



RESEARCH REPORT

**The Voice of the Child in
Separation/Divorce Mediation and Other
Alternative Dispute Resolution Processes:
A Literature Review**

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The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review

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EXECUTIVE SUMMARY

When parents separate or divorce, decisions have to be made that will have significant impacts on their children. Finding ways to include children's participation in those decisions is often referred to as promoting "the voice of the child".

Promoting children's participation in decision-making in the context of family law is a relatively recent development. Historically, children were not included in decision-making based on the belief that they lacked the capacity to participate in family law matters and were in need of protection. A more recent viewpoint is that not listening to children may cause more harm than good.

The continuing high numbers of children experiencing parental separation and divorce have generated an interest in helping children voice their needs and wishes. Increasingly, children are understood as being rights-bearing individuals. Children's participation in the separation and/or divorce process has also been enshrined since Canada ratified the *United Nations Convention of the Rights of the Child* in 1991. Yet certain tensions remain with respect to allowing children to participate in separation and divorce-related matters. These tensions are created by attempts to balance the vulnerability of children and their need for protection given their age and development level, on the one hand, with their rights as individuals on the other. There is also debate about *how* the goal of including children ought to be achieved—in what circumstances and in what ways children should be included.

As part of a broader discussion designed to address the participation of children in the separation and/or divorce process, the purpose of this review is to focus on a relatively new and controversial aspect of the family justice system, namely *child-inclusive separation, divorce and custody mediation and other child-inclusive separation, divorce and custody alternative dispute resolution approaches*. Specifically, the focus is on exploring initiatives that help give children a voice in the decisions made about post-separation family arrangements, as opposed to therapeutic or educational programs that help children adjust socially, emotionally or psychologically to the separation process and/or subsequent family arrangements.

The paper is organized into five main sections. Section One of this review situates the historical and philosophical debate on why children have not been included in this discussion to date and explores the legal framework that underlies children's participation. In this section, the theoretical framework that guides the review is presented through the lens of empowerment and/or enhancement theory, which is premised on an understanding that children and youths have strengths and expertise that should be acknowledged and capitalized on to their benefit.

Section Two provides an overview of the literature regarding the different views on children's participation during parental separation, divorce, child custody mediation and other alternative dispute resolution processes. Specifically, this section focuses on the legal and social science literature that addresses those who say children *should be* included and *why* as well as those who say children *should not* be included and *why*. Of those who say children should be included, some cite a number of rights-based and interest-based reasons for doing so. Others cite the social science and research literature which demonstrates that children's participation during times of parental separation correlates positively with their ability to adapt to a new reconfigured family and with their ability to regain mastery and control over their lives during a confusing and difficult time. Research in Australia and New Zealand specifically supports these views and further demonstrates that children fare better when they are included in the decision-making process during times of parental separation and/or divorce.

There are also those who say that children should not be included, and provide equally compelling arguments about excluding children from the decision-making process. For example, children may experience divided loyalties, suffer from anxiety and confusion as they may feel overburdened by offering their opinions. In addition, once a child is asked to express his/her views, s/he may believe that his/her views will be recognized and then become disappointed when it is discovered that those views were not listened to.

Section Two concludes with some useful tips on when to include and exclude children in the mediation process are explored. For example, if children are included, they should be consulted if they request an interview and if they have expressed a consistent preference for a particular time-sharing arrangement that differs from their parents' preferences. However, children should not be included if parents can agree on what is in their child's best interest or when children might be put in the middle between two parents.

Section Three provides an overview of the different ways children's voices are being heard, a description and definition of existing services and programs, as well as a summary of the benefits and limitations of the various approaches used in Canada, the United States, and internationally. Across the globe, different methodologies are employed, for example, child reports, mediation, child-inclusive mediation, child legal representation, child custody and access assessments, the use of a child specialist in collaborative family practice, and other alternative dispute resolution processes. The more investigative approaches (i.e., child custody and access assessments, child legal representation and judicial interviews) provide for less participation and the child's voice is filtered through the adult lens of what is in the child's best interest. Child custody mediation and the use of a child specialist in collaborative family practice provide for more participation by children except that the decision whether to include them, and when, is made by the adults first.

Child-inclusive mediation, on the other hand, provides for more autonomy and direct input into the decision-making process. What becomes evident from the discussion of the various services available around the globe is the variability and lack of consistency and level of financial support in the provision of services directed specifically at children.

Section Four provides an overview of the ongoing issues, challenges and lessons learned about children's participation in separation, divorce and custody mediation and alternative dispute resolution processes. This section further explores the existing services outlined in Section Three through an analysis of interviews conducted with selected key informants who practice in the field, conduct research, and advise policy discussion on children's participation post-separation and/or divorce. Section Four further highlights the variability that exists in terms of how services are provided for children's participation around the globe, as well as the limited research support and policy analysis that accompanies such services.

Some of the challenges and lessons learned from the key informant interviews about children's participation include the need to address: (1) the age/gender of the child; (2) the cognitive ability and emotional development of the child; (3) children's safety; (4) limits of confidentiality and consent; (5) the training and education of different professionals in interviewing children; (6) culture, language and other barriers that may impede children's participation; and (7) ongoing research and evaluation of any approach that is to be undertaken with and on behalf of children.

Section Five provides an overview of the future directions and unanswered questions that flow from child-inclusive mediation and other alternative dispute resolution processes. Children's participation continues to remain controversial as it is emotionally laden. The social science literature provides equally compelling arguments both pro and con regarding this debate. While there are many excellent programs and services around the globe, many unanswered questions remain. For example, what do we really know about the efficacy and effectiveness of child legal representation, child custody and access assessments, voice of the child reports, child-inclusive mediation, or any other alternative dispute resolution process? Should children's views be ascertained at all given the potential adverse effects on children in families with different levels of conflict, or where domestic violence or child maltreatment (i.e., physical, emotional, sexual, and verbal abuse) may be of concern? And, of the services currently being provided, how do we ascertain whose needs are really being met—those of adults, the courts, or the child?

If children's participation is to be explored more fully in the future, then a number of important issues from a theoretical, practice, research and policy point of view must also be considered.

These include: (1) the need to provide a clear theoretical and conceptual framework that links the best practice approaches to child-inclusive mediation and other alternative dispute resolution processes; (2) the need for a coordinated research agenda that targets both the risk and resiliency of children during separation and/or divorce, incorporates children's participation throughout the research process, and strengthens parent-child relationships post separation; and, (3) the need for an ongoing discussion and dialogue between and amongst practitioners, researchers, children and their parents, as well as policy-makers if children's participation is to be meaningful at all.

1.0 INTRODUCTION

When parents separate or divorce, decisions have to be made that will have significant impacts on their children. Finding ways to include children's participation in those decisions is often referred to as promoting "the voice of the child".

Promoting children's participation in decision-making in the context of family law is a relatively recent development. Historically, children were viewed as objects of concern, lacking the capacity to participate in family law matters and in need of protection from parental conflict (Graham and Fitzgerald, 2005; Morrow and Richards, 1996; Roche, 1999; Taylor, Smith and Tapp, 1999) or from being put in the middle of their parents' disputes (Emery, 2003; Warshak, 2003). It was assumed that, if children could be insulated from post-separation decision-making, they would be sheltered from the turmoil of their parents' relationship breakdown (Smart, 2002). A related assumption was that parents know what is in their child's best interests (O'Quigley, 2000; Timms, 2003), and, hence, that children's views are adequately represented by adults.

The continuing high numbers of children experiencing parental separation and divorce have generated an interest in helping children voice their needs and wishes. As the importance of children's right to be heard and for their wishes and feelings to be considered have gained prominence in child theory (Aries, 1962; Campbell, 2004; James, Jenks and Prout, 1998; Kaganas and Diduck, 2004; Lansdown, 2005; Prout and James, 1990; Smart, Neale and Wade, 2001), as well as in the social science literature and research regarding children's involvement during times of family breakdown more specifically, perspectives on including children in decisions around their parents' separation and divorce have been shifting (Kelly, 2002, 2003a, 2003b; McIntosh, 2000; Morrow, 1998; Neal, 2002; O'Quigley, 2000; Pike and Murphy, 2006; Smart, 2002, 2004; Smart and Neale, 2000; Smith, Taylor and Tapp, 2003; Strategic Partners, 1998; Tisdale, Baker, Marshall and Cleland, 2002; Schoffer, 2005; Thomas and O'Kane, 1998; Wade and Smart, 2002; Williams, 2006; Williams and Helland, 2007).

Increasingly, children are understood as being rights-bearing individuals, rather than objects of concern or subjects of a decision (Eekelaar, 1992; Lansdown, 2001). Moreover, the social science literature and research have increasingly demonstrated that not listening to children may cause more harm than good (Kelly, 2002; Lansdown, 2001; Pryor and Rogers, 2001; Smith, Gollop and Taylor, 2000), and that meaningful participation of young people in child custody and access disputes can protect them during a time when family breakdown puts them at risk (Amato, 2001; Butler, Scanlon, Robinson, Douglas and Murch, 2002; Cashmore, 2003).

Children's participation in the separation and/or divorce process has also been enshrined since Canada ratified the *United Nations Convention on the Rights of the Child* in 1991. The Convention has been a significant underlying factor in the growing concern for, and commitment

to, allowing children more say in the legal decisions that affect their lives. Article 12 of the *Convention* states that:

1. States 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 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.¹

Article 3 requires states to act in the best interests of children:

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.²

In 1998, several years after Canada ratified the *Convention*, the Special Joint Committee on Child Custody and Access recommended that children in Canada have the opportunity to, “be heard when parenting decisions affecting them are being made” and to, “express their views about the separation or divorce to skilled professionals whose duty it would be to make those views known to any judge, assessor, or mediator making or facilitating a shared parenting determination”.³

These shifts in thinking have all been occurring within the context of a broader global movement towards fostering children and youth’s participation in both political and personal issues. Increasingly, young people are themselves expressing that they want to share their “voice” in the legal processes that fundamentally affect their lives and in post-separation arrangements (Cashmore and Parkinson, 2008; Freeman, 1997; O’Quigley, 2000; Raitt, 2007; Smart and Neale, 2000; Parkinson and Cashmore, 2007; Parkinson, Cashmore and Single, 2006). The existing research on children’s desire to be included suggests that they want to be kept informed, and want their needs and interests heard. Adolescents, in particular, are much more likely to want to be present when major decisions affecting them are made, and to want to express explicit preferences about these decisions (Neale, 2002; O’Connor, 2004).

¹ For a complete listing of the Articles on the *Convention on the Rights of the Child*, the website can be accessed online at: <http://www.cirp.org/library/ethics/UN-convention/>.

² *Ibid*

³ Parliament of Canada, *For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access* (December, 1998), available online at: <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?COM=147&Lang=1&SourceId=36230>.

Thomas and O’Kane (1998) assert that there are now clear demands in public policy to give children a voice in the decisions which affect their lives. Smart, Wade and Neale (1999) argue that children have much to provide to the discussion about divorce and family change such as what it is like, how to cope and what it means to them. The authors suggest that rather than excluding children, “we may have a lot to learn about divorce from children if we suspend the presumption that they are damaged goods in need of protection” (1999: p. 366).

Yet certain tensions remain with respect to allowing children to participate in separation and/or divorce-related matters. These tensions are created by attempts to balance the vulnerability of children, given their age and development level, with their rights as individuals. There is also debate about *how* the goal of including children ought to be achieved—in what circumstances and in what ways children should be included. There are various perspectives on this matter. Several different mechanisms for encouraging the voice of the child are currently used in Canada, such as views of the child reports, custody and access assessments, child legal representation, parenting coordination, and the use of child specialist coordinators. Various models are also employed internationally.

The available literature on voice of the child approaches has, however, tended to focus mainly on approaches occurring under the auspices of litigation. Although most post-separation decisions are made outside of courtrooms, comparatively little has been written about approaches to integrating children’s voices into all other aspects of the family justice system—how or whether children are involved at the front end of the family justice system, at the stages of informal discussions or negotiations within the family, or early consensual dispute resolution.

There is particularly a dearth of published research with respect to children’s involvement in mediation following parental separation or divorce (Mantle, 2001b; Saposnek, 2004). *Mediation*, or assisted negotiation, is an alternative dispute resolution process for working out disagreements with the assistance of a trained, impartial and neutral third party. Recent research has produced little systematic information about *how* children are currently being included in mediation or other alternative dispute resolution processes, the outcomes of child-inclusive mediation and alternative dispute resolution processes for parents, children and the broader family justice system, or any lessons learned based on the work that has been done to date.

1.1 OBJECTIVES

As part of a broader discussion designed to address the participation of children in separation and/or divorce processes, this review focuses on a relatively new and controversial aspect of the family justice system, namely *child-inclusive separation, divorce and custody mediation and other child-inclusive separation, divorce and custody alternative dispute resolution approaches*. Specifically, the focus is on exploring initiatives that help give children a voice in the decisions

made about post-separation family arrangements, as opposed to therapeutic or educational programs that help children adjust socially, emotionally or psychologically to the separation process and/or subsequent family arrangements. The scope of this review excludes young people's involvement in child protection mediation and will instead be limited to child-inclusive mediation and other child-inclusive ADR processes used in the context of separation and/or divorce.

The purpose of this review is two-fold. First, this paper provides a discussion of the issues raised by the participation of children in separation, divorce and custody mediation and other alternative dispute resolution processes (hereafter referred to as ADR). This includes an overview of different theoretical views and lessons learned about including children in these processes. It also identifies unanswered research questions that warrant further exploration.

Second, this paper provides a discussion of the different methodologies that are being employed—both nationally and internationally—to give children a voice in the context of separation, divorce and custody mediation and other ADR processes.

1.2 METHODOLOGY

A review of the literature consisted of searches in scholarly periodical university indexes including, but not limited to: (1) PsychInfo; (2) PsychArticles; (3) Medline; (4) Social Work Abstracts; (5) Sociological Abstracts; (6) Social Science Citation Index; and (7) ERIC. Searches for secondary articles related to the voice of the child, children's wishes, and separation and/or divorce were also performed in legal search engines including, but not limited to:

(1) WestlawCarswell; (2) Hein Online; (3) LexisNexis; (4) Quicklaw; (5) InfoTrac; and (6) LegalTrac. Searches for fugitive articles such as unpublished manuscripts, conference proceedings, topical bibliographies, and curricula vitae lists were also completed using the Internet search engines: (1) Google.com; (2) Google.Scholar; (3) Yahoo.ca; and (4) Altavista. All electronic searches included, but were not limited to, the following search terms in various combinations: children's ages and stages; children's rights; children's wishes; the voice of the child; children's voices in separation and divorce; child-inclusive mediation; alternative dispute resolution; child custody assessments; child legal representation; child custody; child access; child participation; child specialist; family court processes; judicial interviews; child development; development; divorce; separation; custody and access; child support programs; parenting coordination; and children's resources.

In order to gain a more fulsome picture of the issues raised by including children in separation and divorce-related mediation and ADR, and in order to learn more about the various approaches to doing so, both in Canada and internationally, selected family justice practitioners (e.g., family mediators, child specialists involved in collaborative family law practice and collaborative

family lawyers) were contacted by telephone and interviewed about the methodologies presently being used to incorporate the voice of the child. Selected senior administrators from court-connected facilities and policy advisors in the justice system were also contacted by telephone in order to gain a greater awareness of the strengths and limitations of incorporating the voice of the child into mediation and other ADR processes. Finally, selected key informant interviews were conducted with individuals who provide legal representation to children before the court in separation and divorce related matters from Alberta, Ontario's Office of the Children's Lawyer, and Quebec⁴. All interviews incorporated standardized questions⁵ tailored to each type of stakeholder group in seeking information about the various methods presently employed. Specific attention was given to identifying those methods that were the most and least successful in achieving objectives. Attention was also paid to understanding what is required to incorporate the voice of the child in mediation and other ADR processes.

1.3 STRUCTURE OF THE PAPER

The paper is organized into five main sections. Following this introductory section, Section Two examines the social science literature and presents the different theoretical views that exist with respect to the participation of children in separation, divorce and child custody mediation, and other ADR processes. Attention is equally focused on explaining the research methodologies that are currently employed with respect to children's participation in child custody mediation.

Section Three provides an overview of the child-inclusive mediation approaches and other ADR processes that are currently being employed across Canada, the United States, and internationally. It provides a definition of child-inclusive mediation and other ADR processes that involve children in the context of separation, divorce, and custody. Benefits and limitations of the different approaches are also explored.

Section Four provides a discussion of ongoing issues, challenges and lessons learned about children's participation in separation, divorce and custody mediation and ADR, based on interviews with selected mental health and legal practitioners, researchers, and policy experts. The views of these key informants, who carry out the front-line work, research, and explore policy options on behalf of children and youths, are included in order to augment the social science and research literature and to allow for a more comprehensive understanding of the issues at hand.

⁴ All of the participants were chosen because of their years of experience in practice, research, and policy matters relating to separation and/or divorce, which helped to provide a rich and comprehensive understanding of the strengths and limitations of incorporating the views of the child.

⁵ See Appendix A. Adherence to the standardized questions was the goal, in order to provide consistency in the approach and analysis of themes among each different participant. However, many participants provided other important practice and research insights that added depth and clarity to the interview.

Section Five focuses on the future directions that flow from child-inclusive mediation and other ADR processes. Unanswered research questions regarding the participation of children in the separation and/or divorce process are also explored in this section.

1.4 LIMITATIONS

There are several important limitations to the information presented in this review that should be acknowledged. First, it was not the intention of this literature review to provide a complete listing of all the practice initiatives related to child-inclusive mediation and other ADR processes across Canada and internationally. Rather, this literature review is solely intended to provide a point of discussion of the issues raised by child-inclusive mediation and other ADR processes in family law proceedings related to separation and divorce. The review excludes discussion of young people's involvement in child protection mediation.⁶

Second, the key informant interviews were limited and selectively chosen from expert practitioners in law and mental health, research, and policy in Canada and internationally who have demonstrated practice and research expertise in children's participation with child-inclusive mediation and other ADR processes.⁷ Therefore, the information obtained is not representative of all the professionals in this specialized area of family law.

