the parties – in such a case, the judge should ensure there is no conflict of interest or bias;
- c) consent: whether both parties consented to the appointment of the child advocate;
- d) impartiality of content: whether as between the parties, the child advocate was neutral, impartial and objective;
- e) helpfulness of content: whether the child advocate presented evidence or argument before the court that would not otherwise have been available – this suggests that the disbursement was essential to ensuring the best interests of the children were fully represented before the court;
- f) ability to pay: if one party has a substantially lower ability to pay, fairness may require that the cost be shared proportionally, or that the party with greater ability to pay incur the expense; and
- g) success: was one party substantially successful?

The CFCSA does not have any similar provision to section 203 of the FLA, so lawyers for children in child protection proceedings must be either funded by the parties or appointed and funded at the discretion of the Attorney General in consultation with the Representative for Children and Youth.¹²

As for the role of a child’s lawyer, that depends on the maturity and age of the child. Where a child is able to give mature and clear instructions, the role most resembles that of a traditional lawyer. The lawyer may not act as witness, nor may he or she advance opinions or positions different from those of the child (*MF v JL*, 2002 CanLII 36783; 211 DLR (4th) 350 (QCCA)). But where the child is not clearly able to express his or her views, the role of the child’s lawyer starts to more closely resemble that of an amicus:

¹² I suppose it may also be possible to ask the court to appoint counsel for children on a *Rowbotham* basis. In *British Columbia (Attorney General) v. T.L.*, 2010 BCSC 105, the court used a *Rowbotham*-type analysis to consider appointing counsel for parents in a child protection proceeding. The child’s claim should be at least as strong, for, as Justice Boyle pointed out in *Saville v BC (Dir., CFCSA)* 2000 BCSC 1754, in child protection proceedings “it is the child’s not the parent’s, security which is fundamentally at stake.” [para 20]

Representing a client ... usually involves executing a client's instructions and, without being misleading, attempting to show through the evidence that these instructions or wishes best match the child's needs. In other words, a mother who wishes custody of her child expects her lawyer to present her case in such a way that her wishes are shown to be in the best interests of the child. It is, in most cases, an articulation of the client's subjective assessment, rather than the lawyer's. It should be no different when the client is a child. Where, therefore, the child has expressed definite views, these views, rather than those of the child's lawyer, should determine what is conveyed to the Court. The child's advocate is the legal architect who constructs a case based on the client's views.

...

There must undoubtedly be a degree of flexibility in a child's lawyer's role as articulator of his or her client's wishes. The child may be unable to instruct counsel. Or the child may be, as in this case, ambivalent about her wishes. Or the child may be too young. Although there should be no minimum age below which a child's wishes should be ignored -- so long as the child is old enough to express them, they should be considered -- I feel that where a child does not or cannot express wishes, the role of the child's lawyer should be to protect the client/child's interests. In the absence of clear instructions, protecting the client's interests can clearly involve presenting the lawyer's perception of what would best protect the child's interests. In this latter role of promulgating the infant client's best interests, the lawyer would attempt to guarantee that all the evidence the Court needs to make a disposition which accommodates the child's best interests is before the Court, is complete, and is accurate. There could in this kind of role be no inconsistency between what is perceived by the lawyer to be the child's best interests and the child's instructions. Where there is such conflict, the wishes of the child should prevail in guiding the lawyer.

In the case of a child who is capable of coherent expression the lawyer's role in representing the child's wishes does not preclude the lawyer from exploring with the child the merits or realities of the case, evaluating the practicalities of the child's position and even offering, where appropriate, suggestions about possible reasonable resolutions to the case. Offering advice is part of the lawyer's obligation to protect the client's interests. Obviously, however, given the vulnerability of most children to authority in general and given the shattered sensibilities in family disputes in particular, great sensitivity should be exercised during these exploratory sessions. The lawyer should be constantly conscious of his or her posture being an honest but not an overwhelming one.

- from Judge Abella in *Re W*, [1980] 27 OR (2d) 314 (ONPC)

But while child's counsel may advocate for a child's wishes that is able to articulate them, counsel is not a witness. The Courts of Appeal in both Ontario and Alberta have cautioned against giving "evidence from counsel table."¹³ If evidence is required, counsel will have to introduce it through other means.

