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# **The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada**

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*Pathways to co-parenting*

**March 31, 2019**

*The views expressed in this report are those of the author and do not necessarily represent the views of the Department of Justice Canada or the Government of Canada*

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## **Executive Summary**

### **Objectives of the Project**

The objective of this project is to collect and collate research, describe existing methods to include the children's voices in family law in Canada (and internationally where relevant), to identify themes, and to develop a comprehensive and accessible literature review. This review provides descriptions of promising practices applicable to various aspects of the voice of the child and discussions of case law.

### **Background**

There is a heightened awareness that children's views and preferences must be taken into consideration when making decisions regarding their living arrangements. Article 12 of the United Nations *Convention on the Rights of the Child*, a treaty that Canada has signed and ratified, specifies that children capable of forming their own views have the right to express those views freely in all matters affecting them and that the child's voice should be given due weight according to the child's age and maturity. The *Convention* does not, however, specify how children's voices should be heard. There remains debate in the literature about the strengths and limitations of the various approaches that have emerged for facilitating children's voices within family justice services.

### **Key Findings**

There is now recognition in both Canadian legislation and case law of the importance and value of children's participation in family justice procedures. Family legislation in almost all Canadian jurisdictions now explicitly provides that the views of children must be considered as a factor in making decisions based on their "best interests", frequently with a proviso, such as "where these views can reasonably be ascertained" or considering the age and maturity of the child.

To meet the need for hearing children's voices in the context of separation, there has been a growing emphasis on court-based services (Voice of the Child Reports, custody assessments, child-inclusive parenting coordination, judicial interviewing) to provide children and youth with the opportunity to provide their views about parenting plan considerations to complement the views of their parents in the context of child custody disputes.

Less attention has been paid to providing children the opportunity to share their views about parenting plan issues outside of the court context. This is especially concerning given that the majority of parenting disputes will be resolved without ever going to trial, thus leaving many children without adequate alternatives to share their views about decisions made regarding parenting time post-separation.

Given that, for some children, there may be a risk associated with speaking to their parents about their views and preferences, children need to be safeguarded from potential strain caused by their parents' inability or unwillingness to listen to their children.

Parent education programs and support groups can teach skills that help parents learn to listen to their children and to talk with their children about their experiences of the separation process and how parenting plan issues may affect their daily lives.

Children may report their views and preferences to their teachers, which may place the teachers in the family law dispute as third-party collateral sources of children's views. There has been a lack of attention to the role of the teacher and further attention is needed to help teachers support children's voices when they are shared within the school setting.

When there is ongoing conflict between parents, children should be given the opportunity to speak with a mental health professional. These professionals can listen to children outside of the court process to provide children with the opportunity to talk about their views on their parents' separation, their views about parenting options and any frustrations they may be experiencing due to being caught in their parents' dispute.

For the majority of families, parenting plan issues will be resolved without necessarily going to court. For families involved in the courts, specialized methods for child inclusion and legislative support for these programs have been established. It is important to consider children's unique needs and situation to determine which method may work best for a particular child to share their experiences.

In situations of court involvement with lower levels of parental conflict and little risk of the child developing loyalty conflicts with their parents, it may be useful for parents to use mediation offered to them at entry into the courts. Mediation can quickly and efficiently create a parenting plan that meets the needs of their children. Child-inclusive mediation approaches (e.g., interviewing children about parenting plan issues and then integrating these views into the mediation with the parents) can enhance children's voices and provide opportunities for children's participation process.

A Voice of the Child Report allows children to have their views and perspectives shared in family disputes without necessarily requiring involvement of a lawyer or a full assessment by a mental health professional. Voice of the Child Reports may provide a low-cost method for children to share their experiences and provide input into parenting plan issues.

In higher-risk situations, such as cases involving child abuse, intimate partner violence, or alienation, a parenting plan assessment may be the preferred approach for considering children's views. Parenting plan assessments typically entail a systematic and comprehensive consideration of the various factors and issues involved in the dispute.

Judicial interviewing may be best reserved for cases moving towards trial preparation. The judge is given the opportunity to speak with the child to understand from the child's point of view and to have a better understanding of the factors of the case to determine whether and when a trial should proceed.

## **Implications**

The extent to which children's voices can be heard will depend on the services available to elicit information and the adults and professionals' ability to facilitate children's input in post-separation decision making.

There is no “best way” to hear from children during the family justice process. Several methods have been developed to facilitate children providing their voices in the context of family law, but many of these methods seem underutilized. For example, child-inclusive mediation and independent legal representation for children are available in only a small portion of the high-conflict cases in the courts.

It is clear from children’s reports that they want their voices included in decisions that affect them. Article 12 of the United Nations *Convention on the Rights of the Children* also supports hearing children’s voices in all decisions that affect them. Based on the research, there needs to be increased opportunities to hear children’s voices in family justice processes and a substantial investment to support children’s access to these services, regardless of geographical location, culture and language.

Another way to support hearing children’s views is to develop innovative services and approaches outside of the court system to hear children’s voices. It seems counterproductive to give children the opportunity to have input into the parenting plan only if the parents are unable to resolve these issues and therefore turn to the courts to assist in these matters. To maximize children’s voices, the family justice field needs to consider innovative ways to hear children’s voices outside of the court process.

## **Chapter 1: Introduction and Objectives of the Project**

Children can often be at the heart of parenting disputes, leaving parents, decision-makers, lawyers, social workers, researchers, policy professionals and other practitioners asking important questions about how to best ascertain the views of children. While the voice of the child can be defined in different ways, it generally involves direct and indirect opportunities for children to have input into decisions regarding parenting plans post-separation and the mechanics of making the wishes of children known during parenting disputes, divorce or separation.

The increased focus on children's views in family law matters has led to important academic and policy conversations regarding the optimal strategies and opportunities for including children’s points of view when creating parenting plans post-separation and divorce. The Department of Justice Canada has been actively considering children’s voices in family law matters and has spearheaded a number of important projects regarding the methods for including children’s voices. This work includes a collection of reports produced between 2002 and 2012 on the voice of the child in family law.<sup>1</sup> These reports explain the rationale for hearing the voice of the child in family law matters, the domestic and international legal background on the voice of the child, the historical debates in voice of the child scholarship and the role of counsel for children. Current research on the voice of the child has shifted

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<sup>1</sup> Lorne D. Bertrand, Joanne J. Paetsch, Joseph P. Hornick & Nicholas Bala, “A Profile of Legal Aid Services in Family Law Matters in Canada” (2002) Ottawa, ON: Department of Justice Canada; Ronda Besner, “The Voice of the Child in Divorce, Custody and Access Proceedings” (2002) Ottawa, ON: Department of Justice Canada; Pauline O’Connor, “Voice and Support: Programs for Children Experiencing Parental Separation and Divorce” (2004) Ottawa, ON: Department of Justice Canada; Rachel Birnbaum, “Divorce and The Voice of the Child in Separation/Divorce Mediation and other Alternative Dispute Resolution Processes” (2009) Ottawa, ON: Department of Justice Canada.

from questions about why the voice of the child is important to how to include the voice of the child. Scholars have also noted that children want their voices heard without the constraints of social and legal obstacles.<sup>2</sup> Given the opportunity, children generally appreciate the opportunity to share their views.<sup>3</sup>

There remains considerable debate about the key strategies to hear the voices of children in family law matters. Several methods have been developed to hear children's voices both within the context of court services (e.g., judicial interviewing) and outside of the court process (e.g., child-inclusive mediation). Children are also typically interviewed as part of child custody assessments performed by social workers, psychologists, and psychiatrists. Voice of the Child Reports provide children with the opportunity to share their experiences, views and preferences regarding parenting plans. Children can also share their views with lawyers who in turn share these views with the court. In cases where family disputes are moving towards a trial, children may have the opportunity to meet with the judge.

This project explores the different ways that the voice of the child can be considered in Canada and the various approaches to include children's voices within the context of Canadian family law (e.g., parenting plan assessments, Voice of the Child Reports, legal representation of a child, and judicial interviews of children).<sup>4</sup>

Further, this review provides descriptions of promising practices for bringing the voice of the child into decision-making processes and discussions of case law where relevant. This report presents the best available research and legal analysis regarding children's voices and updates the picture of how to incorporate children's voices in family law situations in Canada. The review of research and law serve to inform policy makers, family law practitioners, parents and the public. The promising practices and discussion of advantages/disadvantages address the cultural changes of family law that are needed to better address children's voices within current practices.

## **Chapter 2: A Brief History of Children's Voices in Canada**

Historically, children in Canada have not had the opportunity to participate in decisions of custody and access.<sup>5</sup> Until the last few decades, children were viewed as lacking the capacity to participate in family law matters, as needing protection from parental conflict<sup>6</sup> or from being put in the middle

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<sup>2</sup> Rachel Birnbaum & Michael Saini, "A qualitative synthesis of children's participation in custody disputes" (2012) 22:4 Res. Soc. Work Pract. at 400.

<sup>3</sup> Rachel Birnbaum & Nicholas Bala, "Views of the Child Reports: The Ontario Pilot Project" (2017) 31:3 Int J Law Policy Family, at 344.

<sup>4</sup> *Supra* note 2.

<sup>5</sup> H.T.G. Andrews & Pasquale Gelsomino, "The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View" in Rosalie Abella and Claire L. Heures-Dube eds., *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983) 241; Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings*. Department of Justice, Canada, 2002-FCY-1E (Ottawa, 2002) Online: dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf at 2, citing C. Bernard, R. Ward, & B. Knoppers, "Best Interests of the Child Exposed: A Portrait of Quebec Custody and Protection Law" (1992-93), 11 Can. J. Fam. L. 57 at 136.

<sup>6</sup> Anne Graham & Robyn Fitzgerald, "Taking Account of the "To and Fro" of Children's Experiences in Family Law" (2006) 31:2 Children Australia at 30; Virginia Morrow & Martin Richards, "The Ethics of Social Research with

of their parents' disputes.<sup>7</sup> 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.<sup>8</sup> Another assumption was that parents know what is in their child's best interests<sup>9</sup> and, hence, that adults adequately represent children's views.<sup>10</sup>

Legal and mental health authorities characterize this debate as one between the "rights" and "protection" of children. For example, some child advocates favouring the protection of children have typically viewed childhood as a special time, associated with an inability to make significant decisions and dependency on parents or other care providers. Children's rights advocates, in contrast, have focused on the child's self-determination and equal treatment regardless of age.

In more recent years, some academics, judges and practising lawyers have taken the position that it is in the best interests of children that they participate in decisions that affect them and that they be listened to and taken seriously. As a Superior Court justice noted:<sup>11</sup>

Another myth that needs to be dislodged is that harm befalls a child from participating in the decision-making process. This has often been a rationalization for leaving the child's voice out. Some experts feel it can be harmful for the child to be left out of the decision-making process. The more paternalistic approach overlooks the reality that the child is already harmed by the turmoil in his home and the stress that litigation has brought upon everyone.

The voice of the child is now a predominant consideration when identifying the factors relevant for creating parenting plans among separating families. The social science and legal literature identify the risks and benefits of listening to the voice of the child.<sup>12</sup> There is a substantial body of research that indicates that children want input into family matters that affect them, that they want to be heard, they want to be made aware of the circumstances that impact them and they want to have a voice in identifying what is important to them.<sup>13</sup> Children also express how they wish to be engaged in processes involving them even if they are not making final decisions.<sup>14</sup> Moreover, listening to

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Children: An Overview". (1996) 10:2 *Children and Society* 934-944; Nicola J. Taylor, Anne B. Smith & Pauline Tapp, "Children, Family Law and Family Conflict: Subdued Voices". (1999)

<sup>7</sup> Robert E. Emery, "Children's Voices: Listening—And Deciding—Is an Adult Responsibility" (2003) 45 *Arizona Law Review* 621–627. Richard A. Warshak, "Payoffs and Pitfalls of Listening to Children" (2003) 52 *Family Relations* 373-384.

<sup>8</sup> Carole Smart, "From children's shoes to children's voices" (2002) 40:3 *Family Court Review* 307-319.

<sup>9</sup> A. O'Quigley, "Listening to children's views: The findings and recommendations of recent research" (2000) York: Joseph Rowntree Foundation; J. Timms, "The Silent Majority—The Position of Children Involved in the Divorce and Separation of Their Parents" (2003) 9:2 *Child Care in Practice* 162-175.

<sup>10</sup> *Supra* note 1.

<sup>11</sup> Judge A. P. Nasmith, "The Inchoate Voice" (1991-92), 8 *Can. Fam. L.Q.* 43-54.

<sup>12</sup> *Supra* note 1.

<sup>13</sup> *Supra* note 1.

<sup>14</sup> *Supra* note 2

children's voices is supported in the research as it contributes to parental harmony and less conflict.<sup>15, 16</sup>

The extent to which children's voices can be heard will depend on the adults involved and whether they are willing to listen to children and able to incorporate the children's input in post-separation decision making.<sup>17</sup> This means that voice of the child is impacted by different people and different processes. Practically speaking, these factors make it important for service providers and professionals to ensure that the child who voices their views has the capacity to do so and is not impaired by the influence or circumstance brought upon them by, for example, the level of parental conflict.

There is growing interest in many countries around the world to incorporate children's views in court proceedings. This is largely due to the United Nations (UN) *Convention on the Rights of the Child*. Article 12 of this *Convention* requires that States party to the *Convention*:

1. 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.<sup>18</sup>

Article 3 of the *Convention* states:

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.

After Canada ratified the *Convention* in 1991,<sup>19</sup> the Special Joint Committee on Child Custody and Access recommended in 1998 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

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<sup>15</sup> Jill Goldson, "Hello, I'm a Voice, Let Me Talk: Child-Inclusive Mediation in Family Separation" (2006) Center for child and family policy research, Auckland University.

<sup>16</sup> Jennifer McIntosh, "Child Inclusion as a Principle and as Evidence-Based Practice: Applications to Family Law Services and Related Sectors" (2007) AFRC Issues: Australian Family Relationships Clearinghouse.

<sup>17</sup> Rachel Birnbaum & Michael Saini, "A Scoping Review of Qualitative Studies about Children Experiencing Parental Separation" (2013) 20:2 *Childhood* 260-282.