The interviews were particularly important as a means of gathering additional information given that, other than the empirical research in Australia and qualitative research in New Zealand on including children in mediation, there remains a paucity of research literature in this area beyond anecdotal information. There are a number of excellent reviews and summaries that provide information about different child-inclusive mediation and ADR processes as well as on children's resources and programs that focus on separation and/or divorce (Ministry of Attorney General, British Columbia, 2007; O'Connor, 2004; Williams and Helland, 2007). However, there is no comprehensive review that integrates both the empirical research and social science literature with the practice experience of mental health clinicians, law and policy experts.

Third, unlike other research projects which outline a rigorous methodology and design regarding the analysis of telephone interviews with key informants (i.e., audio-taped and thematic analysis by different qualitative computer-generated programs), a less formal structured telephone

⁶ Child protection legislation is not an area that falls within the purview of the federal government. Each province has its own child welfare legislation to integrate the different forms of including the voice of the child into child protection proceedings (e.g., child legal representation, child protection mediation). However, Constitutional responsibility for family law matters in Canada is divided between federal and provincial/territorial governments. Therefore, the focus of this review was to examine custody and access matters as they relate to federal law.

⁷ The author acknowledges that there are many more experts around the globe who carry out this work on behalf of children. However, due to time constraints and, in consultation with the Department of Justice Canada, the individuals selected were based on their years of practice, research and policy expertise in the field.

interview was conducted with the participants involved in this report. However, themes are distilled from the different key informants that highlight practice, research, and policy planning options.

Finally, due to time constraints and issues of consent and confidentiality, young people were not interviewed about their experiences and participation in mediation and other ADR processes.

1.5 THEORETICAL FRAMEWORK

From a theoretical view, the social science and research literature is presented in this review through the lens of empowerment and/or enhancement theory, which is premised on an understanding that children and youths have strengths and expertise that should be acknowledged and capitalized on to their benefit. Moreover, this framework is based on the belief that children and youths can change their circumstances, and that they can become more effective ‘social actors’ provided that they are kept informed and are allowed to participate in the family law decisions that affect them (Biddulph, Biddulph and Biddulph, 2003; Birnbaum, 2007).

2.0 REVIEW OF THE LITERATURE REGARDING THE DIFFERENT VIEWS OF CHILDREN’S PARTICIPATION DURING PARENTAL SEPARATION, DIVORCE, CHILD CUSTODY MEDIATION AND OTHER ADR PROCESSES

This Section explores the debate from a legal, social science and research perspective between those who argue in favour of the inclusion of children the decision-making process during times of separation and/or divorce, and those who argue against it. Neale (2002) asserts that, “underlying these arguments is a subterranean debate about which group of adults (mothers, fathers, legal, welfare or therapeutic professionals) are best equipped to take charge of children’s welfare needs, a debate from which children themselves have been largely excluded”.⁸

2.1 THOSE WHO SAY THAT *WE SHOULD INCLUDE CHILDREN AND WHY*

Those who are in favour of listening to children during times of parental separation and/or divorce cite a number of rights-based and interest-based reasons for doing so. First and foremost, children have a legal right to be heard and listened to according to the *United Nations Convention on the Rights of the Child*.⁹ Children’s rights theorists see children not as property, but as persons who can and should be participants in the decision-making processes that affect their lives (Atwood, 2003; Brennan, 2002; Elrod, 2007; Lansdown, 2001, 2005; Woodhouse, 2000). The *Convention* on children’s rights implicitly incorporates a recognition that children should not only be respected and heard, but also ensures that children have access to the civil, economic, political, and social rights that are accorded to everyone.

Second, those who are in favour of including children report that children generally want to be active participants in the decisions that affect their lives post-separation and/or divorce (Cashmore and Parkinson, 2007; 2008; O’Quigley, 2000; Parkinson and Cashmore, 2007; Parkinson, Cashmore and Single, 2006; Neale, 2002; Smith and Gollop, 2001). However, this does not mean that they wish to make the decisions or take sides with either of their parents. Children understand the difference between providing input into the decision-making process and making the final decision (Kelly, 2002; Morrow, 1999; O’Quigley, 2000; Neale and Smart, 2001).¹⁰

⁸ Neale, B. (2002). Dialogues with children: Children, divorce and citizenship. *Childhood*, p. 469.

⁹ *Supra* note 2.

¹⁰ The reader is also encouraged to review Richard Chisholm’s paper, Children’s participation in family court litigation, presented at the International Society of Family Law, World Conference, Brisbane, Australia, July, 9-13, 2000 regarding the debate for and against children’s participation in family law. It can be accessed online at: <http://www.familylawwebguide.com.au/library/spca/docs/Childrens%20participation%20in%20family%20court.pdf>

More importantly, children want to be kept informed, want access to information about the separation and/or divorce process and want their needs and interests heard during times of parental separation and/or divorce (Birnbaum, 2007; Marchant and Kirby, 2004; Neale, 2002). Smith (2007) argues that providing children with access to information and allowing them to participate in the separation and/or divorce process translates into more respectful listening of children's wishes, needs, and interests and takes them into account. Taylor, Smith and Nairn (2001) report that children themselves rate their participation rights as important when it comes to issues of the family as well as issues relating to legal and social welfare systems.

Third, children's participation is inextricably linked with social inclusion from a broader policy perspective. That is, more effective policies, services and programs are developed by including children's participation in their design, planning, delivery and implementation (Lansdown, 2005; Ministry of Social Development, 2003). James and Gilbert (2000) argue that unless children's views are incorporated into the policy development that impacts directly on them, decision-makers do not have the benefit of hearing the children's perspectives on the problem, suggestions, and/or thoughts about what should happen about the problem. The same argument can be made with respect to children's participation in the decision-making process during family breakdown. Smart, Neale and Wade (2001) suggest that family policy issues must include children's viewpoints if children are to be treated ethically and given the respect they deserve.

Fourth, some have also cited the social science and research literature that demonstrates that children's participation in a number of decisions, including their experience of parental separation (Cashmore and Parkinson, 2008; Butler et al., 2002; Dunn and Deater-Deckard, 2001; May and Smart, 2004; Neale, 2002; Smith et al., 2003; Smart, 2002), correlates positively with their ability to adapt to a newly reconfigured family (Butler, Scanlon, Robinson, Douglas and Murch, 2003) as well as to their ability to regain mastery and control over what is often a confusing time for them post-separation and/or divorce (Brown, 1996; Butler et al., 2002; Saposnek, 1998).

Fifth, still others have argued for children's inclusion as being important because it provides the most direct enunciation of the needs of children. Focusing on the needs of children early in the process of parental litigation can reduce both the intensity and duration of conflict (McIntosh, 2003) as well as enhancing conciliation between parents to communicate more effectively on behalf of their children (Goldson, 2006). Gray (2002) has also suggested that children's participation in decision-making can facilitate children being clear about their own wants and needs which can translate into enhancing their advocacy skills regarding communication and negotiation with their family.

Sixth, others have also argued that meaningful participation can be a protective factor during times of parental separation and/or divorce (Brown, 1996; Pryor and Emery, 2004; Pryor and

Rogers, 2001) as it provides children with a sense of responsibility and improved parent-child relationships (Brown, 1996; Goldson, 2006; Sanchez and Kibler-Sanchez, 2004) through their role in the decision-making process (Cashmore and Parkinson, 2007, 2008). Including the voice of the child can also enhance their sense of self-esteem and control over their fate, thereby enhancing their resiliency (Kelly, 2002, Marchant and Kirby, 2004; Pryor and Emery, 2004; Williams, 2006).

Finally, while studies in this area have been limited to date, research-based programs in Australia and New Zealand demonstrate the potential benefits to separated families of including children's experience and their voice in a therapeutic mediation process (Goldson, 2006; McIntosh, 2000, 2003, 2005, 2006, 2007; McIntosh and Deacon-Wood, 2003; McIntosh and Long, 2005, 2006, 2007; McIntosh, Long and Moloney, 2004; McIntosh, Wells and Long, 2007; McIntosh, Wells, Smyth and Long, 2008; Moloney, 2005, 2006; Moloney and McIntosh, 2004).¹¹ For example, McIntosh (2007), along with her research colleagues in Australia, has evaluated an evidence-based practice model of child-inclusive mediation. They report on outcomes that were common to both groups, specific to the child-inclusive intervention, and the differences in outcomes. The study compared outcomes over 12 months for 275 separated parents (142 families) and their children (a total of 364 children, with 193 between ages five to 16 years) in two different forms of mediation interventions.

The first type of intervention was a child-focused intervention, where the mediator assists the parents in parenting arrangements for their children based on their developmental needs. The second type was a child-inclusive intervention, which is the same as a child-focused intervention but also includes a direct brief assessment of children's experiences of the separation and their relationships with each parent. In this second type of intervention, feedback from the children's session is brought back to the parents' mediation session by a child specialist in order to assist parents to better understand their children's needs.

Information was collected at the beginning of both interventions as well as at 3 months and 12 months post intervention to explore what differences, if any, were present between the two types of interventions. Specifically, the outcomes explored included: (1) post-separation parental alliance; (2) conflict management; (3) parent-child relationships; (4) the nature and management of living arrangements; (5) children's well-being and adjustment; (6) children's self representation of parental conflict; and (7) children's perception of parental conflict and communication.

¹¹ For a thorough discussion of this major research initiative and the results, the reader is also encouraged to review the government of Australia website that provides the series of research articles and information on child-inclusive interventions that have been written by these researchers. The website can be accessed online at: http://www.familycourt.gov.au/presence/connect/www/home/publications/papers_and_reports/new_papers/papers_state_of_the_nation.

In both groups, there were high rates of poor parental communication, parental conflict, and children who were experiencing significant psychological distress at the outset of intervention. However, one year post intervention/mediation, there was a significant and enduring reduction in conflict for both groups. The majority of parents in both groups reported that they had improved or resolved the initial dispute that had brought them to mediation in the first place. The children in both groups, across all ages, perceived less frequent and intense conflict between their parents and were less distressed in relation to their parents' conflict.

Of interest, certain findings were unique to the child-inclusive intervention that were not evident in the child-focused intervention; mainly the effects of child-inclusive intervention on fathers and children. One year post intervention demonstrated that there was lower conflict reported by fathers in relation to their former spouse, and a greater improvement in the parental alliance for fathers. As well, children reported that they experienced more closeness to their fathers and more emotional availability of their fathers; the children were more content with the parenting plan and less inclined to want to change it. Fathers were likewise more satisfied with the parenting plan despite less overnight contact than the child-focused fathers. Finally, there was a greater stability of care and contact over the year.

In New Zealand, Goldson (2006)¹² conducted a qualitative study that explored child-inclusive mediation with 17 families and 26 children between the ages of 6-18. The interview questions explored the lived experiences of the children and their parents related to their parenting plan arrangements one month after mediation. Unlike the previous study, the mediator who met with the parents also met individually with the children in this program. Feedback from the children's session was brought back to their parents. The children were aware of what was being discussed with their parents and were provided with an opportunity to decline information that they did not want shared with their parents. The parents and children were then brought together in a joint session to discuss the parenting plan and a subsequent session was held two weeks later to discuss how the implementation of the parenting plan was working as well as to examine outstanding concerns, if any.

The study's findings showed that the children uniformly reported that they liked having their voice heard and were more satisfied with the final parenting plan. The children expressed a strong desire to have an active role in the actual restructuring of their family relationships. The parents reported that there was a reduced level of conflict between them and that each experienced an overall higher satisfaction with the process. Both children and parents acknowledged that the children preferred to speak to a mediator who had previous contact with both of their parents simultaneously. Overall, the findings demonstrated that parental conflict

¹² For a more complete discussion of the research findings, the reader is also encouraged to review the government of New Zealand website, which can be accessed online at:
<http://www.familiescommission.govt.nz/download/innovativepractice-goldson.pdf>.

was reduced and that conciliation and cooperation increased. Furthermore, in each family there was an increase in the parents' awareness of the impact of the conflict and the significance of working together on behalf of their children. As a result of having their voices heard and listened to by their parents, children reported feeling more relaxed and better able to adapt to their parents' separation.

The studies in Australia and New Zealand lend support to the social science literature on the reasons of *why* it is important to include children in the decision-making process. However, *how* they should be included is less clear. Additionally, differences exist between using the same mediator to interview children and having a separate child specialist interview the children. This latter issue will be explored more fully in examining child custody mediation. At the very least, the results of these studies demonstrate that children's participation can be beneficial to their emotional well-being and provide them with a voice in decisions that impact their lives. In addition, the findings confirm that further research initiatives that are grounded in evidence-based interventions are important to assist children and their families post separation and/or divorce to explore what is most helpful to children and how.

2.2 THOSE WHO SAY WE *SHOULD NOT* INCLUDE CHILDREN AND *WHY*

Just as there are strongly held viewpoints about including children in decision-making post separation and/or divorce, there are equally a number of compelling arguments against including children. First, from a rights point of view, academic scholars cite some cautions to be aware of when it comes to children's rights. Atwood (2003) argues that there are competing goals between protecting children from emotional harm on the one hand, and protecting litigants' due process rights, on the other, when it comes to ascertaining children's wishes. Guggenheim (2003) asserts that while there are important reasons to advance children as rights-holders, there are certain costs associated with rights—that is, rights are relational. If children have a right then someone else has a duty and children's legal rights are always in the hands of adults.

Second, concerns have been expressed by mediators themselves who suggest that children may be manipulated by one parent or the other to take sides during a disputed custody and access matter, thereby creating anxiety and loyalty conflicts for children (Brown, 1996; Emery, 2003; Garwood, 1990; Gentry, 1997; Saposnek, 2004). Others have expressed concerns that involving children could undermine parental authority and cause further negative intrusion into children's lives and family relationships (Brown, 1996; Emery, 2003; Lansky, Manley, Swift and Williams, 1995). Garrity and Baris (1994) argue that involving children can also lead to having them tell each parent what s/he wants to hear, which would be of little benefit to the child. Moreover, Warshak (2003) argues that presenting children's wishes without understanding the basis of those wishes can create more problems for children. In other words, children's wishes must be accompanied by an understanding of the context in which those wishes are being made. He also

argues that delegating too much authority to children instead of helping them develop coping strategies during times of parental separation may burden them with too much power.

Third, qualitative findings from research reported by Goldson (2006), McIntosh (2000, 2007) and Garwood (1990) suggest that children would not benefit from being involved in child-inclusive mediation approaches in certain circumstances. These include, for example, when parents are feeling so overwhelmed that they cannot make use of the positive feedback given to them; where the conflict between the parents is characterized as high; and where parents have mental health issues that impede any positive working relationship. Kelly (2003) and Saposnek (2004) also conclude that not all children necessarily need or want to be heard. They suggest that unless there is a request from the child and/or their parent for the child to be interviewed, there is no reason to do so.

Another concern raised in advancing the argument against child participation is that once a child has been asked to express his/her views, s/he may be disappointed if it is discovered that his/her views were not listened to because they may believe that their views will be determinative of the outcome. This can lead to feeling angry and hurt if they were not listened to or feeling too much responsibility for the decision. In either case, the child can be emotionally compromised. Similarly, one parent or the other may use the child's wishes as a trump card to obtain an agreement or alternatively, claim that the child is traumatized by the mediation process, thereby sabotaging the process (Emery, 2003; Simpson, 1991). Additionally, some children may not express their true feelings if they fear their parents' retaliation or anger about their views and therefore should not be placed in that position (Brown, 1996; Drapkin and Bienenfeld, 1985).

2.3 SUMMARY OF *WHEN TO INCLUDE AND NOT TO INCLUDE CHILDREN'S PARTICIPATION*

There are no easy answers as to whether children's participation in post separation decision-making should be included or excluded. As can be gleaned from the above discussion, there is no consensus in the clinical and social science literature about this issue. O'Connor (2004) suggests that one of the reasons researchers and practitioners have such divergent views about children's participation in decision-making post separation is that they are examining very different approaches to including children. She argues that while they may say they oppose or support including children, in reality, they only support or oppose some of the approaches that include children's participation.

There are pros and cons to both sides of this debate. It seems that much depends on the "context" of each situation. From a theoretical point of view, children's participation depends on the theoretical and conceptual lens of the mediator. That is, the mediator would have to have the conceptual viewpoint that children have rights and should be heard and recognized. Moreover,

the mediator would also have to have an appreciation and understanding of the evolving capacities of children. From a practice point of view, children's participation depends on the clinical orientation of the mediator and how comfortable s/he is with interviewing children as well as assessing the individual needs of the children and their parents. From a research point of view, children's participation depends on the available research on evidence-based approaches that focus on the risk and resiliency factors of children and families. This research can, in turn, help guide practice and inform policy with respect to child-inclusive mediation and other ADR processes. From a policy point of view, children's participation depends on resources, training and policies and legislation governing children's inclusion before, during, and after parental separation and/or divorce.

Saposnek (2004) and Kelly (2002) provide some helpful tips on when to include and exclude children in the mediation process. Both stress that the mediator must have the requisite skills, training, and knowledge base, in addition to being comfortable interviewing children if children are to be included at all. They suggest that children should be included in the following circumstances: (1) when children consistently express a preference for a particular type of time-sharing arrangement and one parent or the other disagrees; (2) when a child has specifically requested to speak to the mediator; (3) when both parents need to hear from their child about the negative impact that their dispute is having on the child; and (4) when children have the cognitive ability to relate their views and wishes to a mediator (i.e., six to 16 years of age).

They also suggest that children should be excluded in the following circumstances: (1) when both parents can agree on the needs of their child and can develop a mutual parenting plan that meets the needs of their child; (2) when children are too young and do not possess the cognitive ability to reliably communicate their wishes (i.e., typically children under three years of age); (3) when children exhibit emotional and behavioural complaints about meeting with a mediator to express their views; and (4) when children are being manipulated by one parent or the other.

3.0 WHAT DOES CHILDREN'S PARTICIPATION MEAN?

At the broadest level, children's participation in decisions relating to parental separation or divorce can be as varied as having an opportunity to be involved directly or indirectly when parents are deciding parenting arrangements that affect their lives, having input into services that are being developed for them on separation and/or divorce, or participating in discussions about broader policy issues that directly affect their lives.¹³

There are also different levels of participation. Hart's (1992) ladder of participation in decision-making involves eight steps. As one moves up the ladder, children become more involved. At the lower level of the ladder, children do what adults say. At increasingly higher levels, they may instead be asked to take part in planning a family or community activity or to provide their thoughts and feelings—but without being given the opportunity to make choices. At the highest level of the ladder, children are able to set the agenda themselves and invite adults to participate.

