

**Ministry of Attorney General  
Justice Services Branch  
Civil and Family Law Policy Office**

**Family Relations Act Review**

**Children's Participation**

**Background Paper**

**Prepared by the Civil and Family Law Policy  
Office**

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**EXECUTIVE SUMMARY**

Ensuring children a voice in decisions that affect them is a central issue in any family justice system, particularly in light of Article 12 of the United Nations *Convention on the Rights of the Child*. While everyone recognizes the need to develop voice-of-the-child policies in Canadian family justice systems, the devil, as they say, is in the details.

It is at the implementation stage that opinions diverge, and it is here that society's conflicting images of the child come to the fore. Is the child a dependent to be protected from emotionally laden decision-making or a citizen with independent, democratic rights to participate in decisions that directly affect her? Is the information gathered for the benefit of the decision-maker or the child as a person? This tension is felt in international instruments such as the United Nations *Convention on the Rights of the Child* through to on-the-ground family programs and services.

Research for this paper revealed a wide array of voice-of-the-child mechanisms, including:

1. the provision of information to young people;
2. opportunities for inclusion within informal discussions within the family;
3. general feedback from children fed into parent education workshops from linked children's programs;
4. opportunities for inclusion within a consensual dispute resolution process such as family mediation or collaborative law;
  - children only peripherally involved (e.g. symbolically represented by an empty seat at the table or by a piece of the child's artwork) or merely presented with the agreement at the end;
  - children's views sought and fed back into the session;
  - children attend sessions to provide their views directly, with the help of a support person or alone; or
  - children attend sessions as equal participants
5. opportunities for inclusion within litigation, via:
  - expert reports or assessments (brief or long);
  - legal representation; or
  - children's direct evidence
    - written (e.g. affidavits, fill-in-the-blank court forms, short statements);
    - videotaped statements;
    - judicial interviews; or
    - *viva voce* (live) testimony (e.g. closed circuit TV, behind a screen, traditional courtroom testimony); and
6. opportunities for inclusion in post-order dispute resolution, including speaking with a parenting co-ordinator.

Although the debate on the appropriate involvement of children in post-separation decision-making continues, there is some suggestion that the policy pendulum is swinging toward more direct forms of children's participation, where family circumstances permit. Some examples include Scotland's fill-in-the-blank court forms that are sent to children in contested family cases, the growth of child-inclusive family mediation in Australia and some American states (i.e.

mediation with a feedback sessions of children's views built into the process), and the practice of judicial interviews in some family courts.

There is also evidence of increased appointments of children's counsel, although the role counsel is to play varies from jurisdiction to jurisdiction. For example, New Zealand routinely appoints publicly funded legal representation for children in contested custody and access proceedings. England and Australia have attempted to limit such appointments to complex cases, but, nevertheless, the numbers are rising.

Where publicly funded children's counsel is available, there is a growing recognition that two different kinds of legal representation may be required: best interests' advocacy and traditional advocacy of the child's wishes. Policy on this point has been developed in the United States, England, Australia, and New Zealand.

There is also considerable interest in making family litigation concerning child-related matters less adversarial and less formal. Recently, Australia amended its family law to legislate its children's cases pilot program. The amendment is designed to make child-related family proceedings less adversarial by granting the judge greater control over how the hearing unfolds, including greater control over the evidence (what is heard and how it is heard).

Currently, B.C. relies mainly on written reports and assessments to facilitate the voice of the child in family disputes. Although these tools are undoubtedly valuable, there are further opportunities to broaden the Province's voice-of-the-child strategy. In its May 2005 report, the Family Justice Reform Working Group recommended testing a hearing model similar to Australia's children's cases program as well as making parenting co-ordination to help families experiencing high conflict. The Working Group also supported the idea of child-inclusive family mediation.