<sup>18</sup> UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

<sup>19</sup> Jean-Francois Noel, "The Convention of the Rights of the Child" (2015) Department of Justice. Available online at <https://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/crc-crde/conv2a.html>

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.”<sup>20</sup>

Canadian courts have referenced Article 12 of the *Convention* in their decisions dating back to the 1990s,<sup>21</sup> as they are working with the principle that children’s views are a vital component of the family law process when taken together with other factors. Former Justice Donna Martinson’s widely cited 2010 decision of the Supreme Court of Yukon highlights children’s views as a vital component of the decision-making process in family law:

. . . in my respectful view all children in Canada have legal rights to be heard in all matters affecting them, including custody cases. Decisions should not be made without ensuring that those legal rights have been considered. These legal rights are based on the United Nations Convention on the Rights of the Child and Canadian domestic law.

The Convention . . . says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. There is no ambiguity in the language used. The Convention is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high-conflict, including those dealing with domestic violence, parental alienation.

A key premise of the legal rights to be heard found in the Convention is that hearing from children is in their best interests. Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them. While concerns are raised by some, they can be dealt with within the flexible legal framework found in the Convention.<sup>22</sup>

The court then goes on to list all the manners in which children should participate in their own legal proceedings, and where the participation must be meaningful, which include that children should:

1. be informed, at the beginning of the process, of their legal rights to be heard;
2. be given the opportunity to fully participate early and throughout the

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<sup>20</sup> Parliament of Canada, For the Sake of the Children: Report of the Special Joint Committee on Child Custody and Access (December, 1998)

<sup>21</sup> *Johns v Hickson*, [1996] S.J. No. 806 at para 9; *P (CL) v P (JE)*, 2015 SKQB 13 at para 16; *Seymour v Seymour*, 2012 SKQB 161 at para 88.

<sup>22</sup> 2010 YKSC 44 at para 47. Followed in: *Children's Aid Society of Algoma (Elliot Lake) v PC-F*, 2017 ONCJ 898; *Nunavut (Director of Child and Family Services) v T (E)*, 2017 ONCJ 898; *K (NJ) v F (RW)*, 2011 BCSC 1666; *Jarvis v Landry*, 2011 NSSC 116.

- process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials;
3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;
  4. have their views considered in a substantive way; and
  5. be informed of both the result reached and the way in which their views have been considered.<sup>23</sup>

Article 12 of the UN *Convention on the Rights of the Child* indicates that the views of the child shall be given due weight in accordance with the age and maturity of the child, including the opportunity to be heard in any judicial proceeding. The expectation is limited to children who are capable of forming their own views and does not provide directives on how best to assess children's capacity to have their voices heard. For example, given that children mature and develop at different rates, the *Convention* does not specify an age at which children attain capacity, nor does the *Convention* define "capacity."

The General Comment No.12 of the UN Committee on the Rights of the Child anticipates that children will have a sufficient understanding of the issues on which they are giving their views, but not a comprehensive understanding.<sup>24</sup> As the complexities of the issues surrounding a child's input into decisions increase, the demand for maturity increases proportionately. By way of example, given that many professionals have difficulty fully understanding the complexities of high conflict families, it is naive to think that a child or even an adolescent will.

The question of whether children *should* be given a voice in custody and access disputes has been answered by most in the affirmative. However, the question has now transformed to *how* that participation should take place.<sup>25</sup> The *Convention* does not specify how children's voices should be heard. From research and practical perspectives, there remains debate in the literature about the strengths and limitations of the various approaches for facilitating children's voices within family justice processes.

The discussion above documents the historical shift in the role and presence of the voice of the child in family law. The role of the *Convention* and Canadian case law demonstrates that children's voices should be considered in family law matters that affect them. One of the most pressing issues on the voice of the child in family law is simply how best to hear from children. In what follows, the report examines the different ways in which the court can hear a child's views and preferences, and explores the merits and shortcomings of each approach.

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<sup>23</sup> 2010 YKSC 44 at para 47. Followed in: *Children's Aid Society of Algoma (Elliot Lake) v PC-F*, 2017 ONCJ 898; *Nunavut (Director of Child and Family Services) v T (E)*, 2017 ONCJ 898; *K (NJ) v F (RW)*, 2011 BCSC 1666; *Jarvis v Landry*, 2011 NSSC 116.

<sup>24</sup> Convention on the Rights of the Child, Committee on the rights of the Child, Fifty-first session, (Geneva, 25 May-12 June 2009).

<sup>25</sup> Carolyn Savory, "A Voice for "The Small": Judicial "Meetings" in Custody and Access Disputes" (2013) 28 Canadian Journal of Family Law at 227.

### Chapter 3: Brief Review of Children’s Experiences of Providing Voice

This section provides a summary of the experiences of children providing their views in family law matters.<sup>26</sup> Increasingly children and youth are expressing that they want to share their “voice” in the decision-making processes that fundamentally affect their lives post-separation. The research on children’s desire to be included suggests that they want to be kept informed, and want their needs and interests heard, but usually do not expect to make decisions. Adolescents are much more likely to be involved when major decisions affecting them are made, and to want to express explicit preferences about these decisions.<sup>27</sup>

#### *Children’s Input into Parenting Plans*

Research suggests that despite advances in actively involving children, children have largely remained absent from the decision-making process during parental separation and/or divorce.<sup>28</sup> Qualitative studies of children’s experiences of providing input into parenting plans consistently show that, despite wanting to have their voices heard, many children report not being provided the opportunity to provide their input.<sup>29</sup> According to one study, for example,<sup>30</sup> half of children report no involvement in the decision of where they will live following parental separation. Other research indicates<sup>31</sup> that youth are typically unsure of their rights, and youth report that adults, including their parents, do not listen to them. Those who have “some say” are typically adolescents at the time of parental separation. Children who report having some say in the decision making about parenting plans were generally satisfied that their views were considered.<sup>32</sup>

Children also describe wavering between wanting to be involved and feeling hurt by the processes of their parents’ separation. While children want to be treated with respect and as capable of being involved in the process, they also describe feelings of vulnerability, change and loss.<sup>33</sup> A study in

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<sup>26</sup> Judith Cashmore & Patrick Parkinson, “Children’s and Parents’ Perceptions on Children’s Participation in Decision Making after Parental Separation and Divorce” (2008) 46 Family Court Review 91–104.

<sup>27</sup> Stephanie Holt, “The Voice of the Child in Family Law: A Discussion Paper” (2016) 68 Children and Youth Services Review 139-145; Patrick Parkinson, Judith Cashmore & Judi Single, “Adolescents’ Views on the Fairness of Parenting and Financial Arrangements After Separation” (2005) 43:3 Family Court Review 429-444; Anne Stafford, A. Laybourn, Malcolm Hill & Moira Walker, “Having a Say’: Children and Young People Talk about Consultation” (2003) 17 Children & Society 361-373.

<sup>28</sup> Judith Cashmore, “Children’s Participation in Family Law Decision-Making: Theoretical Approaches to Understanding Children’s Views” (2011) 33:4 Children and Youth Services Review 515-520; Christina Sadowski & Jennifer E. McIntosh, “On Laughter And Loss: Children’s Views of Shared Time, Parenting And Security Post-Separation” (2016) 23:1 Childhood: A Global Journal of Child Research 69-86; Sofie D. J. Maes, Jan De Mol & Ann Buysse, “Children’s Experiences and Meaning Construction on Parental Divorce: A Focus Group Study” (2012) 19:2 Childhood: A Global Journal of Child Research 266-279.

<sup>29</sup> Anne Graham, Robert Fitzgerald & R. Phelps, “The Changing Landscape of Family Law: Exploring the Promises and Possibilities for Children’s Participation in Australian Family Relationship Centres” (2009) Lismore: Southern Cross University; C. Brand, G. Howcroft & C. N. Hoelson, “The Voice of the Child in Parental Divorce: Implications for Clinical Practice and Mental Health Practitioners” (2017) 29:2 Journal of Child and Adolescent Mental Health 169-178.

<sup>30</sup> Parkinson, *supra* note 27.

<sup>31</sup> C. Reeves, “Youth Included! Youth Recommendations for Children and Youth Participation in British Columbia’s Family Justice System” (2008) The Social Planning and Research Council of British Columbia.

<sup>32</sup> Cashmore, *supra* note 28.

<sup>33</sup> *Supra* note 6.

Scotland found that children's voices can be overlooked and/or dismissed when the parents are preoccupied with the interparental conflict.<sup>34</sup>

### ***Reasons why Children want their Voices Heard***

Children want the opportunity to express their views within custody disputes and feel that their voices should be represented in discussions about their living arrangements and relationships with their parents. Children express a number of reasons for why they think it is important to have their voices heard, including wanting to be acknowledged as an important voice in the family dispute and to be better informed about parenting plan decisions.<sup>35</sup>

Children emphasize the importance of fairness and equal opportunity to be part of the decision-making process<sup>36</sup> and that they want to be consulted.<sup>37</sup> Other reasons for wanting to be heard include to make sure that the decisions reflect their needs and to be made aware of the parenting plan so that they are more informed and better able to cope with changes and transitions.<sup>38</sup> When children aged eight to twelve years rank, in order of importance, a number of reasons why children should be involved in decision making, children consistently put at the top of their lists: "to be listened to"; "to let me have my say"; "to be supported", and at the bottom: "to get what I want."<sup>39</sup>

Although some adults may perceive that children's voices in family justice matters equates with allowing children to become the sole decision-makers, it appears that many children actually want an opportunity to express their views and be heard, not the power to ultimately make custody and access decisions.<sup>40</sup>

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<sup>34</sup> Gill Highet & Lynn Jamieson, "Cool with Change: Young People And Family Change (Final Report)" (2007) Scotland's Families/Centre for Research on Families and Relationships.

<sup>35</sup> Rachel Birnbaum, Nicholas Bala & Francine Cyr, "Children's Experiences with Family Justice Professionals and Judges in Ontario and Ohio" (2011) 25 *International Journal of Law, Policy and the Family* 398–422.

<sup>36</sup> Dale Bagshaw, "Reshaping Responses to Children When Parents Are Separating: Hearing Children's Voices in the Transition" (2007) 60 *Australian Social Work* 450–465; Alan Campbell, "The Right to Be Heard: Australian Children's Views about their Involvement in Decision-Making Following Parental Separation (2008) 14 *Child Care in Practice* 237–255; Tapologo Maundeni, "Seen but not Heard? Focusing on the Needs of Children of Divorced Parents in Gaborone and Surrounding Areas, Botswana" (2002) 9 *Childhood* 277–302.

<sup>37</sup> Alan Campbell, "The Right to Be Heard: Australian Children's Views about their Involvement in Decision-Making Following Parental Separation" (2008) 14 *Child Care in Practice* 237–255.

<sup>38</sup> Rachel Birnbaum, "Listening to Youths about their Needs and Preferences for Information Relating to Separation and/or Divorce" (2007) Department of Justice, Family, Children, and Youth Section, Justice, Canada.

<sup>39</sup> N. Thomas & C. O'Kane, "Children's Participation in Reviews and Planning Meetings when they are 'Looked After' in Middle Childhood" (1999) 4 *Child & Family Social Work* 221-230.

<sup>40</sup> Maria Coley, "Children's Voices in Access and Custody Decisions: The Need To Reconceptualize Rights and Effect Transformative Change (2017) 12 *Appeal* 49-72 Available online at <https://journals.uvic.ca/index.php/appeal/article/viewFile/5454/3397>

## ***Children's Capacity in Decision-Making***

Several factors are generally considered with respect to the capacity of children and adolescents to make decisions including age, context and development.<sup>41</sup> The amount of weight given to the child's voice increases proportionally with the age of the child.<sup>42</sup> Children and adolescents are not generally invited to share their views in final decision-making post-separation, yet the weight assigned to their voice and their input as they get older is often akin to determination.

When assessing children's capacity to provide input, it is also important to consider the context of the family dynamics. For example, in family breakups that include higher levels of interparental conflict, children's age should not be the only factor to consider. Older children and adolescents experiencing interparental conflict can be more vulnerable to the influence of their parents and therefore the extent to which their decisions are independent is questioned.<sup>43</sup> When stuck in their parents' conflict, some children may be motivated to protect their relationships with their parents and may not want to upset their parents by expressing views that may be contrary to the expectations of their parents. When these factors prejudice children's input, there is a question as to what their independent views might be if they were isolated from these dynamics. Moreover, children attempt to predict what they believe their parents wish to hear, which often results in inconsistent statements of their wishes.<sup>44</sup>

## ***Effects of Children's Participation***

Researchers have come to recognize the advantages of talking directly to children about their experiences with sharing their views of parenting plans, rather than relying on reports mediated by adults.<sup>45</sup> Child participation is considered essential to making good decisions that affect children, whether the child is a party to court proceedings, the subject of a proceeding, a witness or an affected third party to the decision-making.<sup>46</sup> Children's lived experiences are considered distinct from those of adults and considering these experiences can help make legal decisions better for the children.

Researchers report that children generally view their participation in family justice services as beneficial.<sup>47</sup> Including children's voices in decision making contributes directly to their well-being and adjustment, and can help them cope more effectively with the transitions of separation and divorce.<sup>48</sup> Including children in parenting plan determinations may also increase their feelings of

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<sup>41</sup> P. Grootens-Wiegers, I. M. Hein, J. M. van den Broek, & M. C. de Vries, "Medical Decision-Making in Children and Adolescents: Developmental and Neuroscientific Aspects (2017) 17:1 BMC Pediatrics 120.

<sup>42</sup> Joanne Paetsch, Lorne Bertrand, Jan Walker, Leslie MacRae & Nicholas Bala, "Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights" (2009) [unpublished]

<sup>43</sup> Kirk Weir, "High Conflict Disputes: Evidence of the Extreme Unreliability of Some Children Ascertainable Wishes and Feelings" (2011) 49:4 Family Court Review 788-800.

<sup>44</sup> Ibid

<sup>45</sup> Carrie Brand, Greg Howcroft & Christopher Norman Hoelson "The Voice of the Child in Parental Divorce: Implications for Clinical Practice and Mental Health Practitioners" (2017) 29:2 Journal of Child & Adolescent Mental Health 169-178.