Shier's (2001) pathways to participation associates children's involvement with a range of openings, opportunities and obligations. Similar to Hart's ladder, there are succeeding levels of participation from just listening to children to providing children with opportunities to share power and responsibility for decision-making with adults.

Sinclair (2004) describes children's participation as involving four dimensions: (1) the level of active engagement in participation (e.g., degree of power sharing between adults and children); (2) the focus of the decision-making that involves children (e.g., decision-making within the family versus in the context of public services); (3) the nature of the participation activity (e.g., consultation exercises, young people's forums or advisory groups, or ongoing involvement in the governance of institutions); and (4) the children and young people involved. This model begins on the premise that, given the diversity of children, it is important to start from the dimension of the fourth factor—the children and young people involved—and to consider, for example, age, gender, culture, economic and social circumstances and disability. That dimension must then be matched with all other dimensions relating to the nature of the activity, its purpose, and the decision-making context, if children are to meaningfully participate in decisions that affect their lives.

¹³ The reader is also encouraged to review, Lansdown, G. (2001). *Promoting children's participation in democratic decision-making*. UNICEF Innocenti Insight. This paper provides context to the meaning of and implications of Article 12 of the *Convention*. It can be accessed online at: <http://www.unicef-irc.org/publications/pdf/insight6.pdf>.

3.1 THE DIFFERENT WAYS CHILDREN’S VOICES ARE BEING HEARD DURING SEPARATION AND/OR DIVORCE

In the context of mediation or other ADR processes specifically, children’s involvement is highly varied and does not follow any one particular model. In considering how children are currently being included from the perspective of where their participation fits along the various participation models identified above, children are usually involved at the lower end of the spectrum. That is, children are not automatically given “voice” in the decision-making process but rather continue to rely on adults asking them first. In turn, this leaves children feeling less empowered in the decision-making process.

Currently, children and youth participate in separation and divorce mediation and ADR processes in a variety of ways: (1) by directly participating in the mediation session; (2) by directly participating in the mediation session but with the help of a support person; or, (3) by indirectly participating, for example, by having his/her views sought and fed back into a mediation or collaborative family law session by a child specialist. Some of the child-inclusive models in mediation and other ADR processes have been discussed in the preceding sections (e.g., Goldson, 2006; Kelly, 2002; McIntosh, 2000; Saposnek, 2004). The following provides further clarification on what is meant by mediation¹⁴, child-inclusive mediation, ADR processes and the use of a child specialist in collaborative family law practice.

Mediation

The practice of mediation is largely dependent on who is conducting the mediation (lawyers or mental health practitioners), where it is being offered (private vs. public service), and what is being mediated (custody/access/property). Additionally, there are different types of mediation (i.e., facilitative, transformative, evaluative, and therapeutic) that are being practiced. However, in general, mediation shares four common elements: (1) it is process-oriented; (2) it is client-centered; (3) it is communication-focused; and (4) it is interest-based (Mayer, 2004).

The use of mediation in separation and/or divorce proceedings has been part of the family landscape for many decades and a preferred alternative to court (Folberg, 1983; Folberg, Milne and Salem, 2004; Folberg and Taylor, 1984; Haynes, 1980; Irving, 1980; Saposnek, 1983, 1998). Mediation has provided an alternative to the traditional adversarial approach that focuses on a zero-sum game and a win-lose outcome. Rather, mediation provides parents with a neutral third-party professional who assists them in reaching an agreement on parenting issues. Parents benefit as they are not engaged in a win-lose mentality that is often associated with litigation. Children benefit through a model that encourages greater cooperation between parents. In turn, parent-child

¹⁴ In Scotland and in England the term conciliation has often been used (Garwood, 1990).

relationships are less threatened than in the adversarial process where one parent often blames the other in a fault-finding exercise.

However, children's involvement in the mediation process has been quite limited (Austin, Jaffe, and Hurley, 1991) until recently (Goldson, 2006; McIntosh, 2007; Ministry of the Attorney General, British Columbia, 2007; Saposnek, 2004). Saposnek (2004) indicates that mediators included children's direct input in only four to 47 per cent of all completed mediations across public and private sectors, and across the United States, the United Kingdom, and Australia.

While much has been written on the possible benefits and limitations of including and/or excluding children in mediation, less attention has focused on research that either supports or refutes children's participation in the process (O'Connor, 2004). The divergent views that are expressed over whether to include or exclude children in mediation are not dissimilar to those in the debate over how children are fundamentally viewed during the divorce process—through the lens of a rights-based approach versus a protectionist approach (Elrod, 2007; Schoffer, 2005; Woodhouse, 2000).

Child-inclusive Mediation

Child-inclusive mediation refers to the involvement of the child in the mediation process in either one of two ways. One method is where the same mediator who interviews the parents also interviews the child separately, and then provides a feedback loop to the parents or brings the child into the mediation session with the parents. A second version of child-inclusive mediation involves a child specialist who interviews the child separately and provides a feedback loop to the parents or is present with the child in the parents' mediation session as a support person (Gamache, 2005, 2006; Gentry, 1997; Goldson, 2006; Kelly, 2002; McIntosh, 2000; Mosten, 1997; Saposnek, 2004).

Gentry (1997), Kelly (2002) and Saposnek (2004) include children in several different ways. For example, they may interview the child early in the process to get their views and feelings about the situation and introduce the information to their parents. They may bring the child into the mediation sessions when an issue comes up that the child can bring clarity to. They may consult with the child regarding his/her opinions after the parenting plan has been agreed upon in order to explore if any changes might be required. Or they may bring the child in at the final mediation session to be informed about what agreement was reached by his/her parents.

Kelly (2002) describes other ways to include children's participation in the separation and/or divorce process, depending on the child's age, emotional ability and cognitive ability. These range from including children in the discussions within the family at one end of the spectrum (e.g., parents talk directly to their children) to more formal discussions (e.g., talking to a judge)

at the other end. These latter processes will be explored later in order to more fully capture these important forms of child participation in the separation and/or divorce process.

As noted earlier, there remains a paucity of research literature regarding child-inclusive mediation (Goldson, 2006; McIntosh, 2007; Saposnek, 2004), in addition to a lack of consensus on whether or not children should be included from participating in the decision-making, as well as how they should be included. In the final analysis, Smart and Neale (2001) assert that asking what matters must come before asking what works. In other words, children's participation must be viewed as the primary issue following separation and/or divorce as it is central to their sense of well-being providing children are adequately protected from harm.

Alternative Dispute Resolution Processes

There has been an increasing acceptance and understanding that the traditional adversarial system does not meet the needs of children and families. Since the 1980s other approaches have been developed that focus on reducing reliance on the adversarial process when it comes to parent-child relationships post separation and/or divorce (Emery, Sbarra and Grover, 2005; Irving, 1980; Kelly, 2002). These other processes have been commonly referred to as alternative dispute resolution processes. They fall on a continuum from simple negotiations between the parents at one end of the spectrum (i.e., parents sort out a parenting plan together) to negotiating with the assistance of lawyers, to appearing before a judge and litigating the dispute at the other end. Along the continuum, a number of different options remain available and can simultaneously occur. For example, parents can proceed with litigation while negotiating a resolution to the dispute and/or engage in mediation. In other words, there are numerous options before and during litigation that parents can still avail themselves of, rather than proceeding directly to court.

Parenting coordination (PC) is an ADR process that targets chronically-conflicted separated and divorcing families (Boyan and Termini 2004; Coates, Deutsch, Starnes, Sullivan and Sydlik, 2004; Fidler and Epstein, *in press*; Sydlik and Phelan, 1999). Unlike mediation where the parents meet with a neutral professional to resolve a dispute and obtain agreements, parenting coordinators facilitate the implementation of an existing parenting plan. Specifically, their functions include, but are not limited to: (1) assessing; (2) educating; (3) coaching;

(4) monitoring and case management; (5) mediating; and, (6) arbitrating decisions within a limited scope (Coates et al. 2004). Children's participation varies depending on the issues presented and the skill level of the parenting coordinator.¹⁵

Many of these ADR processes also provide children with different levels of participation. The levels of participation can also be characterized along an ADR continuum that stretches between voluntary and mandatory participation, such as: (1) psycho-educational forums that offer information on the separation and/or divorce process to both adults and children; (2) child custody and access assessments that are carried out by various mental health professionals (social workers, psychologists and psychiatrists); (3) child legal representation; (4) judicial interviews; and (5) child custody mediation.¹⁶

Parent and Children's Programs

Many parent and child programs offer both information and didactic exercises that focus on reducing conflict as a result of parental breakdown and promoting positive parent-child relationships. These programs are offered through court-connected and/or community-based programs throughout Canada, the United States, and internationally, both on a voluntary and mandatory basis (Arbuthnot and Gordon, 1996; Bacon and McKenzie, 2004; Grych, 2005; Kelly, 2002; O'Connor, 2004). Kelly (2002) maintains that these programs should be mandatory across every jurisdiction as they help educate parents about the negative effects of their behaviour and attitudes regarding their children.¹⁷ Moreover, she adds, that many of these programs have benefited parents and children alike by offering clinical and therapeutic components, important information about the negative effects of conflict on children, and skill-building exercises for parents to learn to better communicate with one another.

However, while these programs respond to the needs of the court and separating and/or divorcing parents, there remains little empirical evidence that the programs improve the quantity of nonresidential parent-child contact, foster quality parent-child contact, reduce inter-parental conflict, improve co-parenting, reduce relitigation and/or improve outcomes for children (Grych, 2005; O'Connor, 2004). The reasons vary from methodological limitations in the design of the programs (i.e., the use of comparison groups and how parents are assigned to groups) to not differentiating the reporting of consumer satisfaction with the program as distinguished from a more rigorous evaluation (Grych, 2005).

¹⁵ Conversation with Dr. Barbara Jo Fidler, psychologist in private practice who practises and teaches parenting coordination to mental health and legal professionals. For a discussion of the guidelines on parenting coordination, the reader can access these through, The Association of Family and Conciliation Courts (AFCC) website at: http://www.afccnet.org/resources/standards_practice.asp.

¹⁶ *Supra*, note 6.

¹⁷ Dr. Joan Kelly is a psychologist, mediator, and researcher in California who is internationally recognized in the field of separation and divorce.

Some have suggested that, while programs and resources focused on improving parent-child relationships during family breakdown are important, children and youths still have their own independent needs and require resources that focus on those needs (Hawthorne, Jessop, Pryor, and Richards, 2003). As a result, in Canada and internationally, attention has more recently focused on targeting children and youths in providing information on the legal process, how to cope with their feelings as well as the changes in their family structure, and demystifying the separation and/or divorce process (Birnbaum, 2007; Department of Justice Canada, 2007; Richards and Stark, 2000; Walker, 2001).

Child Custody and Access Assessments

Child custody and access assessments typically involve a qualified mental health professional (social worker, psychologist, psychiatrist) interviewing each of the parents and children. Observations are made with respect to parent-child interaction, and personal and professional reports on the family are collected with a view to providing a written report to the court on the best interests of the children and the parents' abilities to meet the needs of their children (Birnbaum, Fidler and Kavassalis, 2008). In Canada, every province has legislation that provides for the provision of a child custody assessment and/or investigation and report.¹⁸ Child custody assessments are conducted either privately and/or through publicly-funded programs.

While child custody and access assessments/reports have facilitated settlement between disputing parents, questions remain about what assessors can and cannot reasonably address in the assessment given the lack of uniformly accepted standards and guidelines, the absence of validated methodology and standardized instruments, and the lack of empirical evidence to support various parenting time schedules and methods for decision-making (Bala, 2005; Tippins and Wittman, 2005). Bala (2005) asserts that, irrespective of the concerns expressed, assessments often produce a settlement of a child-related dispute that may not be reached through mediation or lawyer-assisted negotiation.

While legislation focuses on the best interests of the child as the only issue to be determined, the child custody assessment process falls under the traditional adversarial model where each parent's strengths and limitations regarding their parenting abilities becomes the focal point. Children's participation is limited to observations between the child and each parent. Interviews with the child (typically age five and older) and observations of parent-child relationships are made in the context of who could best meet the needs of the child. Although child custody assessments play an important role in the court system in that they often facilitate settlement (Bala, 2004), they remain part of the adversarial system that pits disputing families against one another (Johnston & Roseby, 1997).

¹⁸ See Bala, N. (2004). Assessments for postseparation parenting disputes in Canada. *Family Court Review*, 42(3), 485-510 for a listing of the legislative provisions across Canada.

Child Legal Representation

Children can be legally represented by a lawyer in their parents' custody dispute and have their views put forward by their lawyer. While the process of appointment for a children's lawyer across Canada varies, only Ontario and Quebec have a formalized program. Many states throughout the United States also provide for child legal representation in custody disputes. Internationally, in the United Kingdom, New Zealand, Australia and Scotland, there are also provisions for child legal representation.

There are three different roles that lawyers have traditionally played with respect to representing children. First, there is the traditional advocate role where the lawyer puts forward the child's wishes based on the child's instructions. Second, a child's lawyer can act as a guardian *ad litem* (best interest advocate) by presenting to the court his/her opinion of what the final decision should be based on the child's best interests. Third, the child's lawyer can act as *amicus curiae* (friend of the court). That is, the child's lawyer makes sure that the court has as much information about the child as possible (Bala, Talwar and Harris, 2005; Bessner, 2002; Burns and Goldberg, 2004; Davies, 2004; Ministry of the Attorney General, British Columbia, 2007)

While there remains debate regarding what role a lawyer should take when representing the child's voice in their parents' dispute, child legal representation serves an important function for children—their voices are heard. Moreover, child legal representation is consistent with Article 12 of the *Convention*.¹⁹

Judicial Interviews with Children

Judges can interview children who are involved in their parents' disputed custody and access matters in Newfoundland and Labrador, Prince Edward Island, Ontario, the Northwest Territories, and Nunavut (Ministry of the Attorney General, 2007). However, not all judges are comfortable with this approach (Raitt, 2007). Judges do not wish to place children in the middle of their parents' dispute where it is felt that children may have to take sides and where it may affect the quality of their decision-making and the parents' perceptions of fairness (Bala, Talwar and Harris, 2005; Bessner, 2002; Boshier and Steel-Baker, 2007). Yet, some children who were interviewed about being able to talk to a judge during their parents' disputed custody and access matter were generally in favour of doing so (Cashmore and Patrick, 2007; Parkinson and Cashmore, 2007; Parkinson, Cashmore and Single, 2007).

Child Specialist in Collaborative Family Law

Collaborative family law is an emerging practice that is interest-based and a settlement-oriented dispute resolution process. Unlike mediation where the mediator is a neutral third-party

¹⁹ *Supra*, Note 2.

facilitating a resolution to the dispute with the parents only, in collaborative family law, the parents and their lawyers engage in a process together to resolve the dispute. Specifically, the parents and their lawyers agree at the outset that they will not proceed to court; but rather, engage in a joint problem-solving effort as opposed to the traditional adversarial approach (Fairman, 2007; McFarlane, 2005; Tessler, 1999; Webb, 2000). If the parents wish to proceed to court, both lawyers for the parents have to withdraw from the case.

When parents need a neutral third person to interview the children in order to bring the children's concerns and views into the process, a child specialist is then brought into the practice of collaborative family law (Gamache, 2005, 2006). Typically, the child specialist is a mental health professional and is included in the agreement with the parents and their lawyers that any information obtained by the child specialist remains outside of any future court proceeding. In addition, if the parents proceed to court, the child specialist can no longer be involved in any future adversarial action. The role of the child specialist is to report to the collaborative team (lawyers and parents) regarding what the children have said about their views and concerns about the parenting dispute. The children are aware of the limits of confidentiality and provide input into what they wish to be withheld or disclosed to their parents.

The level of child participation in collaborative family law varies depending on the issues the parents are able to agree or disagree about with respect to their children. In other words, children are not automatically involved in the collaborative family law process. Rather, parents are informed that a child specialist can be used to assist with children's issues, if necessary.

3.2 SUMMARY OF THE BENEFITS AND LIMITATIONS OF THE DIFFERENT LEVELS OF PARTICIPATION FOR CHILDREN

All of the approaches discussed provide children with different levels of participation in the decision making process. Child custody assessments, child legal representation, and judicial interviews provide the court, if necessary, with assistance in their decision-making regarding children's best interests. From a child's perspective, their level of participation can be characterized at the lower end of Hart's (1992) ladder of participation. That is, while their wishes are canvassed, they are also filtered through the adult lens of what is considered to be in the child's best interest. In the final analysis, children remain on the periphery of these different levels of participation despite the extant social science literature and research that calls for their inclusion (Austin, Jaffe and Hurley, 1991; Cashmore and Parkinson, 2008; Butler et al., 2002; Goldson, 2006; Kelly, 2002; Marchant and Kirby, 2004; McIntosh, 2007; Neale and Smart, 2001; O'Quigley, 2000; Parkinson, Cashmore and Single, 2007). Additionally, child custody and access assessments, child legal representation, and judicial interviews remain under the umbrella of the litigation process. In other words, children's participation may occur a little too late in the

process to have any meaningful impact on restoring and strengthening parent-child relationships post separation and/or divorce.

The traditional mediation approaches do not usually involve children and when they are involved, there is no consensus as to whether the same mediator should interview the children or whether a separate mediator should be retained to interview the children. In one study of practicing mediators in England, Murch et al. (1998) found that while mediators are aware of the importance of children's voices, the mediators addressed children's issues by having the parents think about the needs of their children, rather than directly talking to children. Child-inclusive mediation, on the other hand, provides children with more autonomy and direct input into the decision making process. However, the mediation process remains driven by an adult agenda when it comes to whether and when to include them (Gilmour, 2004; Kelly, 2002; Saposnek, 2004).