## I) INTRODUCTION

In May 2005, the Family Justice Reform Working Group released a report entitled *A New Justice System for Families and Children* that advocated the replacement of the adversarial framework of B.C.'s family justice system with a comprehensive dispute resolution system.<sup>1</sup> It recommended that: "all participants in the family justice system find better ways to discover children's best interests and to make them a meaningful part of family justice processes".<sup>2</sup>

The Working Group observed that children's participation could cover a range of activities:

- obtaining information about the court process;
- obtaining advice about the consequences of hearings and orders;
- participating in consensual dispute resolution such as mediation or collaborative law processes; and/or
- sharing their views with the court, by means such as:
  - affidavits;
  - expert assessments;
  - children's lawyers; or
  - interviews with judges or decision-makers.<sup>3</sup>

The purpose of this paper is to canvass the issue of voice of the child more fully as part of the review of the *Family Relations Act*. It is divided into five sections. In addition to the Introduction, the paper frames the debate about children's participation in family proceedings and discusses Canada's obligations under the United Nations *Convention on the Rights of the Child*. Part III provides a snapshot of how B.C.'s family justice system currently involves children. The final two sections survey children's participation in family decision-making outside and inside court in other jurisdictions in order to identify policy trends and emerging issues.

## II) BACKGROUND

### a) Children and Post-Separation Decision-Making

There is no doubt that the decisions that flow from divorce or separation affect children in fundamental ways. Family expert, Joan Kelly, writes:

*For most children, their parents' divorce will be a major and upsetting life event, involving many changes. Children's living arrangements, relationships with each parent and extended families, social and academic situations, and economic circumstances will change, often in highly disruptive ways. The vast majority of these youngsters will be passive, and sometimes confused, observers of these significant life changes instigated and dominated by their parents' needs and interests...*<sup>4</sup>

Although they are deeply affected by post-separation decisions, children typically have no or little voice in them. There are two aspects to their exclusion. First, children lack information both about what is happening to their family and about the legal process of divorce. Second, their input is not often sought, even in relation to decisions that will directly affect them.<sup>5</sup>

A 2001 study published in the *Journal of Family Psychology* found that 23% of the children in the research project had received no information about their parents' divorce, and only 5% had been fully informed and encouraged to ask questions.<sup>6</sup> British family policy researchers concluded the year previously: "Children are often left in the dark by parents about what is happening. Some are not spoken to about what is happening much less listened to."<sup>7</sup> A 2003 study involving 104

children aged 7 to 15 in South Wales and South England reported that “only 52% of children under the age of 10 could recall being told anything about separation by either parent”.<sup>8</sup>

Some parents do not openly discuss their separation with their children out of a desire to protect them.<sup>9</sup> Others, pre-occupied by the stress of their own grief and process of adaptation, may simply lack the personal resources in the immediate aftermath of separation to be fully available to their children.<sup>10</sup> Finally, poor communication between separating parents may spill over to the couple's children.<sup>11</sup>

A similar picture emerges with respect to children's input into post-separation decision-making. A Scottish paper summarizes the research this way:

*A large majority of children want to have a say in decisions that directly affect them and they have frequently felt excluded from such decisions. For example, Buchanan et al. (2001) found that eight out of ten children interviewed (n=30) wanted to be involved in decision-making but only four out of 10 felt that they had been (see also Butler et al., 2000; Dunn and Deater-Deckard, 2001; Lyon et al., 1999; Smart et al., 2001 for similar findings...)*<sup>12</sup>

Joan Kelly, assessing the American situation, writes of “a systematic failure to consult children about any aspects of divorce decisions that markedly change their lives and have long-term consequences”.<sup>13</sup>

A recent report on children's participation in family court processes in B.C. recorded similar findings. The young people interviewed for the project reported “being given the message, either directly or indirectly, that separation ‘wasn't their business’”.<sup>14</sup> They reported not being well informed about their parents' separation or the court proceedings (e.g. applications about custody, access, guardianship). As in other jurisdictions, young people in B.C. also reported wanting to be included in custody and access decisions.<sup>15</sup> According to the report, “Being a part of the process in [a] meaningful way involves more than simply asking a young person what they want – it involves informing them about what is going on and having a ‘dialogue’ that is natural and allows them to paint a full picture of their experiences from their perspective.”<sup>16</sup>