<sup>46</sup> *Supra* note 40.

<sup>47</sup> *Supra* note 6.

<sup>48</sup> Joan Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice" (2002) 10 Va. J. Soc. Pol'y & L. 12.

competency and independence.<sup>49</sup> The most significant theme emerging from the research is the importance of keeping children informed, respecting their views, listening to them, and considering them in decision making.

Conversely, excluding children from meaningful participation in parenting plan decisions can have a negative impact on their overall adjustment and understanding of the separation process. Research suggests that when children are excluded from parenting plan decisions, they can feel more distressed, insecure, rejected and angry.<sup>50</sup> Children report a sense of helplessness due to the lack of control and limited input they have regarding divorce-related decisions.<sup>51</sup> Many of these children experience confusion due to the failure of their parents to explain divorce-related decisions.<sup>52</sup>

### ***Children's Advice***

Children's main advice for other children experiencing parental separation is not to let their parents decide on parenting arrangements alone and to talk to adults, including their parents, mental health professionals and legal professionals, about what they want to happen in terms of the parenting plan post-separation and divorce. Studies indicate that children believe that other children should be consulted and that they should have someone they could talk with about their adjustment problems (e.g., parents, friends, counsellor, a judge).<sup>53</sup> Children state that they should be included in decisions, they should be provided the opportunity to share their views and they should be able to talk about their feelings about the separation and divorce. They also suggest that sharing their views should not compromise their relationship with their parents.

Children's advice for professionals working with children post-separation is to talk less and listen more, get to know the children outside of the parental conflict, including their hobbies and interests. Children also want more feedback about what is happening in the decisions regarding the parenting plans.<sup>54</sup>

### ***Summary***

This chapter reviews experiences of children providing their views in family law matters. Children are increasingly expressing a desire to share their "voice" in the decision-making processes in family justice processes that fundamentally affect their lives. Research emphasises the importance of considering the voice of the child, giving children the opportunity to share their voices, and giving sufficient weight to children's views based on the age, developmental stages and capacity to make decisions that affect them. The next chapter considers the various methods that have been

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<sup>49</sup> *Supra* note 46.

<sup>50</sup> *Supra* note 48.

<sup>51</sup> Nancee Biank & Catherine Ford Sori, "Encouraging Children's Stories of Divorce" (2012) 4 *Journal of Clinical Activities Assignments & Handouts in Psychotherapy Practice Assignments & Handouts in Psychotherapy Practice* 15-40.

<sup>52</sup> Wendy Sturgess, Judy Dunn & Lisa Davies, "Young Children's Perceptions of Their Relationships with Family Members: Links with Family Setting, Friendships, and Adjustment" (2001) 25:6 *International Journal of Behavioral Development* 521-529.

<sup>53</sup> *Supra* note 36.

<sup>54</sup> Rhonda Bessner, "The Voice of the Child in Divorce, Custody and Access Proceedings" (2002) *Family, Children and Youth Section, Department of Justice Canada*, 2002-FCY-1E.

developed both within Canada and abroad as means for hearing the voices of children in family justice services.

#### **Chapter 4: Methods for Including Children’s Voices in Family Law Matters**

Methods for including children’s voices in family matters are situated along a continuum of litigation involvement, from services outside of the court process (e.g., child-inclusive mediation services) to methods embedded within the context of litigation (e.g., judicial interviews). Framing methods for including children’s voices along the continuum of the legal process helps to underscore the many services provided to children as their parents follow the various pathways of the family justice system. The continuum also helps to identify and consider the various opportunities afforded to children to provide their views and preferences about parenting plan decisions. The continuum further underscores the gaps in services for hearing children’s voices within the context of separation and divorce.

Exploring opportunities for including children’s voices in the continuum of the legal process provides a framework for exploring, not just the opportunities for children’s voices to be heard within the courts, but also the opportunities for children to have greater voice earlier in the separation and process. Not all children’s parents will be engaged in the family justice system to resolve their disputes and there is a current focus to move families out of court quicker and into dispute resolution services to resolve their disputes without court involvement.<sup>55</sup> Given that the vast majority of separating parents will settle their parenting plan disputes without substantial legal involvement, and that they will usually settle their disputes within one year of initial application to the courts,<sup>56</sup> providing only court-based methods for including children’s voices eliminates opportunities for a substantial number of children to have their voices included in parenting plan decisions.

Although there is much less attention to earlier opportunities to have children’s voices heard (mostly because the case law is more specific to the legal side of children’s voice), it is nevertheless important to consider opportunities both within and outside of the court process for hearing children’s voices. To support children’s voices both within court processes and outside of the courts, the consideration of the various methods for including children’s voices in services that fall along the continuum from a processes outside of the courts to methods embedded in the context of litigation.

#### **Non-Court Child Inclusive Methods**

Although not directly part of the family justice system, it is nevertheless important to consider non-court related approaches for hearing children’s voices given that the majority of children will not be offered opportunities to speak to a judge, lawyer, or court-based mediator or mental health professional about their views of parenting plans that affect them.<sup>57</sup> When parents are not directly

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<sup>55</sup> Michael Saini, Rachel Birnbaum, Nicholas Bala & Brenden McLarty, “Understanding Pathways to Family Dispute Resolution and Justice Reforms: A Court File Analysis & Survey of Views of Professionals in Ontario” (2016) 54:3 Family Court Review 382-397.

<sup>56</sup> Mary Allen, “Profile of Child-Related Family Law Cases in Civil Court” (2013) Available online at <http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11781-eng.htm>.

<sup>57</sup> *Supra* note 55.

involved in the family justice system to resolve their parenting disputes, children can become silenced in the decision-making process.

### *Children Talking with Parents*

Family law problems can be resolved in various ways and court is not the only option for parents. Some view out-of-court dispute resolution processes and resolution through agreements as the preferred option for solving parenting disputes, with court-based resolution processes being a valued, but not always necessary.<sup>58</sup> When parents agree to parenting plans outside of the court, there has been little focus in the literature about how best to engage children's voices into these decisions.

Children discuss the desire to be part of the decision-making process at earlier stages in the divorce process, including at the point where the parents decide to separate.<sup>59</sup> For some children, particularly for those whose parents resolve their disputes without legal involvement, speaking with their parents may be the opportunity to have input in the parenting plan and to share their views and preferences.

There are several challenges associated with children sharing their views with their parents. Most children report that their parents do not provide them with adequate opportunity to be part of conversations about parenting plans post-separation.<sup>60</sup> Studies of children's perspectives of their parents' separation indicate that children do not receive adequate support during their parents' separation, are not given sufficient explanations of what is happening to their families, and most have no input into parenting plan determinations.<sup>61</sup> Parents may not be emotionally ready to hear their children, as separated parents have been found to show decreased parenting competency post-separation.<sup>62</sup> Parents may have lower emotional availability and sensitivity for their children during this time.<sup>63</sup> Parents may also continue to blame the other parent for the family breakdown and may participate in negative disclosures about the other parent, which has been found to affect the child's closeness and satisfaction with their parents.<sup>64</sup> Being placed in the middle of their parents' dispute can feel overwhelming for children and can induce feelings of guilt.

Children can be further put in the middle of their parents' dispute if the parents eventually decide to use the courts to resolve disagreements and carry with them their child's views to augment their arguments to the courts. In these cases, the courts have noted that parents may have a vested interest in misrepresenting the child's views, or pressuring the child to express a certain view. As the court in *M (DG) v M (KM)* noted, since parents "clearly ha[ve] a personal stake in the outcome of the

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<sup>58</sup> Peter Salem & Michael Saini, "A Survey of Beliefs and Priorities About Access to Justice of Family Law: The Search for a Multidisciplinary Perspective" (2017) 55:1 Family Court Review 120-138

<sup>59</sup> *Supra* note 36.

<sup>60</sup> Judith Cashmore & Patrick Parkinson, "Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce" (2008) 46 Family Court Review 91-104.

<sup>61</sup> M. Gollup, A.B. Smith & N.J. Taylor, "Children's Involvement in Custody and Access Arrangements" (2000) 12:4 Child and Family Law Quarterly 396-399.

<sup>62</sup> Michael Saini, "Reconceptualizing High-Conflict Divorce as a Maladaptive Adult Attachment Response" (2012) 93:3 Families in Society: The Journal of Contemporary Social Services 173-180.

<sup>63</sup> Katie E. Sutherland, Shannon Altenhofen & Zeynep Biringen, "Emotional Availability during Mother-Child Interactions in Divorcing and Intact Married Families" (2012) 53:2 Journal of Divorce & Remarriage 126-141.

<sup>64</sup> Tamara D. Afifi, & Tara McManus, "Divorce Disclosures and Adolescents' Physical and Mental Health and Parental Relationship Quality" (2010) 51:2 Journal of Divorce & Remarriage 83-107.

proceedings,”<sup>65</sup> courts should use caution when children’s views are reported via a parent. Additionally, some courts may question children’s views being too similar to a parent’s position in litigation, and will give them less weight when this occurs, seeing this as an indication of parents’ views unduly influencing by the child.<sup>66</sup>

Most jurisdictions in Canada provide parent education programs for separating and divorcing parents to provide them with information, skills, and development activities to help them better cope with the family breakdown and to focus their attention on the needs of the children. Very few of these programs actually focus on how to talk with children about their views on parenting plan issues while protecting them from the conflict. For example, the Parenting After Separation program in British Columbia<sup>67</sup> includes the goals of helping parents make careful and informed decisions about their separation and to ensure that these decisions are based on the best interests of their children. There is no mention of whether parents are informed about how best to listen to their children post-separation.

### *Children Sharing their Views with Professionals*

When children do not feel comfortable talking with their parents about their experiences with parental separation and views about the parenting plan, they may turn to professionals. For example, recent research identifies children speaking with their teachers and mental health professionals about their views and preferences on parenting plan arrangements. School teachers may not be the best adults for children to share their views about parenting plans with, as research finds that school staff are often ill-equipped to listen to children about their parents’ separation. They often lack the expertise for directing children to the appropriate services.<sup>68</sup> Teachers can face legal and ethical challenges when working with students and their families and many are discouraged from becoming involved in child custody matters.<sup>69</sup>

The role of mental health professionals (e.g., child protection workers, therapists), in hearing children’s views about post-divorce arrangements has become more prominent.<sup>70</sup> Mental health professionals, however, may lack the training for working with children post-separation and divorce. For example, a recent survey of child protection workers in Ontario found that the child protection workers often feel pressured to take sides in the parents’ disputes and prematurely close their files without considering the views of children in these disputes.<sup>71</sup>

Parent coaching has recently emerged as a specialized service for separating and divorcing parents serving as an informed educator and consultant to the parents. The parent coach, usually a mental

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<sup>65</sup>2000 ABQB 593 at para 24.

<sup>66</sup>*Milliker v Milliker*, 2005 SKQB 455 at para 32.

<sup>67</sup> Parenting After Separation. <https://www2.gov.bc.ca/gov/content/life-events/divorce/family-justice/who-can-help/pas>

<sup>68</sup> Linda Mahony, Kerryann Walsh, Joanne Lunn, & Anne Petriwskyj, “Teachers Facilitating Support for Young Children Experiencing Parental Separation and Divorce” (2015) 24:10 *Journal of Child and Family Studies* 2841-2852.

<sup>69</sup> C. E. Hatton, “The Experiences of School Counselors with Court Involvement Related to Child Custody” (2015) Available from PsycINFO. (1694709828; 2015-99131-088).

<sup>70</sup> C. van Nijnatten & E. Jongen, “Professional Conversations with Children in Divorce-Related Child Welfare Inquiries” (2011) 18:4 *Childhood: A Global Journal of Child Research* 540-555.

<sup>71</sup> Michael Saini, Tara Black, Elizabeth Godbout & Sevil Deljavan, “Feeling the Pressure to take Sides: A Survey of Child Protection Workers’ Experiences about Responding to Allegations of Child Maltreatment within the Context of Child Custody Disputes” (2019) 96 *Children and Youth Services Review* 127-133.

health professional, typically has specialized knowledge of the effects of family breakdown, knowledge regarding the legal system, and competence in the skills necessary for effective coaching.<sup>72</sup> When parent coaching includes child-inclusive frameworks, the children are typically included and receive education and support for sharing their views with their parents.

There are also a variety of existing programs for children experiencing parental separation and divorce, most of which are intended to provide children with the opportunity to express their voices and needs within the context of their parents' separation and divorce disputes. These programs do not appear to be widely available across Canada.<sup>73</sup> In addition, these programs do not afford the opportunity for children to have input into parenting plan decisions.

### *Child-Inclusive Mediation*

Children's participation in mediation, a dispute resolution process to help parents resolve conflict, varies widely across Canada, and even within individual provinces and territories. Many Canadian provinces now offer mediation to separating or divorcing parents to assist families resolve parenting plan issues outside of court.

Child-inclusive mediation brings the child into the process of family dispute resolution. In one model, for example, a child specialist is engaged in the process to interview the child to gain an understanding of the child's emotional needs, and expressed wishes.<sup>74</sup> The child specialist then participates in the mediation with the parents, incorporating the child's perspective on child-related issues in the mediation session without subjecting the child to the adult session or requiring the parents to modify the session due to the child's presence.<sup>75</sup>

Commentators and researchers are divided over whether, and how, children should be included in their parents' mediation concerning parenting plan issues. Proponents argue that including children gives them a sense of control over their fate, a place to express and deal with feelings they may not be expressing to their parents, and lets them know what is happening.<sup>76</sup> Opponents argue that it is in children's best interests not to be included in mediation because it places children in the middle of their parents' dispute and burdens children with the responsibility of making adult decisions.<sup>77</sup>

Results from the social science research suggest that involving children in mediation can have a positive effect on mediation outcomes, including agreements with more parenting time for non-residential parents and more communication provisions.<sup>78</sup> Some research suggests that parents and

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<sup>72</sup> Lindsey N. Plante, "Ending in A Way that Allows for New Beginnings: A Divorce Coaching Curriculum" (2014) Massachusetts School of Professional Psychology, Ann Arbor.

<sup>73</sup> O'Connor, *supra* note 1.