Interestingly, the Nanaimo Children's Lawyer program's role largely consisted, as I understand it, on offering advice and then providing a report to parents and if need be the court on the

¹³ *Strobridge v Strobridge* (1994) 4 RFL (4th) 169 ONCA and *RM v JS* [2013] AJ No. 1390 ABCA

child's views. I see the utility of this, and I would wish lawyers offering ILA to be able to do much the same. But the functions need to be clearly understood from the outset if that is to be the case. There is a fine line between relaying instructions and giving evidence, and I would not want to be child's counsel who is challenged on having waived privilege and then being asked to give evidence about lawyer-client conversations or other matters the child chose to keep private.

3. Expert assessments

Expert reports were allowed by section 15 of the former FRA and now by section 211 of the current *Family Law Act*.

Orders respecting reports

211 (1) A court may appoint a person to assess, for the purposes of a proceeding under Part 4 [Care of and Time with Children], one or more of the following:

- (a) the needs of a child in relation to a family law dispute;
- (b) the views of a child in relation to a family law dispute;
- (c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

(2) A person appointed under subsection (1)

- (a) must be a family justice counsellor, a social worker or another person approved by the court, and
- (b) unless each party consents, must not have had any previous connection with the parties.

(3) An application under this section may be made without notice to any other person.

(4) A person who carries out an assessment under this section must

- (a) prepare a report respecting the results of the assessment,
- (b) unless the court orders otherwise, give a copy of the report to each party, and
- (c) give a copy of the report to the court.

(5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

Custody and access assessments (now probably more properly called section 211 assessments) are a way of introducing expert opinion, but in my view there are several problems with such assessments. Firstly, they are expensive. That may seem an ironic comment given the cost of legal representation, but it is nonetheless true. A full assessment will run from \$5,000 to \$8,000 per child and a short form assessment rarely costs less than half that. This is beyond the means of the majority of litigants.

Free assessments may be obtained through the Family Justice Centre, but resources are stretched. They do two types of reports, a full section 211 assessment and a views of the child report similar to the non-evaluative views of the child reports championed by the BC Hear the Child Society. There have been some delays since I last talked about this in 2015. Demand is up about fifteen percent, and staffing shortages have seen volumes go down from 548 to about 485. In 2014, the Family Justice Report Services completed 184 full reports and 364 views of the child reports. For 2105 the statistics are still being compiled, but I am told it looks like 168 and just over 300 respectively. The wait times vary a bit regionally, but the average time to complete a full assessment is now 12 months, whereas it takes about 4 to 6 months to complete a views of the child report.

A full assessment is typically assigned within 6 to 8 months, and may take a few weeks to conclude. A views of the child report is usually finished within 6 to 8 weeks. The Family Justice Centre will not provide a report or assessment if the children are in care, and may not if they are subject to a criminal investigation.

Secondly, section 211 assessments often duplicate the process of the court – weighing the evidence of the parties and collateral witnesses and coming up with recommendations as to a final result. Ideally, such an exercise should reduce the need for a trial, but if parties can afford a report in the first place, they can usually afford to go to trial and challenge the report if they don't like the result. Further, they can often be successful, on the very basis that the assessor misapprehended the evidence, or failed to exercise due process, or did not have evidence available to the trial judge.

In my view, expert assessments would be most valuable if they were confined to assessments of the child or parents and not allowed or required to make factual investigations that are better left to the courts. Candidly, I am not sure how to do that. Something like a stated case, perhaps, or a focused assessment, or maybe even having the expert comment on the facts the judge finds at the end of the evidentiary hearing might be possible. Certainly, I suggest that it would be helpful to encourage more dialogue between the family justice system and the mental health professions in this area.

Apart from case-specific assessments, it would also be helpful to know what reliable mental health or social science studies can tell us about some of our generally accepted beliefs in the family justice system. Are they warranted by actual experience? It was long held, for instance, that involving children in the resolution of disputes inevitably did them harm. It was liberating to find out that it did not – or at least not if the involvement was handled appropriately. We also need research on different sorts of parenting arrangements. What works best for certain children, or parents? What are the indicators for success or failure? What types of family

violence can be addressed through reeducation or conduct orders? What types are irremediable, and must be protected through protection order?