## **b) The Pros and Cons of Children's Involvement**

There is some debate as to the proper role of children in post-separation decision-making. Historically, those who oppose children's direct involvement cite concerns that:

- Participation in adversarial court proceedings will be a damaging experience.<sup>17</sup>
- Asking direct questions about children's preferences may cause anxiety, loyalty conflicts, and fear of retribution from the disappointed parent.<sup>18</sup>
- It would burden children in that it risks their feeling responsible for making the final decision.<sup>19</sup>
- Younger children may lack the capacity to participate.<sup>20</sup>
- Children may be manipulated by a wilful parent or they, themselves, may be manipulative<sup>21</sup> (e.g. choosing the parent whose disciplinary style is most permissive).
- It would make matters more complex, adding to the time and cost of resolving family disputes.<sup>22</sup>
- Practitioners may be unable to protect children from the emotionally charged, frank details that emerge in mediation discussions.<sup>23</sup>
- It would undermine parental authority.<sup>24</sup>
- Children's interests are adequately represented through their parents in most situations.<sup>25</sup>

Those in favour of greater involvement of children say:

- Being kept in the dark during a major family transition increases children's stress.<sup>26</sup> When children are not told what is going on, they create their own understanding of the situation.<sup>27</sup> In the absence of information or reassurance to the contrary, many interpret their parents' separation as meaning they are not loved by the parent who has left the family home<sup>28</sup> or that they are responsible for the break up.<sup>29</sup>

With respect to shielding children from the stress of participation, some commentators write: "...the child is already harmed by the turmoil in his home and the stress that the litigation has brought upon everyone."<sup>30</sup> Further, "[t]rauma for the child is going to be present in [contested custody and access] cases, like it or not, and this cannot be covered up. Whether to state a preference or not should be the *child's* choice."<sup>31</sup>

- If the arrangements are not workable, older children may simply vote with their feet.<sup>32</sup>
- Children understand the difference between providing input and making the final decision.<sup>33</sup>
- There is a link between positive mental health and perceived control over decisions. Not listening to children has an unintended negative effect on them.<sup>34</sup>
- Being listened to has therapeutic value in itself.<sup>35</sup>
- Canvassing the views of all those involved in family decisions may lead to better decisions.<sup>36</sup>
- Children who have had a say in the decision-making process are more likely to be satisfied with the final agreement or order.<sup>37</sup> Because of this, they are more likely to comply with it, making the agreement more durable.<sup>38</sup>
- Children's involvement can keep the decision-making process focussed on the best interests of the child.<sup>39</sup> It may rein in intra-parental hostilities.<sup>40</sup>

Others, such as University of Leeds sociologist, Carol Smart, conclude that although listening to children's voices in family disputes is a positive development, it is likely to make these cases more complicated.<sup>41</sup> She writes:

*...I worry sometimes that we may think that if we ask children what they want, they will give us the sort of answers we can work with and which fit in with the parameters of existing policy and practice. Speaking with children is only going to make the life of the practitioner harder because it will provide another dimension to take into account, not a series of solutions.*<sup>42</sup>

Smart elaborates this point:

*...the exhortation to ascertain the wishes and feelings of children makes the process appear far easier than it is. But it also makes it appear as if gleaning these "wishes and feelings" will make it easier to come to a just or fitting decision about postdivorce residence and contact arrangements. This is unlikely to be the case, however, because if we really do allow children to speak, and if we really attempt to hear what they say, it will become harder to find solutions. This is because at present, in policy terms, children are regarded as the objects of their parents' concerns and desires. This means that the just apportionment of the child (or the child's time) is seen as the solution to the conflict between parents. But once the child himself or herself becomes a speaking participant in the process, the idea of apportionment rapidly appears to be less than ethical as a solution. This means that including the perspectives of children will alter the whole process; it will not be the ingredient that makes the current process fairer or easier to resolve.*<sup>43</sup>

### c) The Swing of the Pendulum to Greater Inclusion

Although the debate continues, the policy pendulum has begun to swing towards greater inclusion. The shift began forty years ago with the rise of the civil rights and women's rights movements that forged the path from which the children's rights movement also emerged.<sup>44</sup> As the protectionist philosophies start to give way, children are beginning to be seen more than simply the objects of their parents' concern but rather separate individuals with rights to independent participation and consideration.<sup>45</sup>