<sup>74</sup> Jennifer McIntosh, "Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study" (2000) 18:1 Mediation Quarterly 55-69.

<sup>75</sup> Stacey Platt, "Set another Place at the Table: Child Participation in Family Separation Cases" (2016) 17 Cardozo 749-765.

<sup>76</sup> *Ibid.*

<sup>77</sup> Robert Emery, "Children's Voices: Listening—and Deciding—is an Adult Responsibility" (2003) 45 Ariz. L. Rev. 621.

<sup>78</sup> R. H. Ballard, "A Randomized Controlled Trial of Child Informed Mediation" (2013) Available from ProQuest Dissertations & Theses Global: Health & Medicine; ProQuest Dissertations & Theses Global: Social Sciences. (1425265132).

children in child-inclusive mediation believe that children gain a sense of relief, a lighter burden, a clearer perspective, and the experience of being heard.<sup>79</sup> Child-inclusive mediation also has been found to decrease court motions following the final resolution of issues addressed in mediation.<sup>80</sup>

Child-inclusive mediation provides the children of separating families an opportunity to be heard. It is, moreover, an essential opportunity for disputing parents to focus on children's needs and wishes.

The financial and emotional savings to families from successful mediation, removing the need for costly, lengthy, and profoundly negative legal processes and trials, may well justify the additional cost of including children in the mediation process. Providing child-inclusive mediation for families experiencing lower levels of conflict can also free judges to hear and determine only the most intractable cases. Even in cases that do not settle, children benefit from child-inclusive mediation processes, knowing that their parents care about how they feel and knowing that their parents are making attempts to settle the parenting dispute peacefully. Disadvantages of child-inclusive mediation include instability of government funding to support these programs. Including children in the mediation process can also increase the cost of mediation given the extra cost of including a child specialist to interview the children and then report back to the mediator.<sup>81</sup>

### **Court Based Child-Inclusive Methods**

Many of the court-related child-inclusive methods for hearing the voices of the child are 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. Several Canadian and international pilot studies have been developed to better respond to children's voices within the context of court-based disputes regarding parenting plans. Many of these seem promising, but further evaluation is needed to assess the impact of listening to children and integrating their voices in parenting plan disputes.

#### ***Child-Inclusive Conferencing***

Most recently, the Australian family courts developed a new service to involve children's voices within their parents' disputes at the initial stages of court involvement. Child Inclusive Conferencing involves a meeting with the parents and children with a Family Consultant, qualified social workers or psychologists, ordered by the court and without the presence of lawyers. The Child Inclusive Conference is intended to give the court an understanding of the family situation, and particularly of the children's experience.<sup>82</sup>

According to the model, the Family Consultant interviews each parent and the children and then assists the court by making suggestions about what needs to be considered for the children. The Family Consultant also provides an opportunity for the parties to discuss arrangements for the

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<sup>79</sup> *Supra* note 74.

<sup>80</sup> B. N. Rudd, R. K. Ogle, A. Holtzworth-Munroe, A. G. Applegate & B. M. D'Onofrio, "Child-Informed Mediation Study Follow-Up: Comparing the Frequency of Relitigation Following Different Types of Family Mediation" (2015) 21:4 *Psychology, Public Policy, and Law* 452-457.

<sup>81</sup> *Supra* note 75.

<sup>82</sup> Family Court of Australia. Child Inclusive Conferencing Fact Sheet. (nd) Available at <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/reports-and-publications/publications/child+dispute+services/child-inclusive-conferences>.

children and negotiate their own agreement. The process usually involves the Family Consultant first speaking with the adults and then with the children about what has been happening and what is important to them. After seeing the children, the Family Consultant may give feedback to the adults about the children's views and preferences.

Child Inclusive Conferencing is unique to Australia and has been developed by court-based mental health professionals with very little statutory and regulatory guidance. While there are no known Child Inclusive Conferencing in Canada, recent research from Australia details<sup>83</sup> how this can be effectively implemented. Results based on a small sample of Family Consultants balance the right of the child to be heard with the responsibility to ensure the child's safety and the child's best interests. Furthermore, the Family Consultants suggest that to truly listen to the views of the child, the child needs to have a more substantial role in identifying and determining what is in their best interests and deciding what matters that affect them. The Family Consultants reported that they considered how much weight the court might give to the child's views in their decision making.

Based on these findings, Child Inclusive Conferencing could serve as a framework to guide the role of Family Consultants or other similar professionals within Canadian family justice processes. Child Inclusive Conferencing seems to provide an important model for including children's voices within court-based services and has the potential of providing children with meaningful contributions to parenting plan decisions while also protecting their safety and their relationships with their parents. However, research would need to be conducted in Canada on a pilot basis to determine the fit of Child Inclusive Conferencing within existing family justice services.

### *Appointment of Children's Lawyer*

Different provinces offer different options for child representation. Ontario has the most comprehensive method for representing children, through the Office of the Children's Lawyer (OCL), which is empowered to litigate custody and access issues. In Prince Edward Island, there is no legislation for child representation in family law matters, but they do have an Office of the Children's Lawyer. In Quebec, a child has the right to be heard, meaning that a lawyer will be appointed for them as soon as they wish to exercise this right. Limited resources exist in Nova Scotia for a child's lawyer to be appointed. This is in comparison to Alberta, Quebec, New Brunswick, Nunavut and the Yukon, which have no equivalent government office, and where the courts appoint Legal Aid lawyers for children when needed. In British Columbia, children are not considered parties for the purposes of legal aid and as a result, assessments are more common than full representation.

Studies in Canada and abroad have found that most children are supportive of having a lawyer represent them in court. Most children are satisfied with their legal representation as they believe their lawyers are neutral, objective, and trustworthy.<sup>84</sup> In contrast, other studies have noted that children generally do not benefit from talking to lawyers as these children feel that representation was more like intervention and discussions felt like interrogations.<sup>85</sup>

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<sup>83</sup> Vicki Banham, Alfred Allan, J. Bergman & Jasmin Jau, "Acknowledging Children's Voice and Participation in Family Courts: Criteria that Guide Western Australian Court Consultants" (2017) 5:3 Social Inclusion 155-163.

<sup>84</sup> Rachel Birnbaum & Nicholas Bala, "The Child's Perspective on Legal Representation: Young Adults Report On Their Experiences with Child Lawyers" (2009) 25:1 Canadian Journal of Family Law 11-71.

<sup>85</sup> Alan Campbell, "For Their Own Good: Recruiting Children for Research" (2008) 15:1 Childhood 30-49.

With different possibilities across Canada for appointing a lawyer for a child, courts have also taken different approaches. For example, in the Ontario Superior Court of Justice decision in *Collins v Petric*, the court sets out three instances where it is not necessary to appoint a lawyer for a child, including where: a full assessment has been made; the appointment of a lawyer would significantly delay the proceeding; or the introduction of a new party might be upsetting for the child.<sup>86</sup>

The Quebec Court of Appeal in *F (M) v L (J)* has stated that if a child is mature enough to have an opinion, a low threshold, then the child's lawyer has a duty to advocate this position.<sup>87</sup> The appointment of a lawyer cannot be tied into the parties' litigation. Otherwise, there exists an understandable concern that the child's representative will not be neutral to the parent's interests.

Advantages of child legal representation include that children may benefit from having their own advocate to explain the court proceedings to them, including possible case outcomes. Children's legal representation may informally help parents settle disputes and refocus attention on the child's needs. Disadvantages of child legal representation include some children not feeling they benefit from talking to lawyers, preferring instead to keep family issues within the family. Further, some children do not respond well to interactions with their lawyers.<sup>88</sup> It is also important to point out that the high cost of legal representation and the limited funds and resources to publicly support these programs limit the number of children who are able to access the services.

### ***Children Interviews of Children within Parenting Plan Assessments***

A significantly less direct way to incorporate a child's voice within court-based processes is through the involvement of a court-appointed or private parenting plan assessor. This assessor completes a comprehensive parenting plan assessment and makes a report to the court. Psychiatrists, psychologists, social workers, and other mental health professionals routinely conduct these parenting plan assessments.

There are differing models across Canada for how costs are allocated for parenting plan assessments. For example, in Nova Scotia, the costs associated with assessments are shared between the court, the Nova Scotia Department of Justice, and the parents if they earn more than \$20,000 per year.<sup>89</sup> In Manitoba, free parenting plan assessment reports are provided through Family Conciliation, a branch of Family Services and Housing.<sup>90</sup> In Ontario, parenting plan assessments can be conducted both by the government at no charge to the parents and for a fee by a private assessor.

The primary goal of the child's interview within the parenting plan assessments report is to assist judges, lawyers, and families by providing expert opinions regarding the level of inter-parental conflict, parent functioning, child-parent relationships, and the children's developmental, social,

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<sup>86</sup> [2003] W.D.F.L. 328 at para 19.

<sup>87</sup> [2002] R.J.Q. 676 at para 35.

<sup>88</sup> *Supra* note 75.

<sup>89</sup> Linda Tippett-Leary, "Voice of the Child in Court Proceedings" (2017) Department of Justice Canada.

<sup>90</sup> "Family Conciliation Services," <[https://www.gov.mb.ca/fs/childfam/family\\_conciliation.html](https://www.gov.mb.ca/fs/childfam/family_conciliation.html)>.

emotional, and educational needs post-separation and divorce. Child interviews are considered a central part of the parenting plan assessments, second only to parent interviews.<sup>91</sup>

The children's voices within parenting plan assessments is to assist the court in deciding a parenting plan. Children's views are a primary consideration within the assessors' recommendations for parenting time and decision-making responsibility. It has also become a common practice that the older a child is, the more weight their views and preferences are given. An example of this is laid out in the British Columbia Court of Appeal case *Alexander v Alexander*, where the court states that "there does come a point when at near adult years a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter. Concomitant with that he must take the responsibility for his own actions."<sup>92</sup>

The importance of age is also echoed succinctly by the Ontario Court of Appeal in *Kaplanis v Kaplanis*: "the older the child, the more an order as to custody requires the co-operation of the child and consideration of the child's wishes."<sup>93</sup> This principle has been generally accepted in case law throughout Canada;<sup>94</sup> the major exception is where alienation has taken place, which can override the child's autonomy in the eyes of the court.<sup>95</sup>

A benefit of parenting plan assessments is that courts have viewed them as a viable option for hearing children's voices, as it makes the child's views and preferences known to the court without as much pressure as may be associated with appearing in court.<sup>96</sup> The assessor generally has specialized training in understanding and interviewing children and families. Like other court-based methods for including children's voices, these parenting plan assessments can facilitate settlement between disputing parents. Additionally, a parenting plan assessment may be more likely to be considered and applied to a greater degree if the child is quoted verbatim within it.<sup>97</sup> Limitations of parenting plan assessments include the length of time (e.g., several months) to complete an in-depth evaluation which can further delay the court process. The high cost of these assessments also can make this not a viable option for most families. Also, the weight of a child's wishes in an expert evaluation will be decided by the evaluator, and may or may not be fully considered or explained, depending upon the evaluator's perspective and practice.<sup>98</sup>

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<sup>91</sup> James N. Bow & Francella A. Quinell, "Psychologists' Current Practices and Procedures in Child Custody Evaluations: Five Years after American Psychological Association Guidelines" (2001) 32:3 Professional Psychology: Research and Practice 261-268.

<sup>92</sup> *Alexander v Alexander*, 1988 CanLII 3385

<sup>93</sup> (2005) 249 DLR (4th) 620 at para 13.

<sup>94</sup> *O'Connell v McIndoe*, [1998] B.C.J. No. 2392 at para 13; *C (AJ) v C (R)*, 2003 BCSC 664; *Ellis v Ismond*, [2000] O.J. No. 206; *Berman v Berman*, 2017 ONCA 905; *Roloson v Clyde*, 2017 ONSC 3642 at para 59; *Jackson v Jackson*, 2017 ONSC 1566 at para 65; *Kavaner v Jancsurak*, 2012 ONCJ 543 at para 29; *Lavalee v Moggy*, 2018 ONCJ 801 at paras 140-1; *L (N) v M (RR)*, 2016 ONCA 915 at para 36; *Henderson v Winsa*, 2018 ONSC 3378.

<sup>95</sup> *G (L) v G (R)*, 2012 BCSC 1365 at para 270; *Fernandes v Vukovic*, [2006] W.D.F.L. 1155; *Williamson v Williamson*, 2016 BCCA 87; *B (EM) v B (JR)*, 2016 BCPC 366 at para 160.

<sup>96</sup> *Woodhouse v Woodhouse*, [1996] W.D.F.L. 2137 at para 45; *Rockel v Kent*, 2011 ONSC 4034 at para 80; *Wilson v Wilson*, 1999 ABQB 786 at paras 54-6.

<sup>97</sup> *Catholic Children's Aid Society of Toronto v R. (M.)*, [2003] O.J. No. 4385 at para 19.

<sup>98</sup> *Supra* note 75.

## *Voice of the Child Reports*

A Voice of the Child Report is a recent development that allows children to have their views and perspectives shared in family disputes in a relatively timely and cost-effective way, without necessarily requiring involvement of a lawyer or a full assessment by a mental health professional. Although not appropriate for every case, the preparation of a Voice of the Child Report is becoming more common in Canada, as these take less time than comprehensive parenting plan assessments while still providing the courts with critical information about the child.<sup>99</sup> They were first introduced as a pilot project in British Columbia, and have since been widely adopted across Canada. In 2016, the Law Foundation of Ontario completed a pilot project to allow courts to order Voice of the Child Reports and have since integrated Voice of the Child Reports into the services offered by the Office of the Children’s Lawyer, Ministry of the Attorney General.