Collaborative family law and the use of a child specialist (mental health professional) in collaborative family practice have more recently become a focus of attention in Canada, the United States and internationally (Fairman, 2007; Gamache, 2005, 2006; Mcfarlane, 2005). As both collaborative family law and the use of a child specialist is a relatively new emerging area of practice, there remains little written about the use of the child specialist, the limitations, and their role in the process. Moreover, like child-inclusive mediation, it is the adults who decide if and when children are included. There have also been issues raised regarding those children who may present the child specialist with more clinical difficulties as they try to adjust to the parental conflict and separation. The role of the child specialist in collaborative family law is to provide short-term brief involvement rather than therapeutic assistance (Gamache, 2005, 2006). A similar point is made by Kelly (2002) and Saposnek (2004) who clearly distinguish the role of the mediator in interviewing children as being different from divorce counseling or other therapeutic interventions with children.

Again, it would seem that choosing to involve children in the decision-making process depends on "context". That is, the individual needs of the child must be canvassed alongside each parent's ability to use the child's information constructively.

From a broader policy perspective, comparatively little comprehensive discussions between and amongst practitioners (mental health and legal), researchers and policy analysts have taken place about whether, and in what way, children's participation can be integrated at a much earlier stage in the breakdown of their parents' relationship. Finally, there remains very little discussion and/or empirical research on: what ages are appropriate for children to be interviewed²⁰; how to listen and understand children from diverse cultures, traditional backgrounds, or with language

²⁰ For a discussion of the social and adult construction that is attached to the significance of the age of the child, see Mantle et al. (2006).

barriers; other forms of communication with children (i.e., drawing, play, writing letters); and possible learning and developmental challenges of children in providing their voice in the decision-making process.

The following section provides a description of the types of child-inclusive mediation and other ADR processes that are currently being employed in Canada, the United States and internationally. This section is meant to capture existing services and other ADR processes that include children's participation in the separation and/or divorce process.²¹

3.3 EXISTING CHILD-INCLUSIVE MEDIATION AND OTHER ADR DELIVERY PROCESSES

Canadian Perspectives

British Columbia

The Ministry of the Attorney General in British Columbia has embarked on a series of consultations and reviews regarding the *Family Relations Act*²² over the last several years.²³ The focus of the consultations and reviews is to make the family law system more accessible, serve the needs of children and their families first and foremost, promote early resolution, integrate service planning and delivery of services, and minimize conflict by encouraging an early cooperative dispute resolution process (Ministry of the Attorney General, British Columbia, 2007). Presently, the Family Justice Services Division focuses on four key areas that promote children's participation in one form or another: (1) dispute resolution (whereby family justice counselors who are accredited mediators provide mediation, information and referrals to assist families in resolving their dispute); (2) assessment (family justice counselors meet with parents before going to court); (3) child custody and access assessments (family justice counselors prepare assessments or "Views of the Child" Reports²⁴ to assist judges in their decision-making); and (4) a parenting after separation program (PAS) which is a three hour educational workshop focusing on the needs of children and parents.

²¹ See O' Connor (2004) for an inventory on programs for children experiencing separation and/or divorce in Canada, the United States and internationally. The document can be accessed online at: <http://www.justice.gc.ca/en/ps/pad/reports/2004-FCY-2/index.html>. Also see the Department of Justice website that outlines different services available to families across provinces. While many of the services do not specifically identify the level of children's participation, they do identify ADR processes that encompass children's involvement to one degree or another (i.e., information services, counseling, mediation services, supervised access services). The website can be accessed online at: <http://www.justicecanada.net/en/ps/pad/resources/fjis/browse.asp>.

²² *Family Relations Act*, R.S.B.C. 1996, c.128.

²³ The reader is encouraged to view the Ministry of the Attorney General, British Columbia website that provides an excellent review of the consultations that have occurred in the province about family law matters. The website can be accessed online at: <http://www.ag.gov.bc.ca/legislation/#fra>.

²⁴ Views of The Child Reports focus on interviewing children to hear what their views and thoughts are regarding their parents' dispute. Information is also collected from their parents to provide context to the children's views.

To facilitate inclusive and meaningful participation in the province's review of the *Family Relations Act*²⁵, the Social Planning and Research Council of British Columbia (hereafter referred to as SPARC BC) conducted a participatory inquiry-based research study that focused on hearing the different lived experience of individuals involved in BC's family justice system. The participants included, parents, family law advocates and support workers, and representatives from the Family Youth Justice Committees about their knowledge, experiences, and ideas as to how the *FRA* could be reformed and better reflect the needs of families involved in the family law system (Reeves, 2008).²⁶ Many of the topics that were canvassed with the participants reflect the services already discussed in the previous sections. Participants were also canvassed on other types of services such as those found in Scotland (i.e., child(ren) completes a F-9 Form to advise the court of his/her wishes), Australia (i.e., where the judge takes a less adversarial approach to the matter) and in Kelowna, BC (i.e., where the child(ren) statements are given verbatim to the judge). These latter types of services will be further elaborated on in the following sections below.

Specifically, eleven topics were identified as being the focus for further discussion on family law reform. They were: (1) parenting agreements; (2) family violence and the *FRA*; (3) considering children's best interests; (4) falsely accusing the other parent of abuse; (5) children's participation; (6) access responsibilities; (7) higher conflict families and repeat litigation; (8) giving parenting responsibilities to non-parents; (9) defining parenting roles and responsibilities; (10) spousal support; and (11) cooperative approaches and the *FRA*. Information sheets were created for each topic. Over two hundred and twenty-three family advocacy and support organizations were invited to help organize focus groups; facilitate an online survey and provide a question book to be completed by the different participants.

There were 21 focus groups held throughout BC, with over 146 individuals who participated in a two to three hour focus group discussion about their lived experiences of separation and/or divorce. In addition, 80 family law advocates and support workers completed an online survey as well as three Family Court Youth Justice (FCYJ) committees across BC filled out a question book related to each of the eleven reform topics. As stated many of the services and programs previously discussed were included as options for parents to explore, while others will be further elaborated on in the following sections.

In four focus groups, three questions were discussed with parents who had experience with separation and/or divorce regarding one of the topics—children's participation in family law.

²⁵ *Supra*, Note 22.

²⁶ For purposes of this review, only the results of the themes related to children's participation is being presented. For a complete discussion of the entire research initiative and results, the reader is encouraged to access the Report online through the SPARC BC website. The website can be found at: http://www.justice.gc.ca/eng/pi/pad-rpad/rep-rap/2005_1/index.html.

The objective of the questions was for parents to: (1) provide their opinions about including children's views in family law decisions and processes; (2) consider circumstances when a child's views may be a determinative factor in custody, access, or guardianship decisions; and (3) consider other possible options for including children's views (i.e., mediation, being interviewed by a judge).

Most of the participants had mixed opinions on whether children's views should be included in family law issues. The participants who disagreed with involving children voiced their own children's negative experiences of feeling pressured and overwhelmed by the separation process. They felt that children should be protected from harm. Participants who agreed with including children voiced concerns that parents, instead, should be better prepared to help their children during times of parental separation and/or divorce. Many other participants could neither agree nor disagree; but rather, voiced qualifications about children's participation. That is, the age of the child, maturity level of the child, and the families' circumstances also need to be considered.

Of the participants who responded to the second question regarding whether children's views should be determinants in deciding custody, access and guardianship, again, many voiced concerns about how the age of the child and maturity of the child might affect their views (i.e., the child could be manipulated). There was a mix of opinions between letting children's views be determinative especially in situations of trauma and violence in the family, with others disagreeing, and suggesting play therapy or a third party assessment in situations of violence or trauma in the family.

Overall the participants could not give clear recommendations to the first two questions in the focus groups. One hypothesis was that the participants did not have enough information before them. However, when given specific options to comment on regarding how to include children's views, the participants were able to provide clear recommendations on the following:

(1) *Mediation*: Some participants felt that mediation would be a good idea, some thought that including children would depend on the child's age and level of maturity, others thought the decision to include them in mediation should be left with the parents, and two participants stated explicitly that children should not be included in mediation when there is family violence;

(2) *Providing children's statements to decision-makers* (i.e., *Hear The Child Interviews* as elaborated below): The majority of the participants were skeptical of having their child interviewed and the judge being given a verbatim report of the child's wishes. Yet, two participants were positive about this option;

(3) *Having children fill out a Form* (i.e., Scotland's F-9 Form as elaborated below): Most of the participants did not like having their child complete a Form expressing their views about the dispute as they believed that completing a Form would only increase the child's

anxiety level. Some stated that the child may not even understand the Form, and others stated that completing the Form would be dependent on the age and maturity level of the child;

(4) *Child legal representation*: A large number of participants thought that having a lawyer for the child would be a good idea, while a few stated that separate legal representation for the child was not necessary;

(5) *Having both child legal representation and a social worker* (i.e., Ontario's model as elaborated below): The few participants who responded to this approach were clear that they did not want to see a social worker involved in providing children's views;

(6) *Less adversarial trial process* (i.e., Australia's model as elaborated below): Several participants did not think that children should be involved in the court process irrespective of it being less adversarial and run by the judge, while some thought there might be some value to this model as it would be a better environment for children; and some raised the model of a healing circle that included children and/or a panel or advisory group making the decision, rather than an judge; and

(7) *Judicial interviews*: Most of the participants were clear that judges were not the best people to interview a child, however, if they did, a support person should also be part of the interview, and judges should have special training in interviewing children.

Family law advocates and support workers were also surveyed regarding the same three questions. The vast majority (87 per cent) responded that they thought children's views should be considered provided that the child is capable of forming views and wants to share them. The vast majority (73 per cent) also believed that children's views should be a determining factor in custody, access or guardianship decision under the *FRA*. The child's level of maturity was cited as the most important factor that should be given consideration, as noted by 80 per cent of respondents. In addition, over 64 per cent of the respondents surveyed cited that an interview with the child where their responses could be recorded was the most helpful way of obtaining a child's views. Moreover, three quarters of the respondents also stated that the *FRA* should be amended to give judges a discretionary power to interview children to determine their views. Finally, the vast majority of the respondents (86 per cent) stated that a lawyer or counselor meeting with a child was the best way of obtaining their views (Reeves, 2008).

In addition, SPARC BC held three focus groups in several urban centers with 20 youths (seven females and thirteen males) aged 13 to 18 years old. The 20 youths who responded to the focus groups had heard about the focus groups through various agencies and word of mouth. The youths who participated had some experience with their parent's separation and/or divorce in the past. The goal of the focus groups was to obtain their views and opinions on the seven different

options for having their wishes and views made known to the decision-makers.²⁷ The options presented to the youths to facilitate discussion were similar services that were presented to parents and family law specialists in the previous section.

There were three parts to the focus groups with the youths. Part One involved playing a game called the Thermometer Game. A facilitator read out five statements and the youth could stand in a line between agree or disagree. The five statements were: (1) adults listen to me and take me seriously; (2) I know my rights or have been told of my rights; (3) I know what is best for me; (4) I believe that children and youth should be involved in the family law process; and (5) I have no interest in getting involved in the dispute between my parents.

Most of the youths disagreed with the first statement and believed that adults do not listen to them. However, one caveat was that it depended on the person as teachers and other adults did listen to them. Most of the youths agreed that they knew their rights, many stood in the middle of the line between agree and disagree, regarding whether they knew what was best for them, and had mixed feelings about whether they should be involved in the family law process. Some felt that getting involved in the family law process depended on the situation and their age. That is, they believed that the older they were the more they had a right to voice their concerns. However, they were concerned about younger children who could be swayed. Few, if any responded to the fifth statement.

Part Two involved asking youths for their opinions on whether they should have a say in the separation and/or divorce process. Youths responded by making a list of both the pros and the cons with the assistance of a facilitator. The list of reasons in support of children and youths having a say included the following: (1) a belief that children and youths could help change the mind of the decision-maker; (2) a belief that if a youth went to live with one parent who had emotional difficulties they could assist that parent; (3) a belief that the youth would be in a better position to understand the process; and (4) a belief that the youth would have greater control over their lives by being involved in the decision-making process.

In contrast, the list of reasons why children and youths should not have a say included the following: (1) that their wishes and views could be in the wrong direction, thereby making the situation worse instead of better; (2) that some children could be emotionally hurt; and (3) that they could feel burdened with the responsibility of the decision.

²⁷ The author is most grateful to SPARC BC for providing this information. However, it is important to note that the themes presented are based only on preliminary findings obtained in a telephone interview with Crystal Reeves, Legal Researcher, SPARC BC, one of the facilitator's of the focus groups. At the time of writing this review, SPARC BC had not completed all the focus groups and the analysis of the information obtained. The reader is encouraged to view the SPARC BC website for the Final Report of the focus groups with youths.

Part Three involved obtaining information from the youths on the different options available regarding how they could participate, both before and during the court process. In responding to options before court, youths were provided with information describing both the Australian and New Zealand mediation approaches. Youths liked the idea of having a mediator meet with their parents and they would have their own mediator provide their feedback to their parents as conducted in Australia. However, they were clear that they wanted to be able to review what information the mediator would feed back to their parents. They also expressed that they wanted more than one mediation session with their mediator. The youths did not like the approach taken in New Zealand where the mediator meets with the child and their parents together.

In responding to options during court, youths were provided with information and asked to respond to the following types of services available for them: (1) being represented by a lawyer as in New Zealand; (2) having their verbatim reports given to a judge as in Kelowna, BC; (3) filling out a Form about their wishes and views as in Scotland; (4) having both a lawyer and social worker team as in Ontario; and, (5) being interviewed by a judge as in Germany. Their views varied—many preferred to have a lawyer represent them as in New Zealand, but wondered what would happen if the lawyer misunderstood them and gave the wrong information to the judge. One participant thought the Ontario model of a lawyer and social worker was the preferred way. Many of the participants expressed that they did not like the approach used in Kelowna, where parents decide if youths should be interviewed; they instead felt that youths should be part of the decision-making about whether they would take part in the interview process. In addition, they believed that the interviewer should be someone the youth trusts. Moreover, several expressed the view that rather than hearing from their parents about the court outcome as in the Kelowna pilot project, they would prefer to have someone other than their parents explain the judge's decision to them. Some youths thought that talking to a judge was a good idea as in the Germany model; however, some wanted to have a support person present in the interview itself even if it was with a judge, mediator, or a lawyer interviewing them. Another youth suggested that they preferred to write a letter to the judge or email the judge with their views. Some youths questioned how completing a Form could allow them to express themselves on paper as in Scotland. Some preferred to have more context provided so that the judge knew who and how the Form was filled out. Issues of consent and age were also factors that youths thought needed to be considered with respect to completing the Form. Finally, they stressed that, in any approach, there must be flexibility and choice built into the process (Reeves, 2008).

To date, the SPARC BC research initiative, funded by the Law Foundation of British Columbia as part of a review the province's *Family Relations Act*, has been the only exploratory research undertaken regarding all the different approaches across the globe on children's participation.

Since July 2007, the Ministry of the Attorney General, Family Justice Services Division, British Columbia has been piloting child-inclusive mediation at a number of family justice centers

across the province. The pilot project was seen as a response to a gap in services for children and families before the court as well as facilitating a more timely response to the court about children and their families. This pilot project is in addition to the Views of the Child Report that family justice counselors are already engaged in for court purposes. However, this pilot project does not involve the family justice counselors reporting back to the court. Children are involved in the mediation process by family justice counselors (qualified and trained to work with children and families to resolve disputes) in three different ways. These are: (1) a justice counselor introduces the children's views into the mediation session with their parents; (2) a justice counselor, when appropriate, may invite the child (12 years or older) into the mediation session with their parents; and (3) a justice counselor may request another justice counselor to solicit the child's views, and bring those views into their parents' mediation session.

The overarching goals of the pilot project include: testing out the model; developing training and policy around how to involve children in mediation; and determining the utility of child-inclusive mediation within the context of the services offered through the Ministry of the Attorney General, Family Justice prior to expanding it further province wide. Moreover, however, it is anticipated that hearing from children in high conflict situations will be helpful to children and their families in resolving the dispute.

Families are screened into the program by the family justice counselor. In order to participate in the program, the parents and children need to agree to be interviewed and need to wish to be engaged in the process. Only children who are at least 10 years of age and are developmentally mature to understand the issues can participate, and there must be reason to believe that the children will benefit from the program. Any cultural, religious, and ethnic considerations, or special needs of the child must be examined, but do not necessarily preclude their involvement. There is a special screening for levels of conflict that includes issues of domestic violence. A formal evaluation of this program is forthcoming. One factor to be considered in the evaluation will be the ages for children's participation.

Another project piloted in collaboration with members of the Kelowna legal community and the International Institute for Child Rights and Development (IICRD), in Kelowna, British Columbia, was the, *Hear The Child Interviews* (Williams, 2006; Williams and Helland, 2007) in 2005. *Hear the Child Interviews* was designed to provide an opportunity for children to share their views and have those views considered by the decision-makers during child custody and access disputes. The underlying premise for developing the project was based on existing legislation that allowed for children's views to be heard²⁸, child development research that

²⁸ R.S.B.C. 1996, c. 128, s.2.

demonstrated it was important to children to be heard, and finally, the rights of children enshrined in the *Convention*.²⁹

Hear the Child Interviews also provided for a neutral interviewer (lawyer/counselor) who would conduct an interview with the child and then report his/her views *verbatim*³⁰ back to the parents, the lawyers, and the court through a one-hour non-therapeutic interview. The process was voluntary; children aged nine to 16 years old and their parents could consent to the interview during any stage of the dispute before the court. Parents had to pay \$500.00 for the interview. The goal of the interview with the child was to allow his/her views to be heard and then be considered by his/her parents and ultimately by the court when making its final decision.

An internal evaluation was conducted and findings demonstrated that 100 per cent of decision-makers (judiciary) who responded to the evaluation found that child views, where obtained, were to be considered in their cases (Williams and Helland, 2007). Over four-fifths (83 per cent) who responded gave significant weight to the views of the child as one factor to be considered. From the judges' point of view, the positive benefits of interviewing children were that: (1) having more information before them helped facilitate their decision-making; (2) the children's views contextualized the parents concerns; and (3) the children's views provided corroborating information where corroboration with the views of parents would not otherwise be possible. Moreover, the child interviews provided: (1) a cost-effective and timely way of obtaining children's views before the court; (2) assurance that the child was heard and that his/her views were being considered by the judge; and (3) facilitated early settlement (Williams and Helland, 2007).