More recently, research has increasingly begun to question the assumption that children's interests and views in family law proceedings are adequately represented by their parents.<sup>46</sup> As well, studies have begun to show that excluding children has unintended, adverse consequences, such as increasing their stress levels as well as their sense of isolation and frustration.<sup>47</sup> These findings beg the question of whether exclusion could, ironically, create greater harm than not. The risks related to children's exclusion also arise in the context of family mediation.<sup>48</sup>

Finally, there is a legal imperative to include children's voices in family decision-making flowing from Canada's ratification of the United Nations *Convention on the Rights of the Child* ("UNCROC") in 1991. While Article 3 of UNCROC mandates that the best interests of the child be a "primary consideration" in "all actions concerning children",<sup>49</sup> Article 12 goes further:

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

*2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>50</sup>*

Although ratification binds Canada and all of the provinces and territories, it does not mean that UNCROC automatically becomes a part of Canadian laws. To be fully implemented, the convention must be woven into domestic statutes and policies.

Part 2 of the *Family Relations Act* (the "FRA") addresses children's views and best interests as follows:

#### **Part 2 – Child Custody, Access and Guardianship**

*24 (1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:*

*(b) if appropriate, the views of the child;<sup>51</sup>*

### d) Research about What Children Want

The trend in family law policy towards greater opportunities for involvement or inclusion dovetails well with what children say they want. A growing number of articles report children's wish for greater input into family decisions that affect them.<sup>52</sup> However, they do not want to be forced to participate.<sup>53</sup> Nor do they wish to be burdened with the responsibility for making the final decision.<sup>54</sup> Participation does not necessarily translate into a wish to go to court or to play a formal role in litigation. For example, a British study from 2001 found that a minority of children participating in the research- 40% or 12/30 - wanted to attend court.<sup>55</sup> Informal discussions within their family may suffice.<sup>56</sup>

The research also makes it clear that separation and divorce is a stressful, confusing time for all members of a family, including children. Like other family members, a major need for children in a separating family is information. It is difficult to participate meaningfully in decision-making

without an understanding of the process in which the family is engaged. Thus, an important plank in a comprehensive voice-of-the-child approach is access to relevant information.<sup>57</sup>

There is less research as to the mechanisms children would prefer to use to express their views. Some research suggests that children, particularly younger children, would prefer not to talk to an outside professional such as a lawyer or social worker but rather have their voice heard through informal family forums.<sup>58</sup> Children may perceive the involvement of professionals in their family's decision-making as an "intervention" rather than support.<sup>59</sup> Even where a formal intervention, such as a custody and access report, is appropriate to canvass the child's views, if overused (e.g. the same child is assessed and then re-assessed because so much time has elapsed between the original assessment and the trial), this voice-of-the-child mechanism may tip over from helpful to harmful.<sup>60</sup>

### **e) What Purpose Is Put to Children's Views?**

Although s. 24 of the *FRA* calls for the views of the child to be gathered and considered, it does not explicitly set out the purpose for doing so. Some have interpreted the underlying policy rationale as being the need to facilitate the decision of the judge; that is, to ensure the decision-maker has full information. Article 12 of UNCROC, however, suggests a much broader purpose, one that focuses on children's agency and participatory rights. On this broader reading, the underlying policy goal would be to benefit the child.

Clarifying the purpose of the voice of the child provisions in the *FRA* has important policy ramifications. If the primary focus is to benefit the individual child, this could suggest that public resources be directed to projects such as child-friendly information about divorce and separation, children's education programs, legal advice for children, and revamped evidence laws that would make it easier to obtain children's testimony. More opportunities for direct participation may be called for. In order to maximize the ameliorative effect such programs and services could have on children's lives, resources would presumably be focussed at the front end of the system. If the primary focus is to provide judges with objective and complete information on which to base custody and access decisions, this could suggest that public resources be directed to the completion of more expert assessments or to specialized training for judges with respect to child development or children's evidence. Also, the timing may be different: from a judge's point of view, the closer an expert report or assessment is to trial the more useful it is in providing an up-to-date snapshot of the family in question.