4. Hearsay

Hearsay evidence in family law is quite commonly admitted, especially hearsay evidence about children's views. Often it is informal, coming from the parents, or teachers, daycare providers, babysitters, family friends or extended family members. Sometimes it is more formal, such as evidence from counselors or views of the child reports from family court workers, mental health professionals, or BC Hear the Child Society roster members¹⁴. The test for hearsay evidence generally is necessity and reliability (*R v Khan* [1990] 2 SCR 531), and the same applies for hearsay evidence as to children's views (*BKA v DMA* 2010 BCSC 604 and *PV v DB* 2007 BCSC 237), but as one Justice once put it to me, really, in family law it is the Jenny Craig rule: It all goes to weight. The more independent and professional the reporter, the more weight their evidence will have.

Both the *Family Law Act* (s202) and the CFCSA (ss67 and 68) allow the court to make specific orders as to how a child's evidence will be received.

Court may decide how child's evidence is received

202 In a proceeding under this Act [FLA], a court, having regard to the best interests of a child, may do one or both of the following:

- (a) admit hearsay evidence it considers reliable of a child who is absent;
- (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

Court may exclude child and decide how child's evidence is received

67 At a hearing under this Act [CFCSA], the court may, having regard to the child's best interests, do one or more of the following:

- (a) exclude the child from the courtroom, despite the *Provincial Court Act*;
- (b) admit any hearsay evidence of the child that it considers reliable;
- (c) give any other direction concerning the receipt of the child's evidence that it considers just.

Evidence of others

68 (1) Before ordering that a child be placed in or returned to the custody of a person other than a director, the court may consider the person's past conduct toward any child who is or was in that person's care.

(2) In a proceeding under this Act, the court may admit as evidence

¹⁴ John-Paul Boyd wrote an article on how he does hear-the-child reports, which can be read here http://www.cba.org/CBA/sections_family/newsletters2012/affidavits.aspx. JP was one of the founding directors of the BC Hear the Child Society. (This link is to the CBA national website, which is under reconstruction. If it remains inactive when you try, just ask me or JP directly, and we can get you a copy of this article.)

- (a) any hearsay evidence that the court considers reliable, or
- (b) any oral or written statement or report the court considers relevant, including a transcript, exhibit or finding in an earlier civil or criminal proceeding.

5. Directly

There are essentially three means for children to speak directly to the court: they can give evidence as a witness; they can speak directly to the judge; or they can address the court in a direct written statement or affidavit.

- (a) as witness

Judges in family matters are very reluctant to hear from children in open court. The legislation gives broad power how to accommodate this, but still it is considered a last resort. Perhaps we can learn some things from our colleagues in criminal justice as to how direct testimony can be accommodated while still protecting the child.

- (b) in a written statement or affidavit

Courts have been reluctant to admit written statements or affidavits from children, and with good reason. The opportunity for abuse and influence is enormous. Nonetheless, if there is an appropriate way to allow affidavit evidence, my colleague, John-Paul Boyd has some useful thoughts in his article: *Thoughts on the Drawing of Children's Affidavits*.¹⁵

- (c) in a judicial interview¹⁶

Madam Justice Martinson has been a pioneer in advocating for judicial interviews as a method of hearing from children, especially when alternative means are not available or affordable. Article 12 of the Un Convention was ratified in Canada in 1991, yet it took Justice Martinson's decision in 2002 *LEG v AG* 2002 BCSC 1274 to champion the direct interview of children.

The case merits a full reading, but to summarize the main points here, she found:

¹⁵ This article is posted on the CBA National Family Section newsletter, *The Family Way*, here http://www.cba.org/CBA/sections_family/newsletters2012/affidavits.aspx . Unfortunately, the site is under reconstructions and the link is presently unavailable. Until it is back up, you can find the article, or a version of it, here: http://www.courthouselibrary.ca/training/stream/the-stream-jp-boyd-guest-blogger/2012/10/19/JP_Boyd_Thoughts_on_drawing_children_s_affidavits.aspx (With thanks to Allison Smith, CLEBC)

¹⁶ All but the last part of this section is taken directly from a paper I co-wrote with Trudi L. Brown QC in 2011. The paper itself can be seen here: <http://www.cle.bc.ca/PracticePoints/FAM/12-LawandChildsRight.html>