Some limitations were also noted: (1) the interviews with children occurred at the last minute or too late in the litigation process; (2) more than one interview with the child was needed; (3) children were heard in only 10 per cent or less of all cases; (4) inadequate follow-up with children; and (5) older and younger children were excluded from this process (Williams and Helland, 2007).³¹

In an independent evaluation conducted by Focus Consultants (2008), feedback was obtained from grandparents/parents and children about their experiences with the *Hear The Child* interviews in Kelowna. Due to significant issues related to obtaining consent from parents and children, the evaluators were only able to interview one party from a case in 42 per cent of cases (N=12/28) by telephone. The evaluators report that there was representation by 25 per cent (14/56) of adults, and 13 per cent (6/48) of children (Focus Consultants, 2008). The children

²⁹ *Supra*, Note 1.

³⁰ The child's statements were quoted exactly from what the child reported.

³¹ The reader is encouraged to visit the IICRD's website for a complete description of the *Hear the Child* interviews. The website can be accessed online at: <http://www.iicrd.org/childparticipation>.

interviewed in the evaluation were between the ages of 11-14 years. Parents and children were each asked a series of open and closed-ended questions. For example, questions regarding process included, how each parent/child heard about the interview, how each parent/child felt about the interview, and what qualities they wanted from the interviewer. Questions regarding outcomes for parents included whether the report represented the views of their child and if the report helped advance the best interest of the child. Questions regarding outcomes for children included whether they were able to discuss what they wanted to about the dispute and whether they felt the interview helped them in having a say about their parents' dispute.

Despite the methodological limitations of the evaluation, findings from the fourteen parents interviewed indicated that they were virtually unanimous in endorsing the idea of hearing direct views of the child by some means, that they all viewed the interviewer as a neutral party, and that they all felt that their child was safe in the interview. Findings from the six children interviewed indicated that they would describe the process in essentially positive terms to a friend (Focus Consultants, 2008).

Other limitations that were noted were parental pressure on or recriminations against children in some of the cases, that the judge did not use the report of the interview in some cases, and that there was a fear and awkwardness by some children to have their interview report shared with their parents without the child having reviewed it first (Focus Consultants, 2008).³²

Alberta

In Alberta, there are a number of different initiatives occurring both in the private and public sector that provide for different levels of participation by children in the separation and/or divorce process. Mediation is provided in both the private sector as well as the public sector. It is unclear whether and how children are included private sector mediation. There is no legislation that provides for children to be legally represented and have their voices heard (Burns and Goldberg, 2004).

In the public sector, in addition to a child custody and access assessment that is conducted by mental health professionals, the Ministry of the Attorney General has provided for a Family Law Practice Note "7", which can be used in certain cases involving separated and/or divorced families. The purpose of the Practice Note is to provide services only in cases where: (1) the families are experiencing an impasse; (2) the intervention of the court is required; and (3) the court requires assistance from parenting experts.³³ The Practice Note provides for either an

³² IICRD is in the process of obtaining further funding to continue with the child interviews and has also developed a curriculum for professionals doing this work.

³³ For a complete review of Practice Note 7, see: <http://www.albertacourts.ab.ca/qb/practicenotes/familylaw/note7.pdf>

intervention (short or long term therapeutic involvement of a parenting expert) or a traditional child custody and access assessment to assist the court in determining the child's best interest.

Children have an opportunity to participate in the brief consultation model with a mental health professional to have their views and concerns heard and brought back to their parents.

Children's participation is also considered through the Brief Conflict Intervention Program.

Children even under six years of age have an opportunity to participate in an interview with a psychologist and have their views and concerns fed back to their parents.

In a joint legal/mental health initiative The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review between the Children's Legal and Educational Resource Center (CLERC) and the YWCA, they have been piloting a project called, *Speaking for Themselves* in Calgary. CLERC is a non-profit legal and educational resource for children, youths and their families. The YWCA of Calgary provides specialized counseling to children who have been exposed to domestic violence. In the joint collaborative partnership, a specialized children's counselor provides short-term therapeutic clinical services and CLERC provides legal support to young people throughout the City of Calgary who have been referred to the program. Families include those who have experienced domestic violence and families who are also involved in high conflict custody and access disputes. These are the more severe high conflict cases (i.e., repeated court involvement, issues of domestic violence, alcohol/drug abuse, allegations of poor parenting). The counselors involved in this project are highly skilled clinicians with a background in domestic violence issues and conflict as a result of the intake criteria. Cases are also screened to confirm that the young people are likely to benefit from the program.

The counselor conducts an intake interview with each parent and attempts to acquire consent from each of the parents. Verbal consent of the children is also acquired. If consent from the parents is not forthcoming, a court order is required. All parents are offered the support of a parent counselor through the YWCA of Calgary. The same therapist meets with the child (typically 8+ years of age) to determine the child's needs and suitability for the program and, throughout the course of therapy, treats the child's trauma and acquires an understanding of the child's experiences in the family. The therapeutic involvement with the child lasts approximately 18.5 hours. The counselor prepares a report and works in collaboration with the child's lawyer. The counselor may also provide testimony in court and act as a witness for the child's lawyer if the matter proceeds to trial, which is rare. The lawyer's role is that of an advocate or *amicus curiae* (friend of the court). A formal evaluation of the project is currently underway.

Saskatchewan

In Saskatchewan, mediation services are also provided in the public and private sector by mental health professional and lawyers. Specifically, in the public sector, the Hearing Children's Voices Report, similar to the Views of the Child Report in British Columbia, allows children 12 years of age and older to be interviewed by a mental health professional and have their views known to the court and considered in the decision-making process. The child is usually interviewed twice, once with each parent when it is their opportunity to bring the child to the interview. Specific parenting plan recommendations may or may not be included in a report to the court. Justice counselors also prepare child custody and access reports that provide specific parenting plan recommendations on the child's best interests to the court.

While there is no legislation that provides for independent child legal representation, there have been instances where one parent or the other has retained a lawyer to act on behalf of their child and have the child's voice heard (Burns and Goldberg, 2004).

Manitoba

In Manitoba, mediation services similarly exist both in the private and public sector. In the public sector, Family Conciliation Service, Manitoba has several initiatives that provide for early and brief interventions as well as child custody assessments regarding children and enunciating their best interest. One pilot project, called First Choice, is a settlement-oriented dispute resolution process that combines assessment, mediation and counseling focused on resolving the parental dispute before the court. The parents are seen initially for an assessment with their lawyers to determine what issues, if any, can be resolved and what other services may be appropriate for the family. If a complete resolution cannot be obtained, mediation is offered to the parents to facilitate some resolution on any outstanding issues. Children are not typically seen as part of this project.

In addition, the Brief Consultation Service is a pilot project funded by the Child-Centred Family Law Strategy in Manitoba since October 2001. The project provides children aged 11-17 years an opportunity to share their wishes, concerns and views. In addition, parents are provided with a brief consultation that focuses on their children's emotional and developmental needs. Parents are contacted by telephone to meet with a counselor soon after they are referred from the court. Interviews with the parents occur prior to meeting with the children to obtain background history and assess issues in dispute. The children are advised of issues relating to confidentiality and receive a one page information sheet outlining the nature of the interview. Following the interviews with the children and the parents, a brief report outlining who participated in the process, the issues in dispute, and impressions is prepared for the court. Suggestions regarding parenting time arrangements are made, rather than recommendations. If the parents do not agree with the suggestions, then the counselor can be called as a witness. Only experienced family

counselors who have expertise in mediation and separation and/or divorce provide the Brief Consultation Service (Martin and Kowalchuk, 2007).

In a recent evaluation of the Brief Consultation Service, surveys were mailed to 254 children and their parents, lawyers and judges to assess their level of satisfaction with the service and obtain information regarding settlement one year later. Of the 22 children who completed the survey, most of them reported positive responses to having their thoughts and feelings considered in the decision making process. Most of the children also reported that they believed the counselor listened and understood views. Of the 33 parents who rated the service, the majority of them found the service relatively helpful overall in resolving the dispute before the court. Most parents also rated their child's participation in the process as helpful. Of the 41 lawyers who responded to the survey, most stated that the service met the objectives of providing a voice for the child, reduced the time spent in litigation and was useful as a tool in facilitating resolution of the dispute. Of the 10 judges who responded, the top benefits of the service cited were its timeliness, provision of expertise, and provision of recommendations as direction for the family. The lowest ranked in order of importance was that the service served as a wake-up call for parents. All the judges surveyed indicated overall satisfaction with the service and felt that it met or exceeded expectations in terms of facilitating an early resolution to the issues in dispute. Of the 126 cases that were followed one year later, 33 per cent had settled at a case conference (where parents and the judge discuss the issues that are still outstanding and see where resolution is possible), 38 per cent had resolved by a final court order, 22 per cent withdrew their application or no further litigation was recorded, and 7 per cent did not settle and litigation continued. A total of 93 per cent of the cases were no longer litigating after the Brief Consultation Service (Martin and Kowalchuk, 2007).

The evaluators noted the low response rates and attributed it to parents moving away or just not wishing to respond to a mailed survey. However, those that did respond to the survey demonstrated a mid to high rate of satisfaction with the service and found that it was helpful in settling the dispute before the court in a timelier manner.

Ontario

In Ontario's private sector, various approaches to child-inclusive mediation are being practised by different mental health professionals (social workers and psychologists) who strongly believe in providing an opportunity to hear children's views (Landau, 2005, 2006). Many mental health professionals have included children's participation in similar approaches to those that have already been discussed in both the social science and research literature (Goldson, 2006; Kelly, 2002; McIntosh, 2007; Saposnek, 2004). However, children's voices are not typically included in the mediation process in the publicly-funded court services.

In the public sector, the Ministry of the Attorney General also provides for independent child legal representation through the Office of the Children's Lawyer. The Office (hereafter referred to as the OCL) is a publicly funded legal office that represents children's legal interests before the court in custody and access disputes, child welfare matters, and estate issues. Ontario is the only province that provides a comprehensive child legal representation program³⁴ in both child custody and access proceedings as well as child protection matters. The policy statement on the role of child's counsel at the OCL provides that the: (1) child's counsel obtain the views and preferences, if any, which the child is able to express; (2) child's counsel does not represent the best interests of the child, as that is to be determined by the court; (3) child's counsel is the legal representative of the child and not the litigation guardian or a *amicus curiae*; and (4) child's counsel has a solicitor-client relationship with the child (Burns and Goldberg, 2004; Goldberg, 2004).

The OCL also provides: 1) child legal representation with a clinical assist³⁵; and 2) a child custody and access investigation and report (Birnbaum, 2003, 2005). Focused investigations that explore access-based difficulties are also provided by both clinical investigators (mental health professionals) and lawyers (Birnbaum and Moyal, 2002; Birnbaum and Radovanovic, 1999). Only the clinical investigators write a brief report to the court outlining parenting plan recommendations. Children's participation is limited in that their voices are canvassed by the professionals in the context of litigation.

Quebec

Like Ontario, Quebec also has specific legislation that provides for legal representation of children in custody and access disputes.³⁶ Unlike the role of child's counsel in Ontario, lawyers in Quebec adopt an advocate role on behalf of the child—as long as the child can provide clear instructions, the lawyer is to advocate their expressed wish (Bala, Talwar and Harris, 2005). More specifically, Article 34 of Quebec's *Civil Code* allows for a child to be heard if they are old enough and have the ability to express themselves. As a result, it has been suggested that in Quebec, children are more likely to testify in court about their parents' dispute more often than elsewhere in Canada (Ministry of the Attorney General, 2007).

³⁴ In Ontario, the *Children's Law Reform Act* explicitly sets out that judges must consider, "the views and preferences of the child when such views and preferences can be reasonably ascertained" s.24(2). The OCL has complete discretion as to whether to become involved in a custody and access dispute or not and what type of service (lawyer/clinical investigator/or both) they will provide.

³⁵ A clinical investigator (mental health professional) assists the child's lawyer in obtaining information about the child and family to facilitate the court's decision-making. There is no specific legislation that provides for this type of intervention by a clinical investigator. The assist is used only at the Office of the Children's Lawyer. The court is the final arbiter in all child custody and access proceedings.

³⁶ R.S.Q, c. C-25, art. 208 and 394.1.

In addition, there are mediation services in Quebec that are provided by both the public and private sector. The court can order parties to attend mediation, except in cases of domestic violence. Children are only included in mediation on a case-by-case decision with the consent of both parents. In addition, in the public sector, Information Sessions for parents are mandatory. Child custody assessments are also conducted in the public sector and children are interviewed as part of the process.

New Brunswick

In New Brunswick, when parents are disputing custody and access of their children, they can obtain a child custody and access assessment only in the private sector. In the public sector, parents who are eligible may receive financial assistance to defray the cost of the child custody assessment through the Court Ordered Evaluations Support Program (C-OESP). In addition, mediation services are provided at no cost to the families in the public sector. However, children do not typically participate in the mediation sessions, but are included in the child custody assessment.

There is legislation for child legal representation under the *Family Services Act*³⁷, however, representing children is an uncommon practice (Burns and Goldberg, 2004).

Nova Scotia

Similar to the other provinces, parents disputing child custody and access can obtain, by court order, a child custody assessment. There is a conciliation service that is mandatory in the family court (Supreme Court). A conciliation officer only meets with parents to understand what issues are in dispute and the next steps to be taken. Children are not included in any of the discussions. Additionally, while there are private and public mediation services available on a voluntary basis, children rarely participate in the process in any informal or formal way. Moreover, there is no child legal representation in custody and access disputes (Burns and Goldberg, 2004).

Prince Edward Island

As with the other provinces, there are both public and private mediation services available in Prince Edward Island. Typically, children are not included in either the private or public sector mediation services. However, in the public sector, there are family court counselors who conduct custody and access assessments. As stated previously, children's participation is part of the litigation process only. There are no statutory provisions for child legal representation.

³⁷ S.N.B. 1980, c. FO2.2, as amended by S.N.B. 1996, c.13, s.6(4).

Newfoundland and Labrador

There are both private and public mediation services. Children are typically not included in public service mediation, but are provided with counseling to assist them during their parents' dispute. Depending on the mediator, children may be involved at the end of the mediation session to help them understand the agreement their parents have reached about them (O'Connor, 2004). Similar to the other provinces, there are child custody and access assessments which include interviewing of children as part of the process. Additionally, child-focused reports are conducted. They are similar in practise to those completed in Saskatchewan, British Columbia, and Manitoba. There are no legislative provisions for child legal representation in Newfoundland and Labrador (Burns and Goldberg, 2004).

Yukon

There is a court-based mediation service for parents to help them resolve their dispute. Children are not included in the process at all. In addition, few custody and access assessments are completed due to a lack of resources (O'Connor, 2004).

The Public Guardian and Trustee acts under section 168 of the *Children's Act*. The Official Guardian has the exclusive right to determine whether a child will be legally represented in a child protection matter.³⁸ However, there is no specific reference for child legal representation in a custody and access dispute. When a lawyer is provided in a custody and access dispute, child advocates are appointed from the private bar (Burns and Goldberg, 2004).

Northwest Territories

Similar to the Yukon, there are few custody and access assessments that are carried out because of a lack of resources. Mediation services are limited and do not include children. There is also no legislative provision for child legal representation (Burns and Goldberg, 2004).

Nunavut

Similar to the Yukon, few child custody assessments take place due to a lack of resources. However, there is a public sector mediation service that provides for innovative dispute resolution and is culturally-based. Information and counseling services are also provided.

³⁸ See the Yukon government website for the role and responsibilities of the Public Guardian and Trustee. The website can be accessed online at: <http://www.publicguardianandtrustee.gov.yk.ca/children.html>.

The *Children's Law Act (Nunavut)* is the same as the Northwest Territories. A judge may appoint an *amicus curiae* (friend of the court) for the child (Burns and Goldberg, 2004).³⁹

American Perspectives

Mediation is also practiced widely throughout the United States, in both the public and private sectors, and is undoubtedly the most widely researched form of intervention used for parents involved in separation and/or divorce (Emery, Matthews and Kitmann, 1994; Emery, Matthews and Wyer, 1991; Kelly, 2002, 2004; Sbarra and Emery, 2008). Folberg, Milne and Salem (2004) describe different types of mediation services and models of mediation (i.e., facilitative, transformative, evaluative, and therapeutic) that are offered in both private practice, court-connected centers, social service agencies, clinics, as well as community mediation centers. However, the degree to which children are involved in court-connected or community-based mediation centers remains unclear, as well as when, and, if so, how.⁴⁰

In the private sector, many psychologists and child related specialists have brought children into the mediation process, before, during and after as previously described (Johnston and Campbell, 1988; Kelly, 2002; Sanchez and Kibler-Sanchez, 2004; Saponek, 2004, Shienvold, 2004). Increasingly, parenting coordination, which is practiced more widely in the United States than any other jurisdiction, is meant to assist high conflict families with the assistance of a mental health clinician, to work with both parents on implementing their parenting plan (Boyan and Termini, 2004; Coates et al. 2004). Yet, as previously mentioned, the level of children's participation in this process varies and is not automatically included.

There are countless programs for parents and children that provide a psycho-educational component, assessment and counseling (Homrich, Glover, and White, 2004; O'Connor, 2004).⁴¹ While many of these excellent programs provide important information and assistance to parents and their children experiencing separation and/or divorce, children's participation is focused on obtaining information, rather than participating fully and having a "voice" into the parenting arrangements that are about them.

³⁹ See the government of Nunavut website information about the *amicus curiae*. The website can be accessed online at: http://action.attavik.ca/home/justice-gn/attach-en_conlaw_postdiv/consSNWT1997c14.pdf.

⁴⁰ An internet search did not yield any further clarity about specific mediation services available that include children's participation in government based public services. As well, an email discussion with Joan Kelly (psychologist and researcher in California) and Peter Salem (Executive Director, Association of Family and Conciliation Courts) did not yield any further programs and/or services in the non-private sector that could be easily identified. However, there are many excellent research reports and articles written about public mediation services in California to name a few. They can be accessed online at: <http://www.courtinfo.ca.gov/programs/cfcc/resources/publications/articles.htm>.

⁴¹ For example, *Kids Turn* in San Francisco (www.kidsturn.org); *Kids First* in Orange County (www.kidsfirstoc.org); *Support Groups for Children and Young Adults*, in Maryland (www.divorceabc.com); and *Children in the Middle* programs in Ohio (www.divorce-education.com/CIM.pdf) to name a few. Also see O'Connor (2004).