Of course, the two policy rationales may overlap. Canvassing a child's views in a thorough manner may recognize the child's dignity and agency and also ensure that a complete record is before a judge. As well, a different policy rationale may govern at different points in the process. If a particular case is destined to be one of the few to go to trial, then completeness and objectivity of information available to the decision-maker will be increasingly significant. Conceptual clarity is, nevertheless, important as it will guide the more difficult questions of the how and when of child-inclusive practices. More will be said of the operational policy questions in Parts IV and V of this paper, which address children's role in consensual dispute resolution and family litigation respectively.

## **III) THE CURRENT PRACTICE IN B.C.**

### **a) Voice of the Child in Child Protection Legislation**

As may be gleaned from the ongoing debate over children's involvement in family decisions, there are competing views of children. British sociologist, Bren Neale, writes that listening to children is relatively straightforward but hearing them raises fundamental questions, such as their place in society and how they are seen by adults— either as "welfare dependents" or as rights-bearing citizens.<sup>61</sup>

The best interests of a child is a welfare or protectionist concept. It is one of the general principles of UNCROC (Art. 3), although it long pre-dates the *Convention*.<sup>62</sup>

The problem for policy-makers is the tension between the best interests approach and the more active, participatory role for children envisioned by Art. 12. Australian academic, Nicola Ross, sums it up this way:

*... 'Best interests' is fundamentally about expert, adult interpretations of what is best for children. This image conflicts with the image underpinning article 12 of the child as a social actor and competent being whose views are valid and important to any decisions made about him or her. ...*<sup>63</sup>

This tension found in UNCROC is also reflected in domestic legislation to varying degrees. Some statutes are weighted more heavily towards one approach than the other. For example, although B.C.'s child protection statute, the *Child, Family and Community Service Act* (the *CFCSA*) is concerned with making decisions in the best interests of children, a welfare principle, it also conceptualizes children and youth as rights-holders. Section 70 sets out the rights of children in care, including:

*(b) to be informed about their plans of care;*

*(c) to be consulted and to express their views, according to their abilities, about significant decisions affecting them;*

\*\*\*

*(o) to be informed of their rights, and the procedures available for enforcing their rights, under*

*(i) this Act, or*

*(ii) the Freedom of Information and Protection of Privacy Act.*

In addition, the age of 12 marks a significant threshold in the *CFCSA*, triggering a number of statutory obligations relating to the voice of the child. For example, before a Director can agree to a plan of care for a child, he or she must explain it to the child and also take that child's views into account (s. 21(3)). A child over 12 is to be given notice of various hearings, including protection hearings (s. 38(1)(a)) and continuing custody hearings (s. 49(2)(a)). In addition, a 12 year old must consent before a Director may apply to transfer custody of that child to a non-parent permanently (ss. 54.1(1.1) & 54.1(3)). The legislation also gives children over 12 who are in the continuing custody of a Director a significant voice regarding access decisions:

***56(3) The court may order that the applicant be given access to the child if access***

*(a) is in the child's best interests,*

*(b) is consistent with the plan of care, and*

*(c) is consistent with the wishes of the child, if 12 years of age or over.*

(Emphasis added.)

Dispute resolution practices in child protection matters also provide an opportunity to listen to children's voices. There are two forms of collaborative decision-making or dispute resolution in the *CFCSA*: mediation, including a structured form of mediation called facilitated planning, and family group conferences (ss. 20 & 22). These collaborative options are increasingly taking root in B.C. and are used at all stages of a child protection case.<sup>64</sup>

In the more structured facilitated planning meetings, there are six stages to the mediation. The model contemplates separate orientation sessions for the parents and for the social worker prior to the start of the planning meeting. The six stages are:

1. Invitation or referral to participate.
2. Scheduling (orientation session for parents, assignment of mediator).
3. Orientation – the mediator meets separately with the parents and with the social worker.
4. Information exchange.
5. Planning meeting.
6. Formalizing the agreement.<sup>65</sup>

Children may be involved to varying degrees in either of the two forms of child protection mediation. Their participation may be indirect or direct.