1. The court's discretion to interview was founded both in the court's *parens patriae* jurisdiction and in its statutory duty to consider the best interests of the child (important, because otherwise the Provincial Court could not interview).
2. In considering whether to do so in individual cases, the court must consider the relevance of such evidence to the issues at trial, the reliability of the information, and the necessity of conducting the interview rather than obtaining the information in another way.
3. This can be done either toward the end of the hearing, after the court has heard enough evidence to put the child's views in context, or at the beginning, so the parties can introduce evidence to answer any concerns raised.
4. The court does not require the parents' or guardians' consent. "While a parent cannot simply veto an interview, a parent's specific reasons for withholding consent may be important to a determination of relevance, reliability, and necessity." (para 6)
5. Three purposes of doing such an interview include obtaining the wishes of children; making sure they have a say in decisions affecting their lives; and providing the judge with information about the child.
6. While it may be preferable to have such evidence come in through an expert or *amicus curae*, the "regrettable reality" (para 57) is that parties often lack the resources to avail themselves of such services.

The judge did accept that there were both limitations and challenges for judicial interviews. A particular judge may not have the knowledge or expertise required for certain circumstances, or certain children. Such interviews will generally not have the same procedural safeguards we maintain for most other evidence (oath; cross-examination), and there are questions about whether a record is necessary, or how it will be kept (tape; transcript; judge's or clerk's notes), or how much of the interview will be made available to the parties. But, she notes two significant differences between these proceedings and other more usual civil proceedings: most civil proceedings deal with the past, while this is trying to secure a fair result for the future; and in most civil proceedings, only the parties are affected, whereas here the court must also (even primarily) consider the interests of the child.

This decision was followed eight years later in *BJG v DLG* 2010 YKSC 44. Once again, the question was whether the court should hear from the child in question, and once again the decision was no. Nonetheless, Madam Justice Martinson took the opportunity to make some of the strongest statements yet about the court's duty to hear from children and to consider their views, when they wish and are able to express them.

[3] The *Convention* ... says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. 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.

She repeats at length the legal framework set forth earlier in her earlier decision and makes the following additional points:

1. Most children want to be involved and heard.
2. Obtaining "information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute can lead to better decisions..." (para 21)
3. Receiving children's input early can reduce conflict. (para 22)
4. Excluding children and adolescents can have both immediate and long term adverse consequences for them.

She sums it up this way:

[47] More than just lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful; children should:

1. be informed, at the beginning of the process, of their legal rights to be heard;
2. 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;
3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;
4. have their views considered in a substantive way; and
5. be informed of both the result reached and the way in which their views have been taken into account.

In 2014, The Advocates' Society and the Association of Family and Conciliation Courts, Ontario Chapter, published their guidelines for judicial interviews and meetings with children in custody and access cases in 36 RFL – Art 489. The guidelines are worth considering in their entirety, but I quote here the discussion about whether to conduct a judicial interview:

6. Factors that may suggest that an **interview** is **appropriate** include:
 - a. The dispute involves a single issue, other than the determination of custody or access, such as the selection of a particular school a child may wish to attend;
 - b. The child's age or level of development suggests that he or she possesses a sufficient level of maturity;

- c. The child's views and preferences will likely play a significant role in the court's determination of the issues before it;
- d. There is no independent evidence of the child's views and preferences;
- e. The court has balanced the expected benefits of the interview against the risk that the child may be adversely affected and is satisfied, on balance, that the interview is appropriate;
- f. A child has requested an interview by a judge;
- g. Both parties consent to the child being interviewed by the judge;
- h. There has been an assessment report or Children's Lawyer Report (CLR) which is over one year old or is otherwise outdated due to a material change in circumstances since the completion of the report.

7. Factors that may suggest that an **interview** is **not appropriate** include:

- a. There has been an assessment report or CLR which has been completed within the past year, unless that report re-requests a judicial interview and there is no conflicting professional recommendation against such an interaction;
- b. The child has independent legal representation obtained through the OCL or otherwise privately retained by the parties;
- c. There is independent and reliable evidence available through an independent third party regarding a child's views and preferences;
- d. The child's age or level of development suggests that he or she does not possess a sufficient level of maturity;
- e. The court has balanced the expected benefits of the interview against the risk that the child may be adversely affected and is satisfied, on balance, that conducting the interview would be inappropriate;
- f. One or both parties do not consent to a judicial interview of the child taking place;
- g. There is evidence before the court that the child does not wish to be interviewed by a judge.