In 2002, the Association of Family and Conciliation Courts (AFCC) organized its annual conference focusing on the theme of children's participation. A survey was conducted with the participants asking them to rate eight methods of obtaining the voice of the child. The eight methods rated were: (1) child testifies in court; (2) child provides an out-of-courtroom deposition with the other lawyer; (3) child is interviewed by a judge; (4) child signs an affidavit with a lawyer to submit to court; (5) child expresses views to an *amicus curiae/attorney ad litem* who presents their views to the court; (6) child is interviewed privately by a mental health clinician who consults with the parents and may also interview the child with the parents, if helpful; (7) child is interviewed by a mental health custody evaluator who testifies in court about what is in the child's best interest; and (8) child participates in mediation, either privately or with both parents.

A total of 530 participants rated these eight different methods on a scale from one to 10, with 10 representing a healthy way of including children, and 1 representing an approach that is emotionally damaging to children. The participants rated method number (6)—child is interviewed privately by a mental health clinician who consults with the parents and may also interview the child with the parents, if helpful—as the healthiest way to hear the child's voice and method number (1)—the child testifies in court—as the most damaging way to hear a child's voice (Yingling, 2005).

Texas is the only State that has a law⁴² providing for a child (12 years and older) to sign an affidavit identifying the child's preference for which parent s/he will primarily reside with, subject to the approval of the court. In part, due to the AFCC survey discussed above and other lobbying efforts, Texas law changed in 2005 to include a focus on parenting plans and to authorize the use of mental health professionals to coordinate and facilitate the implementation of parenting plans. In addition, a revision to the Family Code was made to be more consistent with the social science and empirical research (Yingling, 2005).

As in many jurisdictions, child custody and access assessments exist in every state. They are conducted in both the public services as well as by private practitioners. Children are interviewed as part of the custody and access assessment. As noted previously, these assessments are time consuming and intrusive in the lives of children and families. The courts have also explored alternative types of interventions that are commensurate with different levels of conflict and risk in an effort to better meet the needs of families and the courts (Finman, Fraser, Silver and Starnes, 2006; Salem, Kulak and Deutsch, 2007). For example, in the 20th Judicial Circuit of Florida, there is the Sieve Model. This model focuses on conflict resolution and differentiates services for families that range between high and low conflict families (i.e., intensive therapeutic

⁴² The Texas Family Code, 153.008 can be accessed online at: <http://www.legaltips.org/texas/FA/fa.005.00.000153.00.aspx>.

support, a child custody and access assessment, mediation, parenting education, and other mental health coaching) (Finman et al. 2006). There are also fast track evaluations or what is also referred to as mini evaluations⁴³, or issue-focused evaluations. These types of evaluations are meant to examine a specific issue (i.e., supervised to unsupervised access, parenting time) rather than conducting a full child custody evaluation in the courts in Connecticut, Los Angeles, Oklahoma, Minnesota and Texas. However, the level of children's participation varies according to the characteristics of the case (Little, 1997).

In the Connecticut court services, there are five primary services that are offered to disputing families. They are: (1) negotiation services (disputes over access, finances, property contempt motions, etc.); (2) mediation services; (3) conflict-resolution conference; (4) issue-focused evaluation; and (5) comprehensive child custody and access evaluations.

More recently, the court in Connecticut has embarked on establishing a more evidence-based approach to servicing families according to a triaging system or a tiered services model. Families start with the least intrusive service (i.e., divorce education) and then move to the next tier of services if they cannot resolve the dispute. The services become more investigative as families move through the tiers (i.e., mediation, child custody evaluation, a moderated settlement conference and, if necessary, a trial) (Salem, Kulak and Deutsch, 2007). An intake and assessment instrument, called the Family Civil Intake Screen⁴⁴, has facilitated the effectiveness and efficiency of the referrals to the various tiered services. Research on this instrument has been ongoing since 2004. To date, there is support for the overall effectiveness of the Screen and the ability to match families to appropriate services (Salem, Kulak and Deutsch, 2007). Long term data analysis of the efficacy of the Family Civil Intake Screen is ongoing.

In Arizona, Markan and Weinstock (2005), two psychologists in private practice, also identify other types of child custody evaluations that range from a comprehensive child custody evaluation, a problem-focused evaluation (addresses a specific question), a dispute assessment (addresses assessment issues identified in state statutes), a child development evaluation (addresses the relationship between the child's needs and custody/parenting time decisions), a child forensic interview (a videotaped interview of the child by a child specialist focused on exploring a specific issue such as child sexual abuse or the child's preferred residential arrangement), and an emergency case stabilization (aimed at stabilizing a dangerous parent-child situation providing appropriate referral for treatment).

⁴³ The term child custody and access assessments are used in Canada, while the term, child custody evaluations or forensic evaluations are used in the United States. The terms are being used interchangeably and involve the same methodology.

⁴⁴ This instrument has been developed and supported with the assistance of many senior researchers and academics, the AFCC, many other consultants, as well as the Judicial Branch's Court Support Services Division management and staff of Connecticut. The instrument is published in the article by Salem, Kulak and Deutsch (2007).

Many of these different types of child custody and focused evaluations have resulted from the exploration of alternative means to assisting families and children post separation and/or divorce. However, children's participation and their actual input into the decision-making remain less clear.

In addition, children's lawyers can also be appointed throughout the United States. There are two types of children's lawyers that the American Bar Association has adopted as its standard for lawyers representing children (*Standards of Practice for Lawyers Representing Children in Custody Cases*, 2003).⁴⁵ These are: (1) the best interest attorney (independent assessment of what is in the child's best interest and advocate for that position; and (2) child's attorney (traditional attorney-client relationship providing the child with a strong voice in their parents' dispute). Some courts also provide for a *guardian ad litem* to report to the court or testify about the child's best interest. However, this latter role is not a role of the lawyer under the Standards of the American Bar Association.

International Perspectives

Australia

Since 1999, Australia has taken the lead in providing empirically-based child-inclusive practice approaches with children (Hewlett, 2007; Mackay, 2001; McIntosh, 2000, 2003, 2005; 2006, 2007; McIntosh, Bryant and Murray, 2008; McIntosh and Deacon-Wood, 2003; McIntosh and Long, 2005, 2006, 2007; McIntosh, Long and Moloney, 2004; McIntosh, Wells, Smyth and Long, 2008; McIntosh, Wells, and Long, 2007; Moloney, 2005, 2006; Moloney and McIntosh, 2004).

Framed as a public health crisis regarding the psychological needs of children during family breakdown (Amato, 2006; Emery, 2001; Kelly and Emery, 2003; Lamb, 2002/2003), considerable research funding and support have been provided by the government to explore evidence-based practice models that include the voice of the child post separation and/or divorce. Consequently, children have greater involvement in decision-making in Australia.

In addition to the research agenda, Australia provides four different tiers of services: (1) family relationship centers, where every family receives up to 6 hours of education and mediation (whereas families that are not considered suitable for mediation go through the court stream); (2) family relationship services that provide for community-based mediation on a sliding scale based on the parents' income; (3) court services for highly intractable disputes (a child consultant

⁴⁵ The Standards can be accessed online at: http://www.abanet.org/family/reports/standards_childcustody.pdf. The reader is also encouraged to review the following website that outlines the most recent conference proceedings on the recommendations of the role of child legal representation, competencies for practice, and the attorney-child relationship for lawyers representing children in the United States: <http://rcif.law.unlv.edu/recommendations>.

interviews the child and will testify at the court, if necessary); and (4) child legal representation. The premise behind each service is based on empirical evidence that targets both risk and resiliency factors for children post separation and/or divorce.

There is also the Children's Cases Program (CCP), which adopts a different court model for determining child custody and access matters. This program has also been called The Less Adversarial Trial where the judge maintains control over what issues will be dealt with, what evidence will be called, and the way in which the evidence will be received by the court. Other features of this approach include: (1) a focus on the future rather than the past; (2) a less formal court atmosphere where lawyers are not wearing robes; (3) direct discussions between the judge, parties, the parties' lawyers, and the family consultant (mediator); (4) the possibility that the judge may dispense with the rules of evidence; and (5) the availability of a family consultant to assist throughout the litigation stage.⁴⁶

McIntosh, Bryant and Murray (2008) have evaluated the Less Adversarial Trial/CCP and the Child Responsive Program (CRP). The CRP program is a front-end service where parents are assigned a family and child consultant early on in the process who provides education, a preliminary family assessment, and a child-inclusive approach.⁴⁷ Pilot findings for the CCP program four months after the intervention have demonstrated that parents were significantly more likely to report better conflict management, less damage to their co-parental relationship, greater parent-child satisfaction with the living arrangements, and improved adjustment of the children. The CCP was contrasted with the experience of parents in a traditional adversarial group. This latter group found the court process neither helpful nor was it reparative of the co-parental relationship. Pilot findings for the combined CRP and CCP program demonstrate that the majority of parents (67 per cent) reported improved protection of the children with respect to their conflict as a result of CRP, increased overall levels of cooperation between parents after court, and decreased levels of conflict between parents after court. McIntosh, Bryant and Murray (2008) conclude that results of the combined CRP and CCP provide encouraging results to foster less adversarial approaches for parents and children.

The children's lawyers in Australia advocate the best interest position on behalf of children. That is, they not only provide the court with the child's views, but also take an independent view of what constitutes the child's best interests and act upon it. The children's lawyers can disclose to the court any information that is shared by a child even if the child disagrees.⁴⁸

⁴⁶ More information on this program can be accessed online at:

http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/

⁴⁷ The child-inclusive approach involves assisting parents in understanding their children's needs. A child specialist meets with the child and begins a therapeutic dialogue with their parents and the mediator about the child's needs.

⁴⁸ *Family Law Act*, s.68LA (2)(5)(7) & (8).

Finally, as a means of dealing with access-based difficulties, a hybrid program was also initiated in 1999. This pilot program (Contact Cases Program) included parent education, children's groups, individual counseling, mediation, and where appropriate, referrals to supervised access for high conflict families.⁴⁹ Children provide feedback to their parents about their feelings. The government has provided ongoing funding for this service since 2005.

New Zealand

In New Zealand, there are mental health professionals who provide child custody and access assessments. In addition, a child-inclusive mediation model was piloted in 2006 aimed at addressing the dispute much earlier in the breakdown of the parental relationship (Goldson, 2006). Intractable custody and access disputes, domestic violence cases and cases involving mental health problems were excluded from the study. Qualitative results demonstrated that children and parents clearly benefited from this approach.

Similar to the Australian Less Adversarial Trial, the Parenting Hearings Program⁵⁰ has been running for the last two years in New Zealand. However, unlike the Australian program, the mediator in the Parenting Hearings program is not present during the hearings. An evaluation is forthcoming on this approach. Some judges have also interviewed children during this process.

New Zealand also provides the most extensive child legal representation for children under its *Care of Children Act, 2004*. The lawyers' responsibilities include: (1) explaining the court process to the child; (2) representing the child in all facets of his/her care and custody; (3) putting the child's views and all relevant issues about the child before the court; and (4) meeting with the child after the judge has made his or her decision.⁵¹ With respect to their role as compared to other jurisdictions that have been discussed, the lawyers for children in New Zealand fall between the traditional advocate and the best interests advocate. The New Zealand government has committed itself to providing child legal representation so that the child's voice in custody and access matters is heard before the court. New Zealand is currently exploring how best to involve children in decision-making in a way that honours their voice but also keeps them safe from parental conflict (Boshier and Steel-Baker, 2007).

⁴⁹ More information can be accessed online at: <http://www.relationships.com.au/what-we-do/services/contact-parenting-orders-program-1>. An evaluation of this service can also be accessed online at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Contactordersprogram-2003.

⁵⁰ For a more complete description of this program and the initiatives being led by the New Zealand government, the reader is encouraged to access the website online at: http://www.psychologistsboard.org.nz/pdfs/MOJBriefingPaper14Sept06__1%20_2_.pdf and; <http://www.justice.govt.nz/family/publications/speeches-papers/default.asp?inline=auckland-family-courts-association-september-2006.asp>.

⁵¹ The role and responsibilities of the child's lawyer in New Zealand can be accessed online at: <http://www.justice.govt.nz/family/practice/notes/child-counselv2.pdf>.

Scotland

In Scotland, as elsewhere throughout North America and England in the early 1980s, conciliation services that focused on working with parents in an effort to resolve their disputes at family breakdown were developed. Today these services continue in one form or another. However, despite the positive benefits of child-inclusive practices in Edinburgh during the 1980s, few mediators or lawyers are prepared to include children in discussions about their parent's dispute presently.

In addition, other publicly funded services such as child custody assessments and some forms of child legal representation are provided (Garwood, 1990; Marshall, Tisdall, and Williams, 2002; Tisdall et al., 2002).

More recently, research on incorporating children's views has been ongoing under the *Children (Scotland) Act*, 1995 (Hill, Lockyer, Morton, Batchelor, and Scott, 2000; Marshall, Tisdall, and Williams, 2002; Tisdall et al., 2002). The *Act* provides a strong focus on having children's views made known to the court when parents separate and/or divorce. For example, a lawyer can assist the child(ren) to complete an F-9 Form, that allows them to express their views to the judge.⁵² Alternatively, a lawyer can also write to the judge on the child's behalf or may apply to add the child(ren) as a party to the proceeding.⁵³ Children who are under the age of 16 years and who have the legal capacity to instruct their lawyers may do so. Legal aid is available for children in family disputes to obtain independent legal advice. Children's participation is also canvassed through assessment reports prepared by social workers or *curators ad litem* (Murch, 2005).

England

In England, the Children and Family Court Advisory and Support Services (CAFCASS: mental health professionals) provides written child custody assessments in disputed custody matters and in some cases, provides for child legal representation (Douglas, Murch, Miles, and Scanlon, 2006; Murch, 2005). The role of CAFCASS workers is to: (1) provide safety and promote the welfare of children; (2) give advice to family courts; (3) make provision for legal representation of children; and (4) provide advice, information, and support to children and families (Murch, 2005).

A limited pilot project ran for approximately one year in 2004 that provided for an initial risk assessment of the issues in dispute, a parent education program, and a dispute resolution process that focused on the parents. The voice of the child was included through interviews with a mediator who provided feedback to the parents after the parents' first mediation session. The

⁵² The F-9 Form is available online through the Ministry of Attorney General, British Columbia website. It can be accessed online at: <http://www.ag.gov.bc.ca/legislation/pdf/Chapter8-ChildrensParticipation.pdf>.

⁵³ *Ibid*

pilot project did not continue as there was no consensus by the professionals or parents involved as to when to interview children in the process.

More recently, family policy in England encourages parents to attend mediation and other ADR processes as early as possible to resolve issues in a more informal manner which may be more beneficial to them and their children in the long run (Mantle, Leslie, Parsons, Plenty and Shaffer, 2006). Parents and their children move through four distinct stages where they can attempt to resolve their issues at any stage. These are: (1) early intervention (CAFCASS receives family law documents); (2) casework (conduct assessment reports); (3) court hearing (a CAFCASS worker recommends a parenting plan based on assessment and provides the necessary referrals for the child and family); and (4) court decision.⁵⁴ However, children's participation remains limited.⁵⁵

⁵⁴ For further information on these approaches, the reader can access the website online at: http://www.cafcass.gov.uk/publications/reports_and_strategies.aspx.

⁵⁵ See Neale (2002), Trinder (1997) and Trinder and Kellett (2007) for an excellent discussion on children's participation in family law in England.

4.0 LESSONS LEARNED ABOUT CHILDREN’S PARTICIPATION IN CHILD-INCLUSIVE MEDIATION AND OTHER ADR PROCESSES AROUND THE GLOBE

As described, children’s participation in child-inclusive mediation and other ADR processes varies widely across and within Canada, the United States, as well as internationally. This parallels the discussion with the participants in this review who also raised many different forms and models of how children may participate in decision-making as well as when to include children.

One theme that has resonated across the globe is that the voice of the child is important and should be heard during times of parental separation and/or divorce. However, what is the best approach to have their voice heard (i.e., child legal representation, child custody assessments, brief interventions, voice of the child reports, judicial interviews, parenting coordination, or the use of child specialists) and when their voice is to be heard (i.e., before, during, or after mediation has been concluded) remains less clear. Another theme that has resonated across the globe is that, irrespective of the approach taken for child-inclusive decision-making, the focus must always be on protecting children from parental conflict and making sure that they are not exposed to any ill effects of loyalty binds, and/or feeling over-empowered in the process and responsible for the decision.

As has been raised, many of the court-related dispute mechanisms that have been outlined invite children’s participation, but primarily in the context of helping the court in its decision-making as opposed to having children contribute to the decision-making in concert with their parents. While there are many excellent pilot projects that have been initiated across Canada and in New Zealand, it is still difficult to determine which methods are most effective in including children’s participation in child-inclusive mediation or any other ADR process, and how. This is due to the limited nature of “pilot programs” and ongoing funding issues. Compounding this problem from a research perspective is that it is difficult to evaluate programs based on one-time, short-term grants with no comparative research designs that would provide more information of what works and what does not. In addition, larger numbers of participants and a long-term follow-up of any of the approaches discussed would provide more clarity on what does or does not work regarding children’s participation. In the final analysis, with little ongoing research to guide policy-makers, it becomes difficult to know what resource impacts on the level of children’s participation. Instead, what remains is a patchwork of services and programs that is not consistent for all children to be able to access. Ongoing research on the scale of that is being conducted in Australia would go a long way into realizing the potential benefits and/or limitations of children’s participation.

The following section incorporates the lessons learned from the existing services that have been identified across Canada, the United States and internationally with the themes that the participants raise regarding child-inclusive mediation and other ADR processes. The lessons learned are grouped according to: (1) child legal representation; (2) brief interventions; (3) voice of the child reports; (4) child-inclusive mediation approaches; and (5) child specialists in collaborative family law practice. In addition, a sixth group incorporates the views from two leading academic scholars in the field of law and social welfare.

Child Legal Representation

The objective of child legal representation is to allow a child to have his/her voice heard during times of parental dispute. Different approaches to child legal representation are taken across the globe and in Canada. As previously discussed the literature and case law have referred to three different models of legal representation. They are: (1) traditional advocate; (2) an animus curiae; and (3) litigation guardian.