Indirect involvement could mean placing a photo of the child at the mediation table or displaying a piece of his or her artwork.<sup>66</sup> It could also take the traditional form of the social worker speaking about the child's best interests and safety,<sup>67</sup> or a family member or advocate speaking with or for the child.

With respect to direct involvement, a brochure for parents about child protection mediation advises that the child may take part "if he or she is old enough".<sup>68</sup> Although the brochure does not state what age is old enough, the repeated reference to age 12 in the *CFCSA* would suggest it to be the threshold age.

Direct involvement is contemplated, but rare. One Vancouver mediator reviewed her files and found that in less than 5% of those files that involved children 12 and over did the children sit at the mediation table.<sup>69</sup> The final evaluation of the Facilitated Planning Meeting Project in Surrey from 2003 also pegged child involvement at 5% of cases.<sup>70</sup>

Direct involvement could mean sitting at the mediation table as an equal participant. It could also mean attending mediation with the assistance of a support person, such as a child advocate. Shuttle or telephone mediation is another option. A child's need for participation may also be met by way of a two-way sound link. One child used such a link to be able to hear what was being said during mediation from the safety of another room. Although she said nothing, her presence was keenly felt by those at the mediation table as they were able to hear her crying at different points in the session. Some mediators interview the children, with the parents' prior consent, in order to ensure that their interests are taken into account during the mediation, although there is some debate whether this is within the scope of their contract with government. Finally, children may be invited to express their views in a letter, read at the start of the mediation.<sup>71</sup>

The family group conference is the other collaborative process available to families under the *CFCSA*. Unlike mediation, the focus is not so much on the resolution of a particular dispute but rather on using the family strengths and resources to make a plan to keep the child safe. Its underlying principle is inclusion ("widening the circle"), so it is a process that is designed to accommodate the participation of more people than a typical mediation session. The extended family, and those who are like family (e.g. a neighbour or family friend), may be invited to a group conference.<sup>72</sup>

While there are many variations, the family group conference is designed to have four phases:

1. Preparation – This could take from 25-35 hours, during which a neutral co-ordinator consults with the family about who should attend, where and when the conference should be held. The co-ordinator speaks with all of the participants to ensure that they understand the process and guidelines and are able to participate in the group conference safely.

When the conference convenes:

2. Welcome and Information Sharing – In this phase, professionals share with the family information they need to know in order to make a plan for the child.
3. Private Family Time – All the professionals, including the co-ordinator, leave the room so that the family can work out a plan for the child. When the plan is ready, the family asks the social worker and the co-ordinator to return to the room to rejoin the conference.
4. Approval – The family presents its proposed plan of care, which the social worker reviews. It is approved by the social worker if it keeps the child safe. Most plans are approved.

There are not any firm statistics about the number of children or youth who participate in family group conferences, although because of its particular design and focus, it may provide greater scope for the involvement of children than mediation.<sup>73</sup> Children 12 and over are invited to participate.<sup>74</sup>

Possible ways the children's voices may be heard during a family group conference include inviting the child to attend the entire group conference. In other cases, children might attend one of the lunch breaks. In some cases, the children come in and out of the conference at will, from, for example, an adjacent playroom.<sup>75</sup>

It should be noted that the Ministry of Children and Family Development also funds Parent-Teen mediation where teenagers participate directly at the mediation table with their parents. These are not child protection mediations, but they provide another example of how the voices of children and youth are being heard in publicly funded dispute resolution services in B.C. Accordingly to the Ministry of Children and Family Development website, the goals of Parent-Teen mediation are:

- to keep families together;
- to help families solve problems on their own;
- to help families recognize and focus on the things that are working in their relationships; and
- to keep teens out of foster homes.<sup>76</sup>

## **b) Voice of the Child in Family Legislation**

The underlying principle of the *FRA* is the best interests of the child. Within the best interests' framework, it contains two references that explicitly relate to the voice of the child. The first is s. 24(1)(b), which makes the views of the child (if appropriate) one of the factors in the best interests of the child test. The second is s. 30(2):