The purpose of Voice of the Child Reports is to give the child an outlet to speak without their views being evaluated by the assessor. It has been suggested that the purpose of a Voice of the Child Report is to allow a child to speak frankly to a qualified neutral third party without the child being pressured to say things that the parent wants to hear.<sup>100</sup> The content is meant to be only evidentiary, with no expert opinions, as it is meant to be solely a space for the child’s views to be repeated in an organized manner.<sup>101</sup> In a typical report-writing process, the child is interviewed on two occasions, brought once by each parent, which forms the basis for the report. They are usually only conducted on children seven years old and older. Courts have found that a Voice of the Child Report is a viable alternative to judicial interviewing of the child.<sup>102</sup>

In Ontario, there seems to be some uncertainty about courts’ statutory authority to order a Voice of the Child Report. Several judges have found that a statutory authority to order this report does not exist.<sup>103</sup> Others have relied on the authority of s. 30 of the *Children’s Law Reform Act*, which provides for parenting plan assessments.<sup>104</sup> In one case, a court found that the court has a regulatory authority, under 20.1(3) of the *Family Law Rules*, to appoint an expert to inquire into a question of fact pertinent to a relevant legal issue. Since the Voice of the Child Report fits this mandate, it was held that this is the source of the authority.<sup>105</sup>

The case law sets out certain criteria for how judges should evaluate a Voice of the Child Report. The New Brunswick Court of Queen’s Bench in *D (KR) v K (CK)* adopted Nicholas Bala’s criteria for evaluating these reports, which consist of:

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<sup>99</sup> Caselaw about Views of Child Reports in Ontario has also grown substantially: *Svirsky v Svirsky*, 2013 ONSC 6290; *Svirsky v Svirsky*, 2013 ONSC 5564; *Walton v Sommerville*, 2010 ONSC 2765; *B.T.O. v A.A.*, 2013 ONCJ 708 (only Ontario case where a lawyer interviewed the child); *Sheldrick v Bates*, 2015 ONSC 2337; *Vieira v. Dos Santos Trillo* 2016 ONSC 8050; *Stacey v Stacey* 2017 ONSC 1226; *F. (V.) v. F. (J.)* 2016 CarswellOnt 21166, 2016 ONCJ 759, [2017] W.D.F.L. 1492, [2017] W.D.F.L. 1495; *Religa v Nesrallah*, 2017 ONSC 1491; *Neger v Dalfen*, 2016 ONCJ 751; *Peter Alexis Mills Henderson v Kelly Ann Winsa*, 2015 ONSC 6322; *Mitchell v Mitchell*, 2016 ONSC 8083; *F. (V.) v F. (J.)* 2016 CarswellOnt 21166, 2016 ONCJ 759, [2017] W.D.F.L. 1492, [2017] W.D.F.L.

<sup>100</sup> 2012 BCSC 282 at para 17.

<sup>101</sup> *S (MA) v S (JS)*, 2012 NBQB 285 at para 44.

<sup>102</sup> *R (BT) v A (U)*, 2014 BCSC 1012 at para 38.

<sup>103</sup> *Ibid* at para 21.

<sup>104</sup> *Religa v Nesrallah*, 2017 ONSC 1491 at para 12.

<sup>105</sup> *Gajda v Canepa*, [2018] O.J. No. 4534, 2018 ONSC 5154

1. Whether both parents are able to provide adequate care;
2. How clear and ambivalent the wishes are;
3. How informed the expression is;
4. The age of the child;
5. The maturity level;
6. The strength of the wish;
7. The length of time the preference has been expressed;
8. Practicality;
9. The influence of the parent(s) on the expressed wish or preference;
10. The overall contact;
11. The circumstances of the preference from the child's point of view.”<sup>106</sup>

One of the benefits of the Voice of the Child Reports is that it can be a relatively quick and efficient method for presenting the voices of children to the courts, can assist in reaching agreements consistent with the child’s views<sup>107</sup> and can provide an accurate portrayal of the children’s views.<sup>108</sup> One potential concern is that a Voice of the Child Report may be ordered in cases where a comprehensive parenting plan assessment is needed to consider the children’s views within the context of the child’s best interests, especially children’s reported views are considered contrary to the child’s best interest. For this reason, Voice of the Child Reports may not be suitable in cases of high conflict, intimate partner violence, cases that involve substance abuse, cases with strong loyalty conflicts (e.g., alienation) and cases where the child’s safety may be compromised.

### ***Child-Inclusive Collaborative Law***

Collaborative family law is a settlement-oriented legal dispute resolution process where the parents and their lawyers engage in a process together to resolve the parents’ dispute. Parents with their lawyers agree at the outset that they will not proceed to court. Instead, parents engage in a joint problem-solving effort as opposed to the traditional adversarial approach.<sup>109</sup> If the parents wish to proceed to court, both lawyers for the parents have to withdraw from the case.<sup>110</sup>

An emerging trend in collaborative law is for the parents and their lawyers to engage with a child specialist as a member of the collaborative team. The child specialist is often a psychologist or social worker with specialized knowledge about children, child development, family relationships and parenting. Within the collaborative team, the child specialist is a neutral third party who focuses exclusively on the children’s voice and their interests. The task of the child specialist in relation to the team is to interview the children and to report back to the collaborative team to ensure the children’s interests are considered in the resolution of the parenting plan issues.

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<sup>106</sup> 2013 NBQB 211 at para 142.

<sup>107</sup> Rachel Birnbaum, Nicholas Bala & John-Paul Boyd, “The Canadian Experience with Views of the Child Report: A Valuable Addition to the Toolbox?” (2016) 30:2 *International Journal of Law, Policy and the Family* 158–178.

<sup>108</sup> Rachel Birnbaum, “Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes” (2017) 5:3 *Social Inclusion* 148-154.

<sup>109</sup> Christopher M. Fairman, *Growing Pains: Collaborative Law and the Challenge of Legal Ethics*. Campbell Law Review, 2008; Ohio State Public Law Working Paper No. 109. Available at SSRN: <https://ssrn.com/abstract=1026675>.

<sup>110</sup> Birnbaum, *supra* note 1.

As both collaborative law and the use of a child specialist are relatively new areas of practice in Canada, there is little written about the use of the child specialist, the limitations, and their role in the process. Based on a study of collaborative law in British Columbia, the use of the child specialist within the collaborative process offers a potential avenue for children to provide their perspective while protecting child safety. More specifically, when the child specialist remains neutral and advocates only for the children, the specialist is in a unique position to relay the children's voices to the parents and their collaborative lawyers in a way that protects children and minimizes potential conflict resulting from children's disclosures.<sup>111</sup>

Collaborative lawyers report that child specialists have an important role to play in the success of the process. Child specialists are most commonly used when there are discrepancies between the parents' perspectives concerning parenting issues, existing dysfunctional parenting arrangements, parental alienation or behavioural issues, or the parents have a poor understanding of child development. The extent to which the presence of child specialists on a file would raise or lower ultimate costs to clients is something worthy of additional research.<sup>112</sup> Child-inclusive collaborative law is considered less expensive than if the parents were to proceed to litigation, but future research is needed to determine the extent to which the cost of collaborative law is too high for parents to choose it as a viable option.

### *Judicial interviews with children*

Some jurisdictions now provide for judges to interview children in family law matters regarding their wishes. Interviews may take place in judicial chambers (as is often the case in Quebec), without the presence of their parents and, often, without their parents' lawyers. The terms judicial "meeting" and "interview" with children have been used interchangeably.<sup>113</sup> A few authors distinguish between a judicial "interview," which may result in a judge acquiring information or insights that can be used in making a decision, in particular about a child's views and preferences, and a judge having a "meeting" with a child for some other purpose, such as to answer questions that a child may have or to tell the child about the court's decision.<sup>114</sup>

The judge's legal authority to interview a child in the family law context exists across Canada. This authority is explicitly set out in legislation in some provinces, and only grounded in the common law in others. In Ontario, s. 64 of *Children's Law Reform Act* explicitly states that "(1)...a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them...[and] (2) the court may interview the child to determine the views and preferences of the child."<sup>115</sup> The legislation also specifies that the interview shall be recorded.<sup>116</sup> A similar legislative provision exists in Prince Edward Island in section 8(2) of the *Custody Jurisdiction and Enforcement Act*, which states that "the court may interview the child to

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<sup>111</sup> M. Ledger, "The Best Interests of the Child and the Potential of Collaborative Family Law: A Critical Analysis of Collaborative Lawyers' Perspectives on Important Issues in Collaborative Law" (2017) Unpublished Dissertation.

<sup>112</sup> *Ibid.*

<sup>113</sup> Rachel Birnbaum & Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24:3 *International Journal of Law, Policy and the Family* 300-337.

<sup>114</sup> Dan Goldberg, "Judicial Interviews of Children in Custody and Access Cases: Time to Pause and Reflect" (2017) *Law Society of Upper Canada, Voice of the Child Education Program*, Apr. 8, 2011, Toronto.

<sup>115</sup> *Children's Law Reform Act*, R.S.O. 1990, c. C.12, s. 64 (1) and (2).

<sup>116</sup> *Ibid.*, s. 64 (3).

determine the views and preferences of the child.”<sup>117</sup> Also, under Newfoundland and Labrador’s *Children’s Law Act*, a judge may interview a child to determine their views and preferences, the interview must be recorded unless otherwise agreed to by all parties and the judge, and the child is entitled to be advised by and to have a lawyer present during the interview.<sup>118</sup>

Similar legislation does not exist in most other provinces. However, common law precedents do explicitly allow judicial interviewing, such as *Jandrisch v Jandrisch*<sup>119</sup> in Manitoba and *S (ME) v S (DA)*<sup>120</sup> in Alberta. It is, however, important to note that the judge is under no obligation to conduct a judicial interview, they only have the authority to do so if they deem it appropriate.<sup>121</sup> Judges are more likely to meet with children if there is no parenting plan assessment, Views of the Child Report or representation for the child, especially if there is urgency for a decision.<sup>122</sup>

There are several safeguards in the case law around the practice of judicial interviews. A child’s counsel, if one is appointed, may be a party to the decision of whether a judicial interview is advisable. There is also the consideration of recording the interview. While the legal need for a recording is part of the relevant statute in many jurisdictions, in other instances it is accounted for in case law. For example, the Manitoba Court of Appeal ruled in *Jandrisch v Jandrisch* that while a trial judge has the discretion to interview children, if the interview would interfere with rights of parties, then the interview must be recorded to facilitate any possible appeal of the case.

Additionally, the British Columbia Supreme Court in *G (LE) v G (A)* established a principle, now widely followed in that province and some others,<sup>123</sup> that while the trial judge has discretion to interview children if they feel it is in children’s best interests, this technique should only be used if it is necessary and there are no other appropriate options to ascertain the child’s views and preferences. In that case, Justice Martinson noted that:

“[although] the court’s discretion to interview a child, even in the absence of consent, is based on its *parens patriae* jurisdiction (an inherent power to act in the best interests of children)... [it must be] address[ed]...whether an interview with a child is necessary. In order to determine whether an interview is necessary, the court should consider what other options are available and the appropriateness of those options as an alternative in the particular case before the court.”<sup>124</sup>

This principle was further elaborated upon in *Ali v Williams*,<sup>125</sup> which suggested that the judicial interviewing of children must be consistent with the appearance of justice, considering that it may not be appropriate to use judicial interviewing as an option if it might compromise the court

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<sup>117</sup> *Custody Jurisdiction and Enforcement Act*, RSPEI 1988, c C-33, s. 8

<sup>118</sup> *Children’s Law Act*, RSNL 1990 c C-13, s. 71 (2) and (3).

<sup>119</sup> [1980] M.J. No. 6 at para 43.

<sup>120</sup> 2002 BCSC 1455 at para 4.

<sup>121</sup> *Uldrian v Uldrian*, [1988] O.J. No. 1139.

<sup>122</sup> Rachel Birnbaum & Nicholas Bala, “A Survey of Canadian Judges About Their Meetings With Children: Becoming More Common but Still Contentious” (2014) 91:3 Canadian Bar Review 637.

<sup>123</sup> *J (CJ) v J (A)*, 2016 BCSC 676; *Tonowski v Tonowski*, 2002 ABQB 1018; *CJA v EMA*, 2018 BCSC 2175.

<sup>124</sup> 2002 BCSC 1455 at paras 4 and 50.

<sup>125</sup> [2008] W.D.F.L. 2631 at para 51.

proceedings. Case law also exists to support the child's right to have the contents of a judicial interview kept from their parents as not to alienate either one.<sup>126</sup> Also with an eye towards protecting the children, the Albertan case *S (ME) v S (DA)* suggests that judicial interviewing of children should only be conducted when there is reason to believe that the contents of the interview do not contain information that should otherwise be considered as evidence for trial.<sup>127</sup> In a more recent decision of the Ontario Superior Court of Justice in *Ward v Swan*, the judge held:

In my view it is not proper to use the judicial interview process in order to contest evidence that may be disputed. The prejudice to the litigants far outweighs any potential probative value .... I will not place [the child] in a position where, through questioning by the judge, where she will be at the centre of a storm that may go further to destroy future family relationships rather than preserve the potential of necessary familial re-integration.<sup>128</sup>

Case law also exists to confirm a judge's authority to conduct judicial interviews. This principle was followed more recently in the British Columbia cases *H (MA) v H (CM)*<sup>129</sup> and *Re L*,<sup>130</sup> as well as the Ontario case *Demeter v Demeter*.<sup>131</sup> There is also some history of judges suggesting that judicial interviewing of older children is a more fruitful process,<sup>132</sup> as these children have more to contribute, and can more meaningfully contribute.

While there has been some debate about the merits and risks of judicial interviews among professionals and academic commentators,<sup>133</sup> there is limited empirical evidence on the views of children and parents about judicial interviews. Based on the social science research to date, the majority of children indicated that they should be able to speak with the judge if they desired.<sup>134</sup> Reasons for wanting to talk with the judge included: having their views heard by the individual who is responsible for decision-making; better decision-making by the judge; being able to share their views in private and in confidence; avoiding the judges' possible misinterpretation of their wishes; and the importance of providing input and being acknowledged (even if the judge ultimately made a decision that was not consistent with their suggestions). Reasons for not wanting to speak with the judge included: feeling that it was inappropriate or unnecessary (typically expressed by children in uncontested cases); preferring to deal with family matters within the family; and feeling that it was scary or too formal.<sup>135</sup>

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<sup>126</sup> *Andrusiek v Andrusiek*, 2002 BCCA 161 at paras 21-2.

<sup>127</sup> 2001 ABQB 1015 at para 54. This principle is also followed in *B (GE) v B (PA)*, 2002 ABQB 476.