At the Office of the Children's Lawyer in Ontario, children are provided with an independent voice to represent them, particularly in high conflict cases (i.e., repeated court appearances, allegations of domestic violence, alcohol/drug abuse, and concerns about parenting abilities) to represent them.⁵⁶ The Children's Lawyer states that many of the children the Office is involved with are already experiencing difficulties as a result of their parents' separation and are more than aware of the issues going on in their family. Therefore, having a lawyer represent them provides an opportunity to have their voice heard, if they so choose. She adds, however, that this does not mean that children are given the final decision, but rather, they are provided with an opportunity to share views that may very well differ from those of their parents. Many of these children find that talking to their own lawyer can be a relief (Birnbaum, 2008).

The Children's Lawyer states that in order for children's voices to be heard more consistently, education and training are required in interviewing children. Additionally, a national clearing house should be established so that all professionals (mental health and legal) can learn from one another about what works, what does not work, and why.⁵⁷ However, the above suggestions require further research and exploration.

While the Children's Lawyer's Office in Ontario provides for a lawyer and a clinical investigator to assist, the focus remains on litigation. That is, the role of the clinical investigator is focused on gathering information and providing that information to the child's lawyer so that the child's lawyer can present the findings to the court on behalf of the child(ren).

⁵⁶ Interviews with Clare Burns, Children's Lawyer of Ontario and Linda Feldman, Counsel at Office of the Children's Lawyer, Toronto, Ontario.

⁵⁷ Interview with Clare Burns.

Another team approach of having a lawyer and mental health professional working together has been piloted in Calgary, Alberta. This pilot project, *Speaking For Themselves*⁵⁸, has been underway for the last three years. It is similar, but has a different approach to the Ontario lawyer/clinician model and focuses on counseling for the child(ren) in addition to legal representation for the child(ren). The Executive Director believes that having a therapeutic component for the child along with a legal one provides one of the more unique approaches in Canada that allows for children to have a voice in their parents' dispute. The project now has a waiting list of participants.

Brief Interventions

Brief interventions run the spectrum between a brief interview with a parent and child and a focused intervention that helps parents understand their child's needs. As previously discussed, Practice Note 7 in Alberta Court of Queen's Bench allows children's views to be presented before the court by a skilled mental health professional. Typically, children who are at least 12 years of age or older can be approached about their views and wishes which will be made known to the court without the clinician offering an opinion. However, a concern is that younger children may get caught in their parents' conflict and may not be able to disengage.⁵⁹ This concern was also expressed by many mediators as well.

In Edmonton, private practitioners provide services regarding Practice Note 7 as well as other child-inclusive approaches that bring the child's views and wishes into the separation/divorce process. One of the participants who provides Practice Note 7 services for the court states that he and his colleagues use three different models when dealing with separated and/or divorced families.⁶⁰ The first model is an evaluation of an opinion. This consists of meeting with each parent once for an hour to hear what the issues and concerns are and then meeting with children separately. Children are screened with a vocabulary test to evaluate their level of language development. A report can be written to the lawyers or the court and the parents are made aware that there is no confidentiality about what their child says in the sessions. However, the children are canvassed about what the views and wishes conveyed in the report to the court will be. The second model is premised on a parent-conflict approach or family restructuring, which focuses on bringing the needs and interests of the children back into focus post separation and/or divorce. One therapist works with the parents while another works with the child alone and then feeds the child's views back into the parent session. The third model is based on a therapeutic-facilitated access approach. In this approach, the estranged child and his/her parent are therapeutically

⁵⁸ Interview with Dale Hensley, Executive Director of Children's Legal and Educational Resource Center (CLERC).

⁵⁹ Interview with the Honourable Justice Marguerite Trussler, Alberta who facilitated bringing Practice Note 7 to fruition.

⁶⁰ Interview with Dr. Steven Carter, psychologist in private practice, Edmonton, Alberta.

assisted in being reunited. All of these models share many similarities to the Australian experience and focus on a therapeutic approach with children and families—the goal being strengthening parent-child relationships post-separation and/or divorce.⁶¹

The Deputy and Legal Director of the International Institute for Child Rights and Development (IICRD) in Victoria, British Columbia, believes that there needs to be a change on a national level whereby space for children is created more consistently to allow them to express their views about being involved in their parents dispute or not—and not dependent on the adults around them.

To assist mental health professionals and lawyers working in the *Hear The Child Interviews*⁶², the IICRD has recently developed a draft curriculum, *Hear the Child Curriculum: What Every Professional Needs To Know (2007)* to facilitate more meaningful child participation. The curriculum is focused on understanding children’s emotional and developmental needs, as well as how to interview children of different ages and stages of development. While she acknowledges that there are limitations to a one-hour interview with a child as it may not be sufficient and more follow-up with children needs to occur, she reports that the community has requested that the project continue.⁶³

In another brief intervention approach in Hennepin County, Minneapolis, Minnesota, court-based services for parents are free. There are four services that disputing families receive. They are: (1) custody and access assessment; (2) mediation; (3) attorney negotiation; and (4) early neutral evaluation (ENE).

The two practitioners of the ENE approach report that the process is voluntary and focuses on providing evaluative information of the dispute to the parents and not the court.⁶⁴ The ENE is completely confidential and conducted by a team of two (male and female for gender balance). If the matter does not settle, the ENE team cannot be called to testify or provide information to a child custody and access assessor.

The initial ENE with the parents lasts for about 2 to 3 hours. Each parent presents the issues that are in dispute, the ENE evaluators may ask clarifying questions, and then the ENE team meets privately to consult. Following this there is one of two options that can occur. The ENE team may present their findings to the parents and their lawyers and explore settlement options or; if

⁶¹ Also see, Carter, Haave & Vandersteen (2006) for a more thorough discussion of these approaches.

⁶² This approach was previously discussed where the child’s verbatim statements were written and shared with their parents and the judge.

⁶³ Interview with Suzanne Williams, Deputy and Legal Director of the International Institute for Child Rights and Development (IICRD).

⁶⁴ Interviews with Maryellen Baumann, social worker and James Goetz, lawyer and social worker who practise this team model.

they require further information they may schedule another meeting in a month. In the interim, the team may meet with the parents separately, interview the children, collect personal and/or professional collateral reports. At the final meeting, a report is prepared that includes information about the settlement, partial settlement, or other information as agreed on. Recommendations can also be made for a comprehensive child custody and access assessment to be conducted or for a referral to a treatment center.

Pearson (2006) reports that, of the 349 ENE cases completed to date, 177 (51 per cent) reached full settlement, 43 cases (12 per cent) partial settlement, and 82 cases (23 per cent) were referred for a full assessment. However, the ENE approach provides for limited involvement of children.

Voice of the Child Reports

In British Columbia, there are the Views of the Child Report. In Manitoba, there is the Brief Consultation Service. In Saskatchewan, there is the Children's Voice Report. And, in Newfoundland and Labrador there is the Child-focused Report. All share similar features in that older children are interviewed briefly and a report is written to the court outlining the child's wishes and concerns. Parents are also interviewed for the purposes of providing context to the child's views.

In Saskatchewan, the general approach to providing for the Children's Voices Report is by way of a court order. The Report focuses on older children (age 12+) where a judge wishes to know what the child is saying and thinking. Parents are interviewed to obtain background information, the children are interviewed, observations of the parent-child relationship are conducted if deemed necessary, and personal and collateral information is collected. The social worker writes a report to the court based on the information gathered that may or may not include recommendations.⁶⁵ However in Regina, mediation services area also provided.⁶⁶ Mediators in a few selected cases (i.e., where there is high conflict, where the child is age 10 years of age and over, and where parents and child have agreed) have also interviewed the child separately to hear their views and wishes. Sufficient screening and preparation work takes place with each parent and child beforehand. This latter approach has been more recent and investigation into this approach unfolds on a case-by-case basis.

Child-inclusive Mediation

In British Columbia, family justice counselors who are involved in the child-inclusive mediation project report anecdotally that they feel more personally rewarded by the work because they see changes being made by both parents and children as the focus shifts to parent-child relationships

⁶⁵ Interview with Melissa Wallace, Manager of Programs and Operations in the Ministry of Justice and Attorney General, Saskatchewan.

⁶⁶ Interview with Alan Jenson, Program Manager, Social Work Unit and Parent Education Program, Regina.

as opposed to who is the better parent. The success of the project is also rooted in having someone listen to children and in turn, parents seem to be hearing what their children are saying.⁶⁷

These themes have been echoed around the globe by Goldson (2006), McIntosh (2000), and Kelly (2002) who also report that listening to what children have to say can be a very powerful tool in helping parents understand their children's needs and interests. This, they argue, in turn, helps to resolve the parental dispute as parents are given a wakeup call about the impact on their children.

In the province of Quebec, similar to every province across Canada, Information Services are available for parents to help them understand the separation and divorce process and explore other ADR processes in an effort to assist in resolving disputes. The Director of the service advises that many of the mediators in their service have interviewed children as part of the mediation process, but only on a case-by case basis, and with the permission and consent of the parents and child.⁶⁸

In Toronto, Ontario, children have been involved in child-mediation practice for decades. One approach that is conducted by a lawyer/psychologist is to meet with the child (aged four years and over), interview his/her teachers, and conduct parent-child observations, all with a view to understanding the family situation and to facilitate a parenting plan with the parents that meets the needs of the child(ren). However, the child is rarely brought into the mediation sessions with his or her parents.⁶⁹ This latter approach is similar to the Practice Note 7 approach noted earlier, which is used in Alberta by the private practitioners.

Another participant described different approaches that he has practiced from being a child specialist in collaborative family practice to interviewing a child in mediation. In mediation, he interviews the child and then provides feedback from the child's interview to his/her parents and their lawyers. The child interview is used to facilitate a parenting plan. Another approach that he has practiced is a separate child interview that is used to facilitate a parenting plan with their parents, as well as acting as the child's advocate with the child and their parents together in family sessions. In any of these approaches, children's safety must be a priority. He believes that there are many positive benefits of involving children in the decision-making process provided that their parents are psychologically capable of using the information in a way that does not

⁶⁷ Interviews with Irene Robertson, Provincial Director of Family Justice Services Division, Carole McKnight, former acting liaison consultant to the project), Janet Lennox, former senior policy analyst, Ministry of Attorney General, and Dan VanderSluis, Acting Regional Manager, Ministry of Attorney General.

⁶⁸ Interview with Lorraine Fillion, Director of Family Mediation Services, Superior Court, Montreal, Quebec.

⁶⁹ Interview with Dr. Barbara Landau, lawyer/psychologist practising in Toronto, Ontario.

threaten or harm the children.⁷⁰ Many of the participants raised this important exclusion criterion when deciding if children's participation would be beneficial to them.

Another participant has defined child-inclusive mediation as a form of parent counseling in which the voice of the child is paramount.⁷¹ He provides an educational approach to parents about the child's needs. The approach he has taken in child-inclusive mediation is premised on the fact that children do not usually divorce their parents and need and want a relationship with each parent post-separation and/or divorce. In this particular model, closed mediation, nothing is reported to a court regarding the discussions with the children; the objective is to provide an opinion to the parents and/or their lawyers about children's living arrangements. No report is written to the court either. The process begins with a meeting with the lawyers, obtaining background information from each parent, and meeting with children aged six and over. After several meetings and getting to know the family, the child may be brought into the parents' session or the child's views, wishes and feelings are fed back into the parent's session. The child's safety and consent are always paramount. He noted that this approach is superior to the traditional investigative approaches used by the court (i.e., child custody assessments or child legal representation) because children and parents are more in control of the process and are all heard. He added, however, that more education and training of professionals is necessary in order to facilitate a real discussion of how the voice of the child can be included in separation and/or divorce processes.

Another participant from Toronto, who provides mediation and acts as a child specialist in collaborative family practice meets with the parents first to obtain an understanding of the issues and then will meet with children aged six years and older to hear their views and provide the feedback to their parents.⁷² Similar to other participants, she reports that a more beneficial resolution for children and parents is facilitated when children are able to share how they feel about the dispute with their parents. She believes that if more parents were brought into the mediation process earlier in the dispute, the positions of each parent would not be as entrenched and children's voices would ultimately have more impact. This latter theme resonates across the globe, both in the social science literature and with the participants interviewed.

Yet another experienced psychologist/researcher states that the key to successful child-inclusive approaches requires a focus on re-establishing or consolidating a secure base between children and their parents rather than a focus solely on the issues in dispute (custody and/or access).⁷³ She asserts that separation and/or divorce are not only a legal problem but also consist of an ethical

⁷⁰ Interview with Dr. Harvey Steinberg, psychologist in private practise in Toronto, Ontario.

⁷¹ Interview with Dermot Hurley, Associate Professor of Social Work, King's University College at the University of Western Ontario, who also has a private practise in London, Ontario.

⁷² Interview with Sheila Brown, social worker and accredited mediator in private practise in Toronto, Ontario.

⁷³ Interview with Dr. Jennifer McIntosh, psychologist/researcher and Director of Family Transitions, Australia.

mandate to assist children and parents in establishing better and richer relationships. Therefore, the child-inclusive approach is designed specifically to target the known risks and mitigating factors that have been well established in the research about the well-being of children pre- and post-separation. In addition, she adds, that with respect to screening of cases, there needs to be a differentiation between the more entrenched conflict-ridden families, those that present serious mental health concerns and those where domestic violence issues are prevalent. This exclusion criteria has also been raised by other participants.

She also believes that the most important method for screening is a focus on therapeutic leverage as opposed to screening out children and families. In other words, the focus must be on how the child's voice can be heard and used to assist parents in reestablishing healthy positive parent-child relationships. Presently, a four-year follow up of the families and children who participated in the interventions is being conducted. There continues to be 100 per cent retention rates since the one year follow-up with the research participants.

A number of participants stated that for a child-inclusive approach to be successfully implemented, proper education and supervision of the child-inclusive intervention must occur. In addition, the risk factors involved in the process for children must be clearly outlined for the parents, the level of conflict needs to be identified, and the capacity of parents as well as the severity and recurring number of issues must be addressed. It is imperative that the process be seamless for children from beginning to end so as not to add further stress to the dispute.

Yet another experienced psychologist/researcher stated that while there is a strong belief that promoting children's participation in the separation and/or divorce process is important, not all children need or want to be interviewed.⁷⁴ In her work, she applies a selection criteria for meeting with children, if they or their parents wish. These are: (1) the parents provide permission to see the child; (2) the child wishes to be heard; and (3) a situation exists where each parent has a polarized interpretation of what the child is really saying, but holds a mutually similar view in wanting to reduce the level of conflict in the family.

Similar to the approach taken by many mediators, she, too, meets with the parents to get background information on the issues and their lives before she meets with the child(ren). She believes that from a child development perspective, it is appropriate to meet with children aged nine years and older, but that if an eight-year-old demonstrates sufficient cognitive capacity, then she will meet with that child. She uses a structured interview process when interviewing children. This consists of: (1) asking children if they understand why they are meeting with her;

⁷⁴ Dr. Joan Kelly, psychologist/mediator/researcher in California. Dr. Kelly had been involved in the training of the professionals in both the *Hear the Child Interviews*, in Kelowna, British Columbia and the training of the professionals in the child-inclusive mediation pilot project in British Columbia. She also acts as a consultant for the child-inclusive mediation pilot project in Australia.

(2) asking questions about them in establishing a rapport with the child; (3) asking about their current living situation and activities they are involved in; (4) asking if they would like to see any changes in their situation, and if so, what; and (5) reviewing the interview with them to obtain consent on what can and cannot be shared with their parents.

She has also used two different models in her work with children and families. In the first model, as the parents' mediator, she also interviews the child(ren). This approach has several advantages as well as disadvantages. One advantage of being the mediator for the parents while also listening to the child is that it provides for continuity of the child's voice which can also be integrated into a parenting plan. The continuity of the child's voice is similar to the theme raised by Goldson (2006). However, one disadvantage can be that the parent becomes suspicious and distrustful if the child's feedback does not coincide with his/her views.

The second model provides for an external mental health professional to interview the child and then attend the mediation session to provide feedback to the parents. This model allows for the appearance of mediator objectivity with the parents, but at the same time the external interviewer does not have a rapport or relationship established with the parents as the mediator does (Kelly, 2000).

Finally, Kelly (2004) asserts that in order for any service to be helpful, a multi-pronged approach is required in the area of children's participation. That is, services must start with mandatory parent-education programs and move to interventions that incorporate the voice of the child by highly trained and skilled professionals. Moreover, guidelines need to be established that examine criteria for including/excluding children, provide for their safety, and encourage research and evaluation that assesses the benefits and limitations of each intervention. These latter guidelines resonate with what many of the participants across the globe shared in their interviews.

An independent contractor and mediator in New Zealand who also conducts child-inclusive mediation research with the families and children, reported that having the same mediator for the child and their parents is important.⁷⁵ Her research demonstrated that children do not wish to talk to strangers about their personal family matters. Similar to other participants across the globe, she believes that children need to be involved in a democratic process that encourages their voice to be heard in the separation process. She, too, believes that the child's voice is a powerful tool which can be used to encourage parents to settle their dispute as they hear from their own child how s/he is experiencing the process. Cases that would be excluded from child-inclusive mediation would include families in high conflict, families where domestic violence is an issue, or where there are mental health problems that could compromise the child emotionally.

⁷⁵ Interview with Jill Goldson, social worker and principle researcher for the (2006) study, *Hello, I'm a voice, let me talk: Child-inclusive mediation in family separation*.

She believes that in order for children to be heard, this requires legislative change on a national level, appropriate training for professionals, and research to better understand what works and what does not work for children. This is, yet again a theme that resonates amongst all the participants.

A private practice mediator with a specialty in special education needs for children in California practises child-inclusive mediation that focuses on interviewing children solely for the purpose of hearing their views and feeding them back to their parents in mediation.⁷⁶ She does not write reports for the court, but only shares the information that the child has consented to. She has interviewed children as young as five years of age. Her interviews are not therapeutic in nature, but rather, she uses the information obtained from the child to facilitate the parents in arriving at a parenting plan that works for their child. Her focus is on empowering children to the extent that their voices are being heard without having them feel that they are the decision-makers. Similar to the other participants interviewed, she believes that children need to be empowered so that they can choose whether they wish to become involved or not in post-separation decision-making.