C. ADAPTING COURT PROCESSES FOR CHILDREN

Section 199 of the *Family Law Act* says this about what the court must consider when dealing with any proceedings affecting children:

Conduct of proceeding

199 (1) A court must ensure that a proceeding under this Act is conducted

- (a) with as little delay and formality as possible, and
- (b) in a manner that strives to
 - (i) minimize conflict between, and if appropriate, promote cooperation by, the parties, and
 - (ii) protect children and parties from family violence.

(2) If a child may be affected by a proceeding under this Act, a court must

- (a) consider the impact of the proceeding on the child, and
- (b) encourage the parties to focus on the best interests of the child, including minimizing the effect on the child of conflict between the parties.

For the Supreme Court, *Supreme Court Family Rule* 1-3 says much the same thing:

Rule 1-3 — Object of Rules

Object

- (1) The object of these Supreme Court Family Rules is to
 - (a) help parties resolve the legal issues in a family law case fairly and in a way that will
 - (i) take into account the impact that the conduct of the family law case may have on a child, and
 - (ii) minimize conflict and promote cooperation between the parties, and
 - (b) secure the just, speedy and inexpensive determination of every family law case on its merits.

Proportionality

- (2) Securing the just, speedy and inexpensive determination of a family law case on its merits includes, so far as is practicable, conducting the family law case in ways that are proportionate to
 - (a) the interests of any child affected,
 - (b) the importance of the issues in dispute, and
 - (c) the complexity of the family law case.

Neither of the Provincial Court rules, CFCSA or Family, has such a provision, but the *Child, Family and Community Services Act* does.

Guiding principles

2 This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:

- (a) children are entitled to be protected from abuse, neglect and harm or threat of harm;
- (b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;
- (c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;
- (d) the child's views should be taken into account when decisions relating to a child are made;
- (e) kinship ties and a child's attachment to the extended family should be preserved if possible;
- (f) the cultural identity of aboriginal children should be preserved;
- (g) decisions relating to children should be made and implemented in a timely manner.

Hearings civil in nature and may be informal

66 (1) A hearing under this Act

- (a) is civil in nature,
- (b) may be as informal as a judge may allow, and
- (c) must be held at a different time or at a different place from the usual time or place for sittings of the court relating to criminal matters.

(2) No order under this Act may be set aside because of any informality at the hearing or for any other technical reason not affecting the merits of the case.

So, both the FLA and the CFCSA refer to less formal proceedings. This makes me wonder whether the Australian Children's Court model or, as I have sometimes heard it described, judicial med-arb would not be more appropriate for some hearings or case conferences. I have participated in this model several times myself, for both interim and final orders. In one case, the issue was actually mobility, and the "hearing" lasted about a day and a half, spread over several days.

In all cases, the witnesses were sworn, the proceedings was conducted like a case conference, but all parties agreed at the outset that if the parties could not agree, or agree on all points, the court would make the decision based on what had been said. Some consisted of the parties alone. Some like the mobility case involved several family members and friends, on both sides. In a few, a central focus was on the child, and the child was interviewed by the judge as part of the proceeding. In the mobility case, we had a views of the child report.

In only a few cases, the parties ended up agreeing on all or substantially all points. In most instances, the judge had to decide some or all of the issues. But I do not consider that a failure. In fact, in all cases, the hearing took less time than a traditional hearing would - and yet I believe the same evidence was adduced. Indeed, I think the parties and the witnesses may have felt more heard than in a traditional proceeding, since they were encouraged more to say what they wanted, rather than having to be led by lawyer's questions.

I do not recommend this procedure where there are crucial or complicated questions of fact to be adjudicated, but for most interim applications and in all applications where the attitudes of the parties are the primary driver (eg joint versus sole custody; allocation of parenting responsibilities; or scheduling children for activities; whose responsibility it is to take them "my time or the child's time"), I would encourage its use.

All of the statutory provisions refer to speedy or timely resolution. I prefer "timely" myself, because especially in FLA or *Divorce Act* proceedings speed can sometimes be more destructive than letting things take their own, appropriate time. No one practices family law for long without realizing that the grief cycle plays a huge role in the resolution – or escalation – of disputes. For some clients, a family breakup is the culmination of a long inevitable slide in the relationship. It is almost a relief when it comes. For others, the breakup is like a thunderbolt. They are shocked, angry, confused, fearful. They are not in the least prepared to deal with what has happened, yet alone to dispassionately negotiate the fallout and plan for the future.