<sup>128</sup> 2009, 95 OR (3d) 475 (Ont Sup Ct) at para 25

<sup>129</sup> 2008 BCPC 14 at paras 20-1.

<sup>130</sup> [1999] B.C.J. No. 629 at para 11.

<sup>131</sup> [1996] W.D.F.L. 2076.

<sup>132</sup> *A (G) v B (K)*, 2014 ONSC 3913 at para 40.

<sup>133</sup> W. Dunbar, "Hearing a Child's Voice in Divorce: A Judge's Experience" (2017) Available from PsycINFO. (1884866874; 2016-53065-083).

<sup>134</sup> Rachel Birnbaum & Nicholas Bala, "Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio" (2010) 24:3 International Journal of Law, Policy, and the Family 300-337.

<sup>135</sup> Patrick Parkinson, Judy Cashmore & Judi Single, "Parents' and Children's Views on Talking to Judges in Parenting Disputes in Australia" (2007) 21:1 International Journal of Law, Policy, and the Family 84-107.

### *Children's testimony in court (children as witnesses)*

Child testimony involves having the child provide live testimony in the courtroom. In some circumstances, this may be the only way for a court to enforce its orders and protect children from future harm. Special considerations are needed, however, given that children's court testimony risks pitting children against one or even both of their parents and children may even be cross-examined by a parent or parent's counsel, which can be a traumatic experience.

In every province, it is possible for a child to be called as a witness. For example, section 18 of Ontario's *Evidence Act* allows a child's evidence to be admitted even if they do not understand the nature of an oath, or if they are able to understand the meaning of the truth. However, it is rare for children to testify in open court in family separation or divorce proceedings, even when all precautions have been taken to protect the child. In most instances, a child testifying in court is seen as too great a burden for a child to bear. Perhaps for this reason, when children's evidence is given, great weight is given to it.<sup>136</sup> Judges can always prevent a child from testifying, even when parties, counsel and the child agree to testify,<sup>137</sup> if the judge deems it to be the correct choice. Courts have also acknowledged this concern. In the 2004 case *Stefureak v Chambers*,<sup>138</sup> the court identified "major obstacles to allowing a young child to testify in custody and access cases...[as] the lack of training of the bench and bar in asking developmentally appropriate questions."<sup>139</sup>

Compelling a child to testify may not always be in a child's best interest if there is any hint of "taking sides" with one parent, as this may put undue pressure on the child. This concern is further addressed in *Sparks v Sparks*, where the Alberta Court of Queen's Bench held that since "the Court should avoid putting children in positions where one or both parent might see them as choosing one over the other," that "all other reasonable avenues should be explored before acceding to such a request."<sup>140</sup> Academics have similarly noted that "since family law proceedings are intended to promote the best interests of a child, it would be inconsistent with the objective of these proceedings to allow a child to participate in the proceedings if doing so would be detrimental to the child or the child's relationships."<sup>141</sup>

When a child's potential testimony adds little weight to the matter at hand, the judge is less likely to have that child testify. This is because "having to testify would likely be traumatic... and while it might not cause long lasting damage, it would nevertheless cause... real harm that could last for some time."<sup>142</sup> This typifies the balancing that courts attempt in both trying to access the views of the child, while protecting them from possible traumatic experiences. This principle also holds that from the perspective of the child, within the consideration of whether to admit a child's hearsay

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<sup>136</sup> *A (M) v L (D)*, [2003] O.J. No. 4174 at para 34; *Kalaserk v Nelson*, 2005 NWTSC 4 at paras 15-23.

<sup>137</sup> *Dudman v Dudman*, [1990] O.J. No. 3246; *S (ME) v S (DA)*, 2001 ABQB 1015.

<sup>138</sup> *Stefureak v Chambers*, [2004] O.T.C. 922 at para 56.

<sup>139</sup> This principle has been followed in *Wilson v Wickham*, 2018 ONSC 2574 at para 30.

<sup>140</sup> *Sparks v Sparks*, [1994] A.W.L.D. 873 at paras 4-5.

<sup>141</sup> Nicholas Bala, Victoria Talwar & Joanna Harris, "The Voice of Children in Canadian Family Law Cases" (2005) 24 *Canadian Family Law Quarterly* 221.

<sup>142</sup> *Collins v Petric*, [2003] W.D.F.L. 328 at para 32.

evidence, there is a deliberation on whether that child will be traumatized by testifying. If the child will, then the hearsay evidence is more likely to be admitted, as it is more necessary.<sup>143</sup>

One must note, however, that the practice of children testifying in court is much more common in Quebec. Section 34 of the Quebec *Civil Code* states that “the court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.”<sup>144</sup> This can result in children as young as nine or ten years old being able to testify more regularly than in other provinces and territories. The court may be modified for them, as the questions posed to the children are screened by the court, and parents are sometimes asked to leave the courtroom and not always given a copy of the transcript.<sup>145</sup>

A growing body of social scientific literature on the psychological and physiologic consequences of appearing in court has supported modifications of courtroom procedures. To decrease the stress children may experience when appearing in courts, available accommodations may range from allowing children to hold comforting objects<sup>146</sup> to being accompanied by a support person while testifying.<sup>147</sup> Research has found considerable variability in views about the competence of child witnesses and the need for special protective measures in court for these witnesses. Given that very few family disputes are resolved by a trial, testimony in court is rarely a vehicle through which children’s views are heard, so this method remains the exception rather than the norm.

### **Post-Court Order for Opportunities to Hear Children’s Voices**

Once the court has made a final order for parenting time and decision-making responsibilities, some families continue to need the assistance of family justice related services. Likewise, parents should not stop hearing children’s voices simply because the court has rendered a final decision. Post-court opportunities are important given that children will continue to develop and mature as the family attempts to integrate the new regime. Specialized services have been developed across Canada to work with families post-court order to ensure that the children remain safe, that the parents follow the requirements of the order, and to assist when minor modifications are needed to respond to the changing needs of the family.

#### ***Child-Inclusive Parenting Coordination***

Parenting coordination is a form of dispute resolution targeting separated parents who remain entrenched in conflict and continue to experience difficulties implementing court orders and parenting plans.<sup>148</sup> Parenting coordinators can be lawyers or mental health professionals working to decrease conflict between the parents and to keep their dispute outside of the courtroom. Parenting

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<sup>143</sup> *Ward v Swan*, [2009] W.D.F.L. 2907 at para 13; *Avakian v Natiotis*, 2012 ONCJ 584 at para 28; *George v Nyugen*, 2017 ONCJ 161 at para 13, *Romero v Malecka*, 2018 ONCJ 128 at para 13.

<sup>144</sup> *Civil Code of Quebec*, 1991, c. 64, a. 33; 2002, c. 19, s. 34

<sup>145</sup> *Supra* note 141.

<sup>146</sup> Susan McDonald, “Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary” (2017) Department of Justice Canada. Available online at [https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10\\_vic3/rr10\\_vic3.pdf](https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10_vic3/rr10_vic3.pdf).

<sup>147</sup> R.H. Pantell, “The Child Witness in the Courtroom” (2017) 139:3 *Pediatrics* 4008.

<sup>148</sup> Michelle Mitcham-Smith & Wilma J. Henry, “High-Conflict Divorce Solutions: Parenting Coordination as an Innovative Co-Parenting Intervention” (2007) 15:4 *The Family Journal* 368-373.

coordination is gaining more popularity in North America and although research on its efficacy is still scarce, the literature is demonstrating promising results, including: reduction of families involved in high conflict;<sup>149</sup> decreases in court filings;<sup>150</sup> and reductions in time spent by the courts in managing these cases.<sup>151</sup>

The practice of including children in the parenting coordination process is relatively new and has the potential to provide children with additional opportunities to have their voices included in parenting plan decisions. Listening to children's voices helps parents resolve their child-related disputes and reduces parenting conflict. As part of a pilot project in the Montreal area,<sup>152</sup> ten high conflict families received free child-inclusive parenting coordination services. Based on the program evaluation, children reported a decrease in the intensity of the conflict between parents over the course of parenting coordination. Approximately half of the children shared examples of improvements in their lives, mostly to do with better communication between parents. Children's negative evaluations of the process included reports that they did not feel heard by the parenting coordinator and a perceived lack of neutrality of the parenting coordinator.

Despite the perceived benefits of child inclusive parenting coordination, there is no consensus as to whether children should be given a voice in parenting coordination. In the Parenting Coordination Guidelines published by the Association of Family and Conciliation Courts in 2005, the directions about child inclusion are vague and the decision to include them is left to the parenting coordinator.

Joan Kelly, a pioneer in parenting coordination, has emphasized the importance of meeting children as part of the parenting coordination process, noting many benefits including empowering children and increasing efficacy of the intervention. To achieve the potential benefits, research and the practice of parenting coordination can be further developed. For example, research and practice directives could address the absence of training and experience standards for working with and interviewing children within the role of parenting coordination. Also, questions remain about the cost of this fee-for-service option for families to manage their court order requirements, which may mean that parenting coordination is not an option for most Canadians.

### *Children's Voices in Supervised Access Services*

Supervised visitation services, also known as supervised access and exchange services, or child contact services, are offered through various distinct programs around the world. All of these services have the common goal of facilitating contact between parents and their children. Supervised visits allow parents to visit with their child under the supervision of trained service providers at a safe and neutral place. Supervised exchange allows one parent to drop the child off at a neutral place to facilitate the exchange of the child to the other parent to spend time with them

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<sup>149</sup> Wilma J. Henry, Linda Fieldstone & Kelly Bohac, "Parenting Coordination and Court Relitigation: A Case Study" (2009) 47 Family Court Review 682-697.

<sup>150</sup> Wilma J. Henry, Linda Fieldstone, Maryann Thompson & Kimberly Treharne, "Parenting Coordination as an Antidote for High-Conflict Divorce and Court Relitigation" (2011) 52:7 Journal of Divorce & Remarriage 455-471.

<sup>151</sup> Karey O. Brewster, Connie J.A. Beck, Edward R. Anderson & G. Andrew H. Benjamin, "Evaluating Parenting Coordination Programs: Encouraging Results from Pilot Testing a Research Methodology" (2011) 8:4 Journal of Child Custody 247-267.

<sup>152</sup> Catherine Quigley & Francine Cyr, "Children's Perspectives on Parenting Coordination: Insights from the Montreal Parenting Coordination Pilot Project" (2017) 14:2-3 Journal of Child Custody: Research, Issues, and Practices 151-174.

offsite and unsupervised, without the parents having to meet.<sup>153</sup> Although government-based supervised access services are not available in all Canadian jurisdictions, these services are used to prevent child maltreatment, to reduce the risk of harm to both parents and children, to improve parent-child relationships, and to provide written accounts of the factual observations of the visit.<sup>154</sup>

An assumption of most supervised access and exchange services is that children benefit from time spent with both parents.<sup>155</sup> However, few empirical studies have directly involved children to explore their experiences and understanding of supervised access and exchange services. Studies have noted that children are typically not aware of the decisions about supervised services, which can create ambivalence about using these services.<sup>156</sup> Indeed, most children reported that the decision to use supervised services was made without their input and many were not provided with information about the supervised services prior to the first visit. Consequently, many of the children reported that they were confused about the reasons for using the supervised services and most of the children reported that they did not feel they could talk to their parents or the staff about their feelings and experiences of using the supervised services.<sup>157</sup>

## Summary of Methods

Exploring opportunities for including children's voices in the continuum of the legal process provides a framework for exploring two types of methods. These methods include opportunities for children's voices to be heard within the courts (e.g., court-based child-inclusive methods) and opportunities for children to have their voices heard in earlier stages of the family justice system (non-court child inclusive methods). There is no one method that fits all the different pathways through which parents and children may resolve parenting disputes. It is important to assess the family's needs early in the court process so that specific methods can be used to augment the children's voices while helping parents to resolve their parenting plan issues without lengthy court involvement.

Based on the review of the methods above, further attention is needed to consider how best to integrate children's voices within non-adversarial approaches so that they may more fully participate in parenting plan decisions even if the parents are able to reach agreements outside of the courts. For families who are unable to resolve parenting plan issues on their own and need the court's assistance, there are a range of options available for hearing children's voices and integrating them into the court's decision. Choosing the right method for children will depend on a number of factors which will be considered in the subsequent chapters.

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<sup>153</sup> Michael Saini, Melissa Van Wert & Jacob Gofman, "Parent-Child Supervised Visitation within Child Welfare and Custody Dispute Contexts: An Exploratory Comparison of Two Distinct Models of Practice" (2012) 34:1 Children and Youth Services Review 163-168.

<sup>154</sup> Wendy P. Crook & Karen Oehme, "Characteristics of Supervised Visitation Programs Serving Child Maltreatment and Other Cases" (2007) 7:4 Brief Treatment and Crisis Intervention 291-304.

<sup>155</sup> Rachel Birnbaum & Romona Alaggia, "Supervised Visitation: A Call for A Second Generation of Research" (2006) 44:1 Family Court Review 119-134.

<sup>156</sup> Grania Sheehan, Australia Attorney-General's Department & Griffith University, Socio-Legal Research Center. *Children's Contact Services Expectations and Experience: Final Report*. (Canberra: Attorney-General's Department, 2005). <http://nla.gov.au/nla.arc-52122>

<sup>157</sup> Robert Fitzgerald & Ann Graham, "'Something Amazing I Guess': Children's Views on Having a Say About Supervised Contact" (2011) 64:4 Australian Social Work 487-501.