Another experienced psychologist/mediator who has published extensively on child-inclusive mediation and has practised child-inclusive mediation for over twenty years believes that children's participation is only as good as the skill and abilities of the interviewer.⁷⁷ That is, the interviewer must first be comfortable with children in addition to having knowledge and understanding of children's language and development. Before the inclusion of children is considered, one needs to think about when children should be brought into the mediation process (i.e., before, during, and/or after), as each entry point presents different degrees of how much input children ultimately have. Similar to the other participants, he, too, prefers to always meet with the parents first to obtain background information about the dispute and then see whether and at what point in time children need to be included or not. Similar to other mediators, his criteria for including children depends on: (1) whether the parents are knowledgeable about their child and can use the information about what their child says; (2) whether there are moderate levels of conflict; (3) when a child is telling each parent something different; (4) if a child asks to speak to him; and (5) if parents are at an impasse. Like others, he views safety as always paramount and believes that interviews with children must have a purpose and be used strategically. He will always see the child individually before any joint parent-child meetings and let the child know about the limits of confidentiality.

With respect to screening cases, he would exclude involving children in high conflict families as parents cannot use the information constructively or may use the information against their child.

⁷⁶ Interview with Nina Meierding, educator and clinician in private practice with a specialty in special needs for children, California.

⁷⁷ Interview with Dr. Donald Saposnek, psychologist/mediator/researcher in California.

He also screens for children with special needs or in cases where talking about feelings may not be part of the child's culture. He usually interviews older children (aged 12 years and over) as it is his belief that younger children could not provide the same developmental perspective as an older child could.

Moreover, he asserts that each family and each child is unique. Therefore, developing policies on one approach versus another can be difficult and limiting in the end. His other concern about policy development is that it could lead to too much structure and not enough "art"—which is the essence of what interviewing children is all about.

A participant from Pennsylvania similarly stated that he has included children before, during, and after mediation for many years.⁷⁸ He, too, stressed the importance of understanding child development and being comfortable with interviewing children. His screening of children is based mostly on their development and maturity level in determining if they are to be involved or not. Like his colleagues in California, he believes that only older children (aged 12 years and over) should be involved in the process, from a developmental perspective. Discussing limits of confidentiality is always part of the process when working with children as well as working out with the child what feedback can and cannot be given to the parents. He believes that one of the keys to successful participation for children lies in the training and education of professionals as well as research and evaluation of what works and what does not work.

Another experienced social work/researcher participant in Ontario, Canada believes that involving children in the separation process is critical as they have a unique perspective that is not necessarily the same as that of their parents.⁷⁹ Many of the activities that are carried out at the family service association where the participant works involve a therapeutic component to re-establishing strong parent-child relationships. The mediation process can involve up to three different therapists working with the child and the parents. Children participate at all ages. For example, even children as young as four years of age can be observed and interviewed by a skilled therapist and provide important information to parents about their child's emotional and behavioural development. Children who are nine years of age and older sign consent forms for their involvement. The purpose of every interview with a child must be made clear, along with the limits of confidentiality. This has been a theme that has resonated with many of the participants.

Like many of the other participants, she advises that the following are all important considerations: ensuring that professionals are trained; ensuring that there is an understanding of issues pertaining to culture and diversity; addressing children's learning challenges and conducting ongoing research and evaluation into the different methods of how children can

⁷⁸ Interview with Dr. Arnie Sheinvold, psychologist and child specialist, Pennsylvania.

⁷⁹ Interview with Rhonda Freeman, Executive Director, Families in Transition, New Directions, Toronto, Ontario.

participate. She also believes that having access to children's lawyers, so that they have a voice in the process, is equally important.

Collaborative Family Practice

Two collaborative family lawyers in Ontario⁸⁰ and another in Quebec⁸¹, each with many years of family law experience, state that they support the use of a child specialist, where appropriate, so that the voice of the child is brought into the collaborative process. They report that while mental health clinicians have been part of the collaborative family law practice in Ontario for some time, Quebec has only recently begun to explore this approach.

The views expressed by all three with regards to screening of cases includes: (1) identifying what age is appropriate; (2) identifying the child's development stage; and (3) examining issues of culture and language of the child. They, too, believed that in addition to the training and qualifications of the child specialist, all instances for including children's participation needs to be carefully assessed on a case by case basis. All agree that not every case requires the child's input or is appropriate. A similar theme is raised by Kelly (2004) and Saposnek (2004) as well as other participants.

Academic Scholars

Nicholas Bala is a law professor at Queens University, Kingston, Ontario. He views advocating for children's voices along a spectrum of services that matches the intervention with the level of service required.⁸² Bala argues that children's views must be ascertained by their age and stage of child development and that those views should be expressed, where appropriate. Bala believes that no matter what approach is used to have children's views and or wishes expressed, it must first be evaluated for its cost-effectiveness as financial resources tend to be limited. Furthermore, the method of intervention used (i.e., child-inclusive mediation, parenting coordination, custody and access assessments, child legal representation, etc.) must also be based on an understanding of the different levels of conflict in separated and/or divorced families, which requires ongoing evaluation and research.

Liz Trinder is a researcher, academic and publishes widely on children's issues in separation and/or divorce in England. She has also written extensively on court-based dispute resolution approaches in England (Trinder, 1997; Trinder and Kellett, 2007).⁸³ She advises that parents are

⁸⁰ Interview with Nathalie Boutet, Collaborative Lawyer and Sharon Cohen, Collaborative Lawyer in Toronto, Ontario.

⁸¹ Interview with Louise Woodfine, Collaborative Lawyer in Montreal, Quebec.

⁸² Interview with Nicholas Bala, Professor of Law, Queen's University, Kingston, Ontario.

⁸³ Interview with Dr. Liz Trinder, Institute for Policy and Practice, Newcastle University, England.

steered to mediation before any litigation attempts are made. However, the focus remains on settlement rates as the main outcome as opposed to any focus on parent-child relationships.

She reports that children's participation varies when they are involved with CAFCASS (Children and Family Court Advisory and Support Services) officers. She believes the ADR agenda remains driven by adults in England and that children continue to have little voice at all in the end. Trinder believes that mediation informed by a strong emotionally-informed content similar to the approach taken in Australia is needed. Moreover, she believes that developing comprehensive services for families in the community is what is required and that court-based interventions should be the last resort.

4.1 SUMMARY OF LESSONS LEARNED BY PARTICIPANTS

It is clear that children's voices are an important component in the separation and/or divorce process as evidenced by the services and programs across the globe and voiced by the practitioners, researchers, lawyers, and policy advisors/experts. Irrespective of whether they are heard through child-inclusive mediation, independent child legal representation, judicial interviews, child specialists, parenting coordinators or voice of the child reports, children's voices are important and need to be heard and listened to by their parents, mental health and legal professionals and ultimately, the judges who decide these cases. However, many have also stressed that not every child needs or wants to have a voice and that, too, should be considered. While the debate continues in the social science literature regarding whether or not children's voices should be heard in the process, the research literature to date provides a resounding clarion call—children and their parents have better relationships and there is less parental conflict between the parents when children are part of the process (Goldson, 2006; McIntosh, 2007).

Moreover, having a child represented by a lawyer, irrespective of the role of the lawyer for the child, provides an independent mechanism for them to be heard, and more importantly, begins to address some of the requirements of the *Convention*.⁸⁴ Having said that, the *Convention* is only one piece of a broader policy discussion that needs to occur regarding children's voices and how they can be truly heard. For example, there needs to be a discussion on policies and programs that guarantee *all* children and adolescents full enjoyment and exercise of these rights under the *Convention*. Moreover, adults need to learn to collaborate with children to help them articulate and exercise their rights (Lansdown, 2001).

While the approaches vary regarding how and when to include children's participation, the following qualifications need to be considered: (1) the age of the child; (2) the cognitive and

⁸⁴ *Supra*, Note 2.

emotional developmental of the child; (3) obtaining children's consent regarding whether they want to be interviewed or not; (4) ensuring that the child's safety is the main priority; (5) explaining limits of confidentiality and canvassing children's views about what can and cannot be shared and/or fed back to parents; (6) ensuring that professionals who interview children are properly trained and qualified to do so; (7) attending to issues of diversity, language and other barriers that may impact and/or limit children's involvement; and (8) providing ongoing research and evaluation into children's participation in child-inclusive mediation and other ADR processes to see what works and what does not.

5.0 FUTURE DIRECTIONS AND UNANSWERED QUESTIONS

Increasingly, the theoretical perspectives and social science literature demonstrate that the child's voice is an important consideration during times of parental separation and/or divorce. Specifically, participation of children in separation, divorce, child-inclusive mediation, and other ADR processes is positively correlated with the minimization of harm/risk to children post separation and/or divorce. These findings are supported by the empowerment and/or enhancement theories which view children as 'social actors' who should be allowed to participate in the decisions that affect them. The importance of listening to children is also premised on rights-based and interest-based ideals, both from a legal standpoint and in keeping with the "best interests of the child" standard. There are some children who want to share their voices in the legal processes that shape and affect their lives when it comes to post-separation arrangements. However, there are also some children who do not want to participate in the process at all and their voices should be equally respected.

In the final analysis, the discussion is no longer focused on *if* children should participate in the decision making post separation and/or divorce, but rather, *how*. That is, children who do wish to participate in the decision-making process have an opportunity to do so. However, the question continues to be framed from an adult perspective—that is, how best to obtain a child's view on the issue for use *by* adult decision-makers, rather than *with* adult decision-makers. While children require guidance and direction by adults, they also have rights within the family and those rights also need to be equally respected, supported and nurtured.

The methodologies employed on both a national and international level to hear children in the context of separation, divorce and custody mediation and other ADR processes varies in terms of voluntary and mandatory participation requirements and type of investigative approach taken (i.e., child legal representation, child custody and access assessments, judicial interviews, voice of the child reports, child-inclusive mediation, and parenting coordination). While the legal and social science literature debate the pros and cons of children's participation in decision-making during times of parental breakdown, children's participation is not required in all matters, and can be harmful if children's safety is not considered paramount.

There remain a number of questions and challenges that still need to be considered irrespective of which approach is considered. For example, if children are heard, how much weight is given to the voice of the child? Should there be an age at which the child's views and wishes are determinative? At what age should children be interviewed and who decides whether they are competent to provide input into the decision-making process? What does children's participation really mean? How is children's safety being addressed in any of these processes? What methods can be used to ensure that there are mental health professionals, lawyers and/or judges skilled in interviewing children? What about issues of confidentiality and consent? What about children

who have learning challenges and cannot express themselves verbally? What about follow-up with children and closure? What about children from different cultural backgrounds where talking about the family and feelings are not part of the culture? What about children and families with different levels of conflict (i.e., low, medium and high conflict families), in situations where domestic violence or child maltreatment is an issue? When should children be brought into the mediation process (i.e., before, during or after mediation has concluded)? Additionally, what should the focus on evaluation involve?—that is, evaluating outcomes that focus on the settlement of a family dispute is different from outcomes that focus on strengthening parent-child relationships post separation. How can adults empower children and facilitate a greater dialogue *with* children about their lives post separation and/or divorce? Finally, are children’s voices being truly considered or are they being filtered through an adult lens about what is in their best interests? These are very important questions to examine as the legal decisions that are being made about children post separation and/or divorce can often change the trajectory of children’s lives physically, emotionally, socially, and behaviourally.

While there are many excellent services and programs that have developed as a response to helping parents find other ADR alternatives to their family dispute, they continue to remain fundamentally within the traditional adversarial framework. Moreover, they also do not reach every child equally across the globe.

In exploring where we need to go from here with respect to children’s participation, a number of considerations are being put forward for future consideration. They can be conceptualized as falling into three distinct but interrelated frameworks: (1) theory and practice; (2) research; and (3) policy implications.

First, there needs to be a clear theoretical and conceptual framework that links child developmental theory, risk and resiliency theory and family relationships post-separation and/or divorce with best practice approaches to child-inclusive mediation and other ADR processes. From the information gathered through the services being provided across the globe and from the key informant interviews a sound knowledge base about child development and the evolving capacities of the child, interviewing children, parent-child relationships, and grounding in family law is essential. Additionally, training and education of the different professionals involved with children needs to be ongoing.

Second, there needs to be a coordinated research agenda that links the best practice approaches with an empirical based focus (i.e., using an array of quantitative and qualitative methods). Exploring outcomes must also include strengthening parent-child relationships and not just whether the dispute settled or not. Moreover, any research that is being considered must also include children’s participation in the design, implementation, and follow-up of the different approaches. That is, “we” (adults and children) need to understand what works and what does

not work for children and their families post separation and/or divorce while maintaining a clear focus on children's safety as the first priority. Each child is unique and a research agenda that incorporates a range of alternatives for children, by children, and with children that honours their "voice" is essential.⁸⁵

Third, there needs to be ongoing discussion and coordination between practitioners, researchers, children and their families, as well as policy-makers if children's participation is to be meaningful. If children's participation is to be a truly democratic process, then they must be considered at every level of engagement. With this shift in thinking and approach, children can then be more firmly embedded in the process and their needs and interests will be informed by them, rather than by adults who presume to know what is in the best interest of children.

⁸⁵ See Camacho, (2006) for a discussion on how children can be included in the research process. Also see Fombad (2005) on how to protect children in research; Wyness (2006) on methods, ethics, and politics of involving children in research; and Christensen and James (2000) for a review of ethical guidelines for children. This latter review can be accessed online on the New Zealand website at: <http://www.rsnz.org/publish/kotuitui/2006/09.php>.

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APPENDIX A: QUESTIONNAIRES

Mental Health Professionals/Collaborative Family Practice

1. How many years have you practiced family law? Collaborative family law?
2. Do you think that children and youths (4-18 years) should participate in mediation sessions or any other ADR process related to their parents separation and/or divorce? If not, why not? (Probe: age, gender issues, diversity).
3. If yes, how do you incorporate the views of the child in collaborative law? (Probe: is there an age criteria that you use?; Do you bring the child into the room, interview privately, use a support person for the youth, or use any other specialist to interview the youth and bring their feedback in? Do you use any special screening techniques/child experts; culture, language, mental health issues, gender considerations)?
4. Do you have any concerns about incorporating their voice? (Probe: ethics, consent, confidentiality, benefits/limitations?)
5. Are there any other issues that you would like to address about youths participation in the mediation and/or other ADR processes? (Probe: what do you see as necessary from a practice, research, policy point of view that could assist in having a more uniform approach to the voice of the child?)

Expert Stakeholders/Policy Advisors

1. Your research/work seems to indicate that(Probe: Concerns? Age? Gender? Culture?).
2. In your research/work do you use any special screening or other mechanisms (Probe: support person) in place to have their voices heard?
3. Based on your expertise and what you know from hearing children, what steps need to occur for children to have meaningful participation in the process?
4. Are there any other issues that you would like to address about youths participation in the mediation and/or other ADR processes? (Probe: benefits/limitations; practice, research, policy point of view, what do you believe is necessary that could assist children and youths in having their voices heard in these matters in a more coordinated process?)

Children's Lawyers Who Represent Youths

1. How do you represent the voice of the child in the separation and/or divorce process? (Probe: best interests, wishes only, *guardian-ad-litem*).
2. At what age is child legal representation usually appointed?
3. How do you use the information the child provides? (Probe: bring the child in; use of a social worker, special issues of confidentiality, consent?).
4. Do you find legal representation helpful as a means to having their voices heard in these important matters? (Probe: Pros and cons?, age?, language?, culture?).
5. Are there any other issues that you would like to address about youths participation in the mediation and/or other ADR processes? (Probe: From a practice point of view, what do you believe is necessary that could assist children and youths in having their voices heard in these matters in a more uniform process?)

APPENDIX B: LIST OF PARTICIPANTS IN ALPHABETICAL ORDER

Nicholas Bala, Law Professor, Queens University, Kingston, Ontario

Maryellen Bauman, Social Worker, Hennepin County, Minneapolis, Minnesota.

Natalie Boutet, Collaborative Family Practice, Toronto, Ontario

Sheila Brown, Social Worker/Mediator, Toronto, Ontario

Clare Burns, Children's Lawyer of Ontario, Toronto, Ontario

Steven Carter, Psychologist, Edmonton, Alberta

Sharon Cohen, Collaborative Family Practice, Toronto, Ontario

Linda Feldman, Counsel, Office of the Children's Lawyer, Toronto, Ontario

Lorraine Fillion, Director, Family Mediation Services of Superior Court, Montreal, Quebec

Rhonda Freeman, Executive Director, Families in Transition, New Directions, Toronto, Ontario

James Goetz, Lawyer/ Social Worker, Hennepin County, Minneapolis, Minnesota.

Jill Goldson, Independent contractor and mediator, New Zealand

Dale Hensley, Executive Director, Children's Legal and Educational Resource Centre, Calgary, Alberta

Dermot Hurley, Social Work Professor, King's University College, University of Western Ontario

Alan Jensen, Program Manager, Justice Services, Regina, Saskatchewan

Joan Kelly, Psychologist/Mediator/Researcher, California

Barbara Landau, Psychologist/Lawyer, Toronto, Ontario

Janet Lennox, Senior Policy Advisor/Lawyer, Ministry of Attorney General, British Columbia

Jennifer McIntosh, Psychologist/Director of Family Transitions, Australia

Carole McKnight, Consultant, Family Justice Services, Ministry of Attorney General, British Columbia

Nina Meierding, Mediator, California

Crystal Reeves, Legal Researcher, Social Planning Council of British Columbia (SPARC BC)

Irene Robertson, Director, Family Justice Services Division, Ministry of Attorney General,
British Columbia

Donald Saposnek, Psychologist/Mediator, California

Arnold Shienvold, Psychologist/Mediator, Pennsylvania

Harvey Steinberg, Psychologist, Toronto, Ontario

Liz Trinder, Newcastle Center For Family Studies, University of Newcastle, Newcastle upon
Tyne, United Kingdom

The Honourable Madame Justice Trussler, Calgary, Alberta

Dan VanderSluis, Acting Regional Manager, Ministry of Attorney General, British Columbia

Melissa Wallace, Manager of Programs and Operations in the Ministry Of Justice and Attorney
General, Saskatchewan

Suzanne Williams, Deputy and Legal Director, International Institute for Child Rights and
Development, Kelowna, British Columbia

Louise Woodfine, Collaborative Family Practice, Quebec