Clients are best able to instruct counsel and negotiate a settlement of their dispute when they have fully processed the breakup and are prepared to move on. Clients who are still in the grip of anger, denial, bargaining or depression need time more than anything else. For those folks, forcing them on to trial usually only increases conflict rather than settling it. They need an interim stability, to be sure, but while they are still seeking emotional balance and acceptance it is best to reduce their horizon to immediate issues – interim support and parenting arrangements.

In child protection matters it seems settled wisdom that young children require swift justice, especially if continuing custody is being pursued. If adoption is likely, better it be done quickly. But particularly where an open adoption is being considered, or where children have extensive family connections or supports, or where aboriginal children have the support of their band or community, I see more harm in rushing things than in giving parents time – even considerable time. Ardith Walkem, Louise Mandell and Hailie Bruce have been presenting their program around the province for aboriginal child protection, *Wrapping Our Ways Around Them*. Such programs avoid the need for adopting out. The Truth and Reconciliation Commission report emphasizes how change or recovery requires its own time. I believe, so long as children are safe, it can be the best thing for everyone to allow that time rather than dogmatically to insist that justice be swift.

In the meantime, and I have said it many times before, there is huge potential in the conduct orders section of the new FLA. It can help reeducate parents (counseling and programs, s224). Parenting After Separation is a great start, but hopefully each community will have additional resources the court can tap into.

Conduct orders can require parties to step out of court for a time and try mediation or other forms of family dispute resolution (s224(a)).

Conduct orders can also “manage behaviours that might frustrate the resolution of a family law dispute” (s222(b)). Section 227(c) allows the court to order a party to literally “do or not do **anything**” [emphasis added] that would serve this or any other purpose in section 222. So, the tools are definitely there. All we need now are some bold and creative thinkers in the Bench or Bar to come up with ideas that will promote appropriate outcomes for children.

And finally, conduct orders and section 199 lend themselves to interim “arrangements pending final resolution of a family law dispute” (s222(d)). Sections 216 and 217 have even been modified to allow for more flexible tinkering of interim orders, at the interim stage, rather than

forcing litigants on to trial as had been the previous bias.¹⁷ As the commentator for the Transition Guide wrote, “This may signal an approach more at adjusting the status quo to alleviate difficulties that may be impeding dispute resolution, rather than moving the parties more quickly toward expecting the more definitive result of a trial.” (p3-287)

D. CHILDREN’S RIGHTS (EXPRESSED AS SUCH)

1. UN Convention

The UNCRC explicitly enumerates a number of children’s rights. UNICEF summarizes them all here http://www.unicef.org/crc/files/Rights_overview.pdf . For our purposes, I will highlight what I consider are the main ones affecting family law:

- (a) to be protected against discrimination (articles 2, 15 and 16);
- (b) to have the benefit of parental and extended family guidance (articles 5, 7, 10, and 18);
- (c) to live with their parents, unless it is bad for them (article 9);
- (d) if they are able and wish to do so, to express their views to anyone making a decision affecting them, and to have those views considered by the person or body making such decisions (article 12);
- (e) to obtain and share information, so long as it is not harmful to them (articles 13 and 17); and
- (f) to privacy (article 16).

2. Child, Family and Community Services Act

The CFCSA outlines the rights of children in care in section 70.

Rights of children in care

70 (1) Children in care have the following rights:

- (a) to be fed, clothed and nurtured according to community standards and to be given the same quality of care as other children in the placement;
- (b) to be informed about their plans of care;

¹⁷ *Hama v Werbes* (1999) 66 BCLR (3d) 120 and (1999) 2 RFL (5th) 203 (BCSC); and *Newson v Newson* (1998) 65 BCLR (3d) 22 (BCCA). The courts haven’t yet decided whether ss199, 216 and 222 have changed this approach under the FLA – though there is growing awareness that it may (*LC v. RK*, 2015 BCSC 303, at para 15). But so far at least it seems the approach under the *Divorce Act* will remain that interim variation of interim orders will be rare: *Janmohamed v. Janmohamed*, 2014 BCSC 107