## Chapter 5: Prevalence of child-inclusive methods in family law

Recent surveys of professionals have documented the types of methods used to integrate children's voices within family law matters. A recent online survey of professionals' views of the various services within the courts and issues related to access to justice found that lawyers most frequently preferred to obtain children's views and preferences within parenting plan assessments, suggesting that the reports are used to help settle cases that may otherwise have gone to trial. This practice may avoid the very significant financial and emotional costs to the families.<sup>158</sup>

In 2016, the Canadian Research Institute for Law and the Family conducted a survey of lawyers and judges at the National Family Law Program and found that judges (35.9%) were considerably more likely than were lawyers (19.7%) to say that they often or almost always are involved in cases where efforts are made to seek children's views. They also found that the manner of soliciting children's views that was most frequently used by most lawyers was a parenting plan assessment report prepared by a mental health professional (62.9%), followed by a legal representative for the child (46.6%), and a non-evaluative report prepared by a lawyer or mental health professional (41.0%).<sup>159</sup>

A recent survey of judges about their opinion on the best mechanisms for enabling children to voice their views found that the majority of judges (85%) rated evaluative Views of the Child report by a mental health professional as the best mechanism, followed by a parenting plan assessment report by a mental health professional (70%). Legal representation for the child (65%) and a non-evaluative Views of the Child report by a mental health or legal professional (60%) were also considered to be among the best mechanisms by the majority of judges. Only one-fifth of respondents (20%) rated judicial interview with child as a best mechanism, and only one judge (5%) thought non-legal representation for the child was a best mechanism. None of the judges thought a legislative provision that parents should consult their children respectfully when making parenting arrangements upon separation was a best way to enable children to share their views.<sup>160</sup>

Judges were also asked what methods the court used to enable children to share their views. The majority of judges reported that methods used in their court included: legal representation for the child (100%); Views of the Child report (95%); parenting plan assessment (90%); and testimony by a mental health professional or social worker who has interviewed the child (80%). Just over one-half of judges also reported that a judicial interview with the child (55%) and testimony by other adults who know the child (such as parents or teachers) regarding the child's wishes (55%) were used in their court. Relatively few respondents said that testimony by the child in court (15%) or voluntary mediation involving the child and parents (15%) are used by the court, and only one judge each reported that mandatory mediation involving the child and parents (5%), non-legal representation for the child (5%), and a legislative provision that children's views must be considered (5%) are mechanisms that are used in their court.<sup>161</sup>

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<sup>158</sup> Bertrand, *supra* note 1.

<sup>159</sup> J. Paetsch, J. Bertrand, J. Walker, L. MacRae & N. Bala, "Consultation of the Voice of the Child at the 5<sup>th</sup> World Congress on Family Law and Children's Rights" (2009). National Judicial Institute and Canadian Research Institute for Law and the Family.

<sup>160</sup> Bertrand, *supra* note 1.

<sup>161</sup> *Ibid.*

Although surveying legal professionals about their choice of methods is an important step in estimating the frequency of use of the various methods, there is a need for caution when assessing the actual use of these various methods to include children's voices.<sup>162</sup> A recent study of two thousand closed court files in Ontario and Quebec found that only a small percentage of family law court cases engaged in services available to support children's voices, including child legal representation and parenting plan assessment.<sup>163</sup>

Despite the heightened awareness that children's views and preferences must be taken into consideration when decisions regarding their living arrangements are being made,<sup>164</sup> and despite Article 12 of the United Nation *Convention of the Rights of the Child*, there remains no systematic method to ensure that children's voices are considered. Further, there remains little consensus on how children's voices should be heard and there remains debate in the literature about the strengths and limitations of the various approaches for facilitating children's voices within family justice processes. So while facilitating children's voices within family justice processes remains important, and there are many methods for facilitating children's voices in family justice, many opportunities remain for research and practical developments on the topic.

## **Chapter 6: Decisions for including child-inclusive methods**

With the heightened awareness of the importance of considering children's views and preferences post-separation and divorce, several methods and approaches have been discussed in both the social science literature and Canadian case law as promising opportunities for including children's voices in decisions that affect them. These various approaches provide different levels of child participation in the decision-making process at different stages of parents' involvement in the family justice system.

There is growing attention as to the importance of listening to children's views outside of the courts. The central focus for including children's voices within Canadian family justice system remain court-based methods, including child custody assessments, Voice of the Child Reports, appointment of children's lawyer, and judicial interviewing. These methods are thought to provide the court with assistance in its decision-making regarding children's best interests and to ensure children's voices are included and considered in these decisions. In addition, children's voices in the courts are now supported by family law legislation in almost all Canadian jurisdictions which provides that the views of children be considered as a factor in making decisions based on their "best interests." Frequently there is also a proviso, such as "where these views can reasonably be ascertained" or considering the age and maturity of the child.<sup>165</sup>

To explore the multiple pathways for including children's views, a decision tree for considering the various options for hearing children's voices is provided based on the review of the social science research and the case law. The decision tree is a tool to assist mental health and legal professionals

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<sup>162</sup> *Supra* note 55.

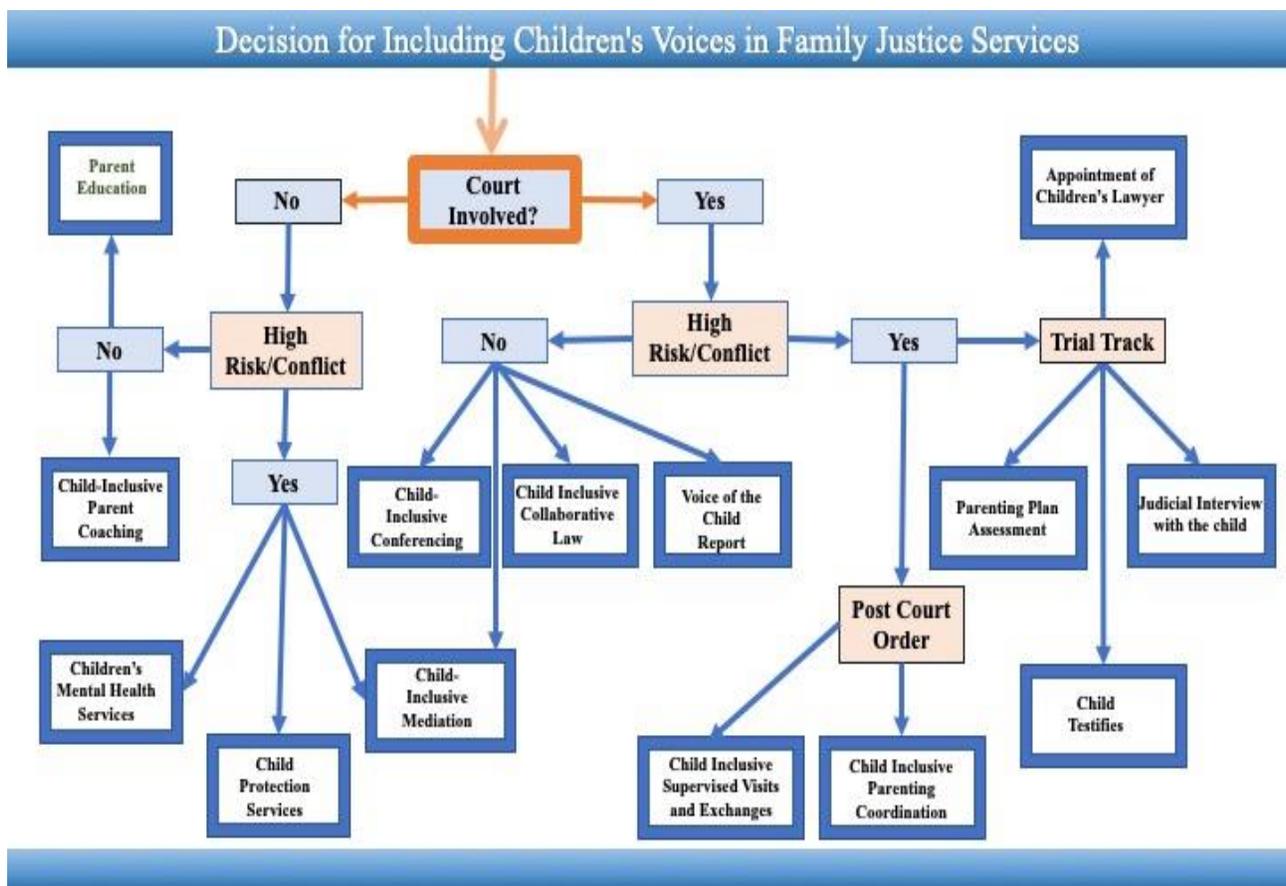
<sup>163</sup> The files were randomly chosen and pulled by court staff. The cases had to have been closed between October 2011 or later and involved at least one child.

<sup>164</sup> *Supra* note 2.

<sup>165</sup> Nicholas Bala & Rachel Birnbaum, "Rethinking the Role of Lawyers for Child: Child Representation in Canadian Family Relationship Cases" (2018) 59:4 *Les Cahiers de Droit* 787-829.

to best consider the pathways through the various stages of the legal process and the opportunities within these approaches for including children’s voices (See [Figure 1](#)).

When using the decision tree, it is necessary to consider all types of methods that have been developed or currently in place for understanding children’s views. The initial question to guide the decision tree should be to consider whether the family is involved in a court process. If parents are not involved in the court process then there may be more challenges to integrating children’s voices in the parenting plans that affect them. Special consideration must be made in these non-court involved situations to understand and assess the degree of risk for children when they share their stories, experiences and views. Children need to be able to share their views without putting them into loyalty conflicts between their separating parents or placing them at risk of creating strained relationships with a parent.



**Figure 1: Decision tree for choosing method for child inclusion**

Children need to be protected from potential strain caused by parents unable or unwilling to listen to them. Parent education programs and child-inclusive parent coaching for parents should be accessed to better support parents to be able to listen to their children and to talk with their children about their experiences of the separation process. This also includes listening to their children about their views about the parenting plan issues that may impact their daily lives. Professionals working with children following separation and divorce should be aware of families’ involvement in the court

process and whether children have been afforded opportunities to share their views about the parenting plan decisions that impact them. When professionals (e.g., children's mental health services, child protection workers) become involved, it is important that they remain neutral to the parental disputes while providing the children with a safe place to share their experiences.

When there is ongoing and/or high conflict between parents, parents should provide their children with the opportunity to speak with a mental health professional. These professionals can listen to children outside of the court process to provide them with the opportunity to talk about their views about their parents' separation, their views about parenting options and any frustrations they may be experiencing due to being caught in their parents' dispute.

Mental health professionals can also work with parents to facilitate healthy parent-child relationships post-separation and develop coping strategies. Parents unable to resolve their disputes may also consider mediation services to assist in resolving parenting issues outside of the court process. Parents should consider engaging with a mediator who embraces a child-inclusive mediation model to ensure that the children can be involved in this process.

For families involved in the courts, specialized methods for child inclusion and legislative support for these methods have been developed. But choosing which method may work best for a particular child to share their experiences needs to be assessed on a case-by-case basis so that the method best matches the unique needs of the children involved.

In situations of court involvement with lower levels of parental conflict and little risk of the child developing loyalty conflicts with their parents, options may include a Voice of the Child Report or child-inclusive collaborative law to provide children the opportunity to share their experiences. Although currently not offered in Canada, the Australian model of Child-Inclusive Conferencing has the potential of providing children with the opportunity to speak with a child specialist about their views and experiences relating to the parenting plan decisions.

The Voice of the Child Reports offer a cost-effective method for capturing their experiences and providing input into the parenting plan. For the feedback to the parents about the children's views to be meaningful, parents must be both ready and willing to accept the views of their children and to be ready to integrate their children's views into the parenting plan.

With lower-conflict families involved in the courts, it may be useful for parents to make use of existing mediation and family dispute resolution services offered to them at entry into the family justice system. Family dispute resolution processes often provide a quick and efficient means of creating a parenting plan that meets the needs of their children and includes their children's voices into the decision-making process. When parents can be amenable to resolving their differences, even in higher-conflict situations, having the opportunity to meet with a mediator who uses a child-inclusive approach may provide the family with the opportunity resolve the conflict, and agree to a parenting plan, while still integrating the children's voices.

In situations of higher risk family dynamics, including where there has been child abuse, intimate partner violence, or alienation, Voice of the Child Reports may create more strain for children by providing too much focus on the children's voices to determine the preferred parenting plan. When resources are available, children should be assigned a lawyer to represent their voices in court proceedings. Parenting plan assessments may also provide children with the ability to share their

experiences and to provide their views about the preferred parenting plan as these assessments typically entail a systematic and comprehensive consideration of the various factors and views of the dispute, including children's interviews. Parenting plan assessments may be particularly important when there are clinical issues to address (e.g., substance abuse, mental illness, etc.). Parenting plan assessments typically include multiple data sources, including children's interviews, so that the assessor is able to make recommendations about the children's best interests, having considered the voice of the child. Despite the benefits of parenting plan assessments for higher conflict families, these can take a long time to complete which may further delay the court process. In addition, due to the limited resources for publicly funded assessments, these may be too costly and so may not be a viable option for most families.

Judicial interviewing may be best reserved for cases moving towards trial preparation where the judge is given the opportunity to speak with the child to understand issues from the child's point of view and to have a better understanding of the factors of the case to determine when a trial should proceed.

Given that only a small fraction of families remain involved in litigation over time and since many of them will resolve their disputes within the first year of the initial application to the courts, it is foreseeable that the child's testimony will not play a significant role in advancing the children's views. Despite the many safeguards put in place to protect children from the challenges of providing testimony in court, children's testimony in court should be considered the last resort. This method should only be used when no other means of including children's voices seem reasonable for the children to share their experiences.

Once a court has made an order, the family may still benefit from family justice services to assist in meeting the expectations set out in the order. Child-inclusive parenting coordination is a dispute resolution method for assisting families to manage their court orders while integrating the voices of the children within the parenting coordination process. Although not all parenting coordinators use a child-inclusive approach, those who do can provide children with ongoing opportunities to express their views and report any changes as they continue to grow and develop within the parenting plans.

For some children, the only safe means for maintaining a relationship with a parent will be with the use of supervised access and exchange, particularly if there has been a history of violence and/or abuse. Based in part on the recent research about the importance of including children's voices in supervised access and exchange programs, most programs that offer these services have protocols for hearing children's voices. With the use of child orientation activities at the beginning of the service and constant feedback from the children throughout their involvement, children have opportunities to be part of decisions about how they use these services and to what benefit.

## **Summary**

With the heightened awareness of the need to include children's voices in decisions that affect them, there is now a range of options for hearing children's voices both within court-based services and prior to families coming into the family justice system. While there is no one-size-fits-all for hearing the voices of children post-separation and divorce, mental health and legal professionals

have several options when selecting among the methods for hearing children's voices both inside and outside the court.