### ***Jurisdiction of courts to make or give effect to guardianship***

**30** (1) *Subject to this Act, a court may, on application,*

*(a) appoint a guardian, or*

*(b) remove from office a guardian appointed or acting by virtue of this Part or a deed or testamentary appointment.*

(2) *If a child is over 12 years of age, a court must not make or give effect under subsection (1) to an appointment unless*

*(a) the child consents in writing to the appointment, or*

*(b) if the child withholds consent to the appointment, the court is satisfied that the appointment is necessary in the best interests of the child. ...*

Interestingly, while s. 30(2) contemplates obtaining the written consent of children 12 years and older, the court may nevertheless override it. This is quite different from s. 54.1 of the *CFCSA* where there is no ability to override the child's consent in applications to transfer permanent custody from the Director to a non-parent, although admittedly the context of cases governed by the *CFCSA* is different than those governed by the *FRA*.

Research from England from the mid-1990s involving "...both family and public law professionals, found considerable antipathy towards children attending courts, let alone being separately represented by a solicitor".<sup>77</sup> The same is true in B.C. Children are not typically called as witnesses, and although the *FRA* refers to the possibility of appointing a family advocate in s. 2 "to act as counsel for the interests and welfare of the child," the program is no longer funded. Judicial interviews of children remain relatively rare, although they occur more frequently in B.C. than in other Canadian jurisdictions. Some commentators point to inadequate family justice resources such as lawyers for children or publicly-funded assessments as a possible explanation for this trend.<sup>78</sup>

In B.C., the views of the child are typically canvassed indirectly through full custody and access assessments or through more focussed views of the child reports, both of which may be ordered by the court pursuant to s. 15 of the *FRA*. Report writers may quote the child in order to capture the child's views or may simply summarize them. The writer also typically includes some analysis regarding why the child's views are as they are.

Publicly-funded reports and assessments are written by government-employed Family Justice Counsellors. Only 10% of Family Justice Counsellor resources are devoted to report writing. The remaining 90% of Family Justice Counsellor resources are devoted to dispute resolution services.

Family Justice Counsellors prepare two different kinds of reports: full custody and access assessments, and views of the child reports that outline the child's perspective on one or two specific issues (e.g. how much time would the child like to spend with the non-custodial parent or what kind of shared custody arrangement feels most comfortable). Family Justice Counsellors have no discretion regarding court-ordered reports or assessments. For example, they cannot recommend a different report than the one ordered by the court or decline to complete an assessment until after mediation has been attempted.<sup>79</sup>

Demand for reports consistently outstrips available resources. Delays, particularly with respect to full custody and access assessments, have resulted.<sup>80</sup> Some B.C. family lawyers have opined that due to the long delays (8 months – 1 year), it is no longer useful to try to obtain a publicly funded s. 15 report.<sup>81</sup> Some families have turned to private assessments, although these cost several thousand dollars to prepare.

### **c) Collaborative Law**

Collaborative family law is another option for parents in B.C. who are unable to negotiate custody and access arrangements on their own. One of the hallmarks of collaborative practise is the use of multi-disciplinary teams to resolve family disputes. One possible member of the multi-disciplinary team is a mediator with mental health or child development training or a child specialist.<sup>82</sup> Collaborative law is discussed in greater detail in the next section of this paper.

### **d) Child-focussed Pilots and Innovations**

In order to meet the information needs of children and youth, the B.C. Ministry of Attorney General has developed, with funding from the federal Department of Justice, web-based guides to parental separation and divorce for children aged 5-12 and for teenagers. A guide for adults, meant to complement the information for children is also available. The guides are hosted on the Law Courts Education Society website at [www.lawcourtsed.ca](http://www.lawcourtsed.ca) or can be reached directly at [www.familieschange.ca](http://www.familieschange.ca).

The report of the Family Justice Reform Working Group speaks favourably of mediation's potential to involve children in post-separation decision-making:

*Mediation can offer a forum where parents can more easily hear their children's concerns and