- (c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them;
 - (d) to reasonable privacy and to possession of their personal belongings;
 - (e) to be free from corporal punishment;
 - (f) to be informed of the standard of behaviour expected by their caregivers or prospective adoptive parents and of the consequences of not meeting the expectations of their caregivers or prospective adoptive parents, as applicable;
 - (g) to receive medical and dental care when required;
 - (h) to participate in social and recreational activities if available and appropriate and according to their abilities and interests;
 - (i) to receive the religious instruction and to participate in the religious activities of their choice;
 - (j) to receive guidance and encouragement to maintain their cultural heritage;
 - (k) to be provided with an interpreter if language or disability is a barrier to consulting with them on decisions affecting their custody or care;
 - (l) to privacy during discussions with members of their families, subject to subsection (2);
 - (m) to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the Representative for Children and Youth Act, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament;
 - (n) to be informed about and to be assisted in contacting the representative under the Representative for Children and Youth Act, or the Ombudsperson;
 - (o) to be informed of their rights, and the procedures available for enforcing their rights, under
 - (i) this Act, or
 - (ii) the Freedom of Information and Protection of Privacy Act.
- (2) A child who is removed under Part 3 is entitled to exercise the right in subsection (1) (l), subject to any court order made after the court has had an opportunity to consider the question of access to the child.
- (3) This section, except with respect to the Representative for Children and Youth as set out in subsection (1) (m) and (n), does not apply to a child who is in a place of confinement.

3. Family Law Act

Neither the FLA nor the *Adoption Act* or *Law and Equity Act* provide explicitly for children’s rights.

4. Who informs children about their rights, or ensures they are protected?

In the case of children in care, it is the director’s responsibility, with the assistance of the Representative of Children and Youth. In the case of children generally, it is their parents.

Lawyers for parents do not have this responsibility¹⁸, though they must caution their clients that parents have a fiduciary duty to their children (and that they will be judged by the court in

¹⁸ In fact, in *CLM v DJM* 2010 BCSC 657, the court said, “Lawyers acting on behalf of parents do not, of course, owe a duty to represent the children’s interests.” (para 3) It was the “of course” that struck me.

how they discharge this duty). The Law Society of BC and the Canadian Bar Association, BC Branch, approved best practice guidelines for lawyers practicing family law, which can be accessed here: https://www.lawsociety.bc.ca/docs/practice/resources/guidelines_family.pdf Article 8 (which repeats the principles in the previous sentence) has only been reinforced by sections 37 and 43, which require parents to assess and act only in the best interests of their children.¹⁹

Ultimately, though, the buck stops with the court and with government.

D. WHAT A CHILD-FOCUSED APPROACH CAN DO TO HELP YOU IN YOUR PRACTICE

1. Getting parents to focus on children – child rights or needs instead of parents’ rights – leads to better cooperation and earlier and better results.

There is a growing body of evidence that when parents are encouraged to focus on their children, they can more easily put aside their personal issues and work cooperatively with the other parent. Australia has reported this phenomenon with their reforms from about 2005. Mediators and collaborative practitioners have reported that having children express their views in the process minimizes conflict and promotes cooperation. The Family Justice Centres are now routinely involving children over 8 in mediations, with parental consent, and are reporting positive results. The Ministry of Children and Family Development is currently considering how to expand child involvement in child protection mediations, as a core principle.

In March 2015, the Voice of the Child Dispute Resolution Advisory Group in the UK released their final report.²⁰ It “endorses the principle of child inclusive practice and recommends the adoption of a non-legal presumption that all children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during dispute resolution processes, including mediation, if they wish.” It cites strong evidence for the proposition that child-inclusive practice lowers conflict and improves outcomes, for both parents and children.

2. This works in court (JCC, FCC, and some hearings) as well as out (negotiations or mediation).

¹⁹ The Justice Review Task Force recommended in 2005 that the Law Society investigate whether lawyers should have a separate duty of care toward children. At least so far, they have concluded that lawyers should not. The best practice guidelines were considered sufficient. (I don’t wish to suggest that I disagree with this conclusion. In fact, I support it whole-heartedly. In my view a lawyer who has a duty to two “clients”, paid or unpaid, cannot effectively act for either.)

²⁰ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421005/voice-of-the-child-advisory-group-report.pdf

I am a strong proponent for getting children's views and getting them early (before parents start to convince themselves they know what they are). The FJC mediation model allows for this, though parental consent is required. We should encourage our clients to give that consent. As for the opposing party, well, they should know that a views of the child report will probably be required if they go to court, so agreeing to it in this context can only be helpful.