The review of these methods suggests that no one approach guarantees that children's voices will be considered when decisions are being made that affect them. Choosing the right method based on the family's involvement in the family justice system can help to facilitate children's voices by connecting families to the most appropriate services. Special considerations need to explore the suitability and accessibility of the method, including the family's income and the cost that may be associated with these approaches. These considerations are especially important when child-inclusive approaches involve extra cost for including a child specialist within traditional methods (e.g., the cost of hiring a child specialist to meet with the child within child-inclusive mediation). Other considerations include the children's age and developmental stage, including any special needs for acquiring the capacity to share their views about the parenting plan, the level of conflict between the parents and whether the child is capable of expressing an independent voice free from the pressures of a parent.

## **Chapter 7: Discussion and Implications**

Although the majority of children want to have their views considered in family law decisions affecting them, children have been found to have mixed feelings about various methods for including their views (e.g., judicial interviews, legal representation...). The role of children's views in family law decisions is unquestionably important, but there remains considerable debate about the role of family law professionals in giving voice to children.<sup>166</sup>

From a broader policy perspective, little comprehensive discussion amongst practitioners (mental health and legal), researchers, and policy analysts has taken place about whether, and in what way, children's participation can be integrated more effectively in the decisions resulting from their parents' relationship breakdown. Only a fraction of the separating and divorcing couples who enter the family justice system to address their custody and access arrangements ever have their disputes ruled on by a judge. Most couples with disputes either reach a settlement by themselves, or with the help of mediators or counsellors. Many couples who reach settlements by themselves do so quickly. Most of those who fail to reach an agreement during mediation, or who do not use mediation, reach a settlement before a final hearing. This often happens after parenting plan assessments have been completed and the parents have absorbed the recommendations, sometimes with the help of further court program interventions.

There remains little discussion and empirical research on how best to: listen to and understand children from diverse cultures and backgrounds, or with language barriers; use other forms of communication with children (i.e., drawing, play, writing letters); and address possible learning and developmental challenges of children in providing their voice in the decision-making process. Further, increased ethnic and racial diversity is one of the most significant sociodemographic

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<sup>166</sup> Nicholas Bala, Rachel Birnbaum, & Lorne Bertrand, "Controversy about the Role of Children's Lawyers: Advocate or Best Interests Guardian? Comparing Practices in Two Canadian Jurisdictions with Different Policies for Lawyers" (2013) 51 :4 Family Court Review 681-697.

changes affecting North American families today.<sup>167</sup> High levels of immigration from diverse countries<sup>168</sup> and significant changes in the composition of families are transforming notions of multiculturalism, multilingual services, and multi-religious observances.<sup>169</sup> Increased immigration to Canada adds to the complexity of working with children and families from diverse cultural backgrounds, since children in immigrant families generally experience additional adversities stemming from families' migration and acculturation experiences. However, very little attention has been paid in the voice of the child literature to culture, religion, and gender issues.

Children's participation and methods for including children's voices within the family law context continues to be a major focus in the body of research. Much has been written about the importance of the voice of the child and consulting children and youth about issues that affect them particularly during times of separation and divorce.

### **Enhancing a Child-Centric Family Justice System**

Meaningful integration of children's voices into the family justice system requires that both parents and family justice professionals create genuine and authentic opportunities for listening to children and including them in decision making. Simply increasing the availability of methods to increase children's involvement in family justice services will not necessarily assist children to have more say in decisions that affect them without a concerted effort to consider the various ways that families may most effectively use processes both within and outside the court system.<sup>170</sup> This can help ensure that children have meaningful opportunities to express their views and preferences and share their stories about the impact of separation and divorce.

Early dispute resolution approaches and non-court-based services can be bolstered to provide greater opportunity for children to share their voices about parenting plan decisions.

If a parenting dispute proceeds to trial, it is the court that ultimately makes decisions about the children's best interests. Courts should therefore ensure that attempts have been made, where appropriate, to best reflect the children's voices in decisions being made about them. This can help courts make fully informed decisions. Increasing opportunities for children to express their views helps judges make decisions in children's best interests.

The inclusion of children's voices in custody and access decisions is justifiable on several grounds: increased participation is likely to have positive effects on children, the integration of children's voices will result in better legal decisions, and children have clearly expressed that they want to be included in decisions that affect them.

To effectively listen to children, it is imperative that mental health and legal professionals working in connection with the family justice system be trained on listening and interviewing children about

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<sup>167</sup> G. Bhatia & M. Saini, "Cultural Dynamics of Divorce and Parenting". In Leslie Drozd, Michael Saini & Nancy Olesen (Eds). *Parenting Plan Evaluations: Applied Research for the Family Court* (2<sup>nd</sup> edition). (New York: Oxford University Press, 2016).

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Supra* note 40.

family justice matters. All professionals working with children should be sufficiently trained to understand normal child development, considerations for children with special needs, the implications of culture, children's capacity for decision making and the impacts of conflict and loyalty conflict on their ability to provide free and independent voices in these complex situations.

### **Practice considerations**

The issues regarding children's voices revolve around questions of how to enable children to participate in legal proceedings that both optimize the chances of decisions that serve their best interests and minimize the chances of decisions that may harm them. Harmful results can range from parental retribution to making children feel they are the sole decision makers, responsible for making everything work out. Specific practical considerations revolve around when, and if, children should directly participate in proceedings (and, if so, which ones). Another issue is when, and if, children should be heard indirectly through the voice of a disinterested third party, such as a mediator, custody evaluator or expert witness, or any third party acting as advocate for the child's best interests.

There is no "best way" to hear from children during the family justice process. Each approach discussed above has its own strengths and limitation. The method chosen will include a number of factors, such as: issues in the family law dispute; resources available and efficiency of the justice system; getting the best information possible before the decision-maker; child's age and capacity; attitude of child; stage of process (e.g., interim or final); nature of dispute resolution process (e.g., mediation/negotiation/litigation); concerns about fairness to parties; concerns about fairness to the child; the legal framework; and the attitudes of the decision-makers.

Family justice professionals can encourage parents to listen to and be acutely aware of their child's views and wishes. From a parenting standpoint, they understand how their children express themselves, what vulnerabilities they may have, and their concerns. As mentioned above, many parents are able to come to post-separation and divorce arrangements themselves, sometimes with additional supports that help them absorb information from their children that is important for them to hear.

### **Considerations for Parents Hearing Children's Voices**

For parents to actively listen to their children during the separation and divorce process, it is important that both parents buy-in to the importance of listening to children and to ensure that they both understand and appreciate the importance of hearing their children without pressuring them to take their side in the disputes. Parents should consider how much weight they want to provide their children's voices into the decisions regarding the parenting plan. Parents also need to be supportive to ensure that their children's voices are at least one of the determining factors for creating parenting plans, as the creation of a plan will have significant implications for the children and the time they spend with both parents. Parents also need to reassure children that providing a say in the parenting plan does not mean that they will be required to make the final decision. Instead, parents can reassure children that their views and preferences will be considered by the parents when constructing the parenting plan.

Parents also need to ensure that they do more listening than talking when providing their children opportunities for input into decision making regarding the parenting plan, which can be challenging for parents when they themselves remain impacted by the family breakdown. If parents are unable to listen to their children's voices in a way that is unfiltered by their own feelings of loss, disappointment, and anger, then parents should involve the assistance of mental health professionals. Involving professionals can help provide children the opportunities to share their voices without fear of retribution or strained parent-child relationships when children's voices are not consistent with the expectations of a parent.

### **Future Research**

While there are many excellent pilot projects that have been initiated across Canada, it is difficult to determine which methods are most effective in including children's participation in family justice processes. There remains a lack of high-quality research about these various approaches, partly because of the challenges of completing comparative research on the various methods and due to the lack of ongoing funding to support this kind of research. Ongoing research about the various methods for including children's voices is needed, particularly research that makes a concerted effort to evaluate the various approaches available for children rather than adding to the patchwork of research projects on individual methods.

## **Appendix A – Methodology**

A Working Group with representatives from Family, Children and Youth Section (FCY) and the Research and Statistics Division (RSD) of the Department of Justice Canada (the Department) provided support for the project. The consultation with the Working Group was ongoing to provide technical advice throughout the project.

To collect and collate research, information and existing efforts to access the voice of the child in family law in Canada, a Rapid Evidence Assessment (REA) methodology was used to systematically search, retrieve and analyze studies and literature in family law in Canada and to consider available international evidence regarding potential trends in children’s voices within the context of family law.

The first strategy was to search for reported studies in the academic literature published in electronic databases in the past ten years (2008 – 2018)<sup>171</sup>. While the focus was on Canadian content, the search was not be restricted to any single country, but only studies in English and French were included given that the focus of the REA is to provide a rapid selection of studies to be explored. For published studies, the electronic databases searched to locate empirical studies related to family law issues, included, PsychInfo, Sociological Abstracts, Social Science Abstracts, Dissertation Abstracts, ERIC, and Medline.

The second strategy was to search for grey literature (reports typically not reported in the academic electronic databases) to locate Canadian research reports, highlights from international family law organizations, and examples of approaches and best practices for including children’s voices in similar legal frameworks or jurisdictions (e.g., Australia, United Kingdom, United States, New Zealand). This review explored all possibilities and when possible, reflect upon the cost-effectiveness and substantive effectiveness.

The third strategy consisted of a review of available Canadian legal cases to explore legal decisions in the courts pertaining to children’s voices. Legal cases were explored using LexisNexis (Quicklaw). The review of legal cases are presented based on legal decisions regarding the inclusion of children’s voices within family law matters and to consider the direction of the courts.

### **Rapid Evidence Assessment**

The functions of a REA are to search the electronic and print literature as comprehensively as possible within the constraints of a policy or practice timetable; collate descriptive outlines of the available evidence on a topic; critically appraise the evidence; and provide an overview of what the evidence is saying (Davies, 2003). The REA follows established guidelines for the inclusion of published reports, analysis and data synthesis to ensure the information retrieval process is explicit and that the criteria for inclusion and exclusion of studies are transparent. The inclusion criteria accommodates various research designs, conceptual papers and media reports. Non-peer reviewed reports (e.g., government reports, guidelines, case studies, etc.) were not excluded given that it is the intention of this review to provide an environmental scan and synthesize the current trends.

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<sup>171</sup> The purpose of the ten-year filter for searching the electronic databases is to provide adequate specificity in the search to locate the most relevant and updated literature. However, this was complemented by grey searches that go beyond ten years if the literature uncovered is important to the topic.

Both published and unpublished works were considered eligible for the review. The search located 1,479 potential hits based on the information retrieval process of key terms relevant to the children’s participation in family law matters (see Table 1). Titles and abstracts were saved to Refworks, an electronic library database and duplicates were removed. The titles and abstracts were then screened.

**Table 1: Preliminary Results of Information Retrieval**

<b>Search</b>	<b>Search Term</b>	<b>Hits</b>
PsychInfo	(child* or teen* or youth or adolescent*) AND (divorce or separation of family Breakdown) AND (voice or interview or participation or preferences) <b>Limited by peer review, “empirical study”</b>	<b>1190</b>
Sociological Abstracts / Social Science Abstracts	(child* or teen* or youth or adolescent*) AND (divorce or separation of family Breakdown) AND (voice or interview or participation or preferences) <b>Limited by peer review, “empirical study”</b>	<b>816</b>
Dissertation Abstracts	(child* or teen* or youth or adolescent*) AND (divorce or separation of family Breakdown) AND (voice or interview or participation or preferences)	315
ERIC	(child* or teen* or youth or adolescent*) AND (divorce or separation of family Breakdown) AND (voice or interview or participation or preferences) <b>Limited by peer review</b>	857
Medline	(child* or teen* or youth or adolescent*).mp. [mp=title, abstract, original title, name of substance word, subject heading word, floating sub-heading word, keyword heading word, protocol supplementary concept word, rare disease supplementary concept word, unique identifier, synonyms] AND (divorce or separation of family Breakdown).mp. [mp=title, abstract, original title, name of substance word, subject heading word, floating sub-heading word, keyword heading word, protocol supplementary concept word, rare disease supplementary concept word, unique identifier, synonyms] AND (voice or interview or participation or preferences).mp. [mp=title, abstract, original title, name of substance word, subject heading word, floating sub-heading word, keyword heading word, protocol supplementary concept word, rare disease supplementary concept word, unique identifier, synonyms]	317
	Duplicates Removed	2016
	Number of Hits for First Screening	1479

During the Rapid Evidence Assessment process, an article should pass through various checkpoints to assess whether it should be included in the final review. The checkpoints should be established in 'level' format where each level consists of increasing scrutiny of the articles based on the inclusion and exclusion criteria of the review.

The review includes three screening points: 1) Initial screening; 2) Strict screening; 3) Data Extraction Form.

- 1) **Initial Screening (level 1):** The first stage consists of an initial screening to quickly determine whether a study might be appropriate for the review based on the study's title, abstract and bibliographical information. The purpose of this initial screening is to include all possible relevant studies related to the objectives of the REA. Two questions guided the initial screen at this stage:
  - 1) Is the population related children? Yes / No
  - 2) Is the article about children's views, preferences, voices within the context of family law issues / services / procedures? Yes / No
- 2) **Strict Screening (level 2):** The second stage consists of a strict screening where research assistants will be given full copies of articles to determine whether the articles should remain in the review. Two bins will be created for included articles:
  - 1) empirical evidence;
  - 2) conceptual.
- 3) **Data Extraction Form (level 3):** The third stage consists of a data extraction form to log data from the articles that have made it past the two previous screenings. Empirical evidence results will be presented in a scoping map of the literature to organize the results based on location of the study; methods used, sampling; and key findings. For conceptual papers, an annotated bibliography was be created.

### **Limitations related to methodology used in the project**

Undertaking a systematic review takes time, typically two years. Users of research and evaluation evidence often need quicker access to what the existing evidence is telling them. To this end, REAs have been developed for use in public policy research and evaluation. REAs are based on the principles of a systematic review. But the focus of the REA is about breadth, not depth. Although systematic procedures were used for the information retrieval process, the results are based on published reports (e.g., journal articles, research reports, conference proceedings, case law) and may not include studies that were not published at the time of conducting the information retrieval of studies.