Some judges are comfortable interviewing children as part of case conferencing, either on the day or a few days before. Private reports through the BC Hear the Child Society or other resources can be affordable, and are often very quickly done.

3. Reframing works for hearings as well as mediation.

A study on resilience in post-separation co-parenting concluded that "parents who reported focusing on their children" rather than their own anger or inter-parental issues fared far better.²¹ The interviewers found they could actually contribute to this result in the way they framed their interview questions. Mediators are taught reframing techniques for re-focusing parties on outcomes rather than on causes – looking forward not back.

We all have some version of the question, "What are your spouse's good qualities as a parent?" The answer is an opportunity to show insight – or the reverse. So, whether you are using the question to nudge parties toward a fresh view, or to reveal their lack of insight, in either case reframing can be quite effective.

4. In court, it is as much what you talk about as what you say.

If you're always talking about your spouse and his/her shortcomings, it is harder to convince the court your real concern is for the kids. Instead, talk about the kids.

5. You can get away with more framing it as serving the child's rights or best interests than you could if the only considerations were between the adults.

Retroactive child support is easier to get than retro spousal support. Even a "bad" spouse has a right to access, because it is really the child's right not that of the parent.

6. If no one else is advising children of their rights, perhaps you can.

²¹ Jamison, T.B., Coleman, M., Ganong, L.H. and Feistman, R.E., 2014. Transitioning to post divorce family life: A grounded theory investigation of resilience in coparenting. *Family Relations*, 63(3), pp.411-423.

This is really tricky, because involving children unnecessarily in court cases is indeed a potential harm to them. But if they do have a view and it is not being heard, perhaps it may help your cause to support their involvement.

In child protection cases, often you can ensure children over 12 are being advised of their rights by speaking with the supervisors of the local MCFD office, or to the Representative's office. Some social workers support the idea; some regard it as their job and can be quite resistant to the idea of anyone else speaking with their charges. It is certainly not a good idea to suggest your clients raise it with their kids during access visits. That can often be taken as interference, or worse.

At a presentation of the Youth Advisory Board of the Vancouver Aboriginal Child & Family Services Society at last year's *Access to Justice for Children Conference*, the children were clear that they would have wanted to be advised of their rights much earlier than they were – or at all, in some cases.

E. WHAT CAN WE DO TO ENHANCE CHILDREN'S RIGHTS AND PARTICIPATION MOVING FORWARD?

1. Teach them in school

Rick Craig of the Justice Education Society would be the better person to talk about this, but I envision having a module in school, even for children as young as age eight, to discuss the options available to children in family proceedings affecting them. Ideally, it might include a child interviewer and judge to speak to children about their roles and experiences involving children.

2. Promote the use of child-friendly materials

I confess I have been aware these materials are available, but I have not been as familiar with them as I should be, nor have I been sufficiently promoting their use for my clients or their children. The Justice Education Society, the Legal Services Society and Justice Canada all have very useful child-centered information on their websites.

<http://www.familieschange.ca/>

http://www.familylaw.lss.bc.ca/legal_issues/youth.php

<http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/book-livre/index.html>

For folks who do not have access to computers at home, public libraries often have workstations, as to the various branches of BC Courthouse Libraries.

- 3. Make sure the checklists for case conferences and pre-trial conferences include whether and how children's voices will be heard**

It might even be a good idea to include reference to these questions in pleadings.

- 4. Expand Family Justice Centre views of the child reports and assessments to CFCSA proceedings**
- 5. Allow staff from the Representative for Children and Youth to present views of the child reports**
- 6. Train duty counsel to interview children and provide reports to the court, verbally if not in writing**
- 7. Expand the roster of children's lawyers for advice as well as representation**

This means obtaining criminal records checks and providing or insisting on training in child development and communication.

- 8. Promote dialogue between justice services and mental health professions, to increase the availability and effectiveness of expert reports and assessments, and to promote studies of general benefit to family justice purposes**
- 9. Explore protocols or best practices for involving children in mediation and in case conferences**

MCFD is exploring and expanding children's participating in CFCSA mediations, and the Family Justice Centres have been involving children 8 years of age and older in their mediations for some time now, with the consent of both parents. We can all learn from their experience, including for case conferences.

- 10. Create and promote a help line for children, to offer advice about their rights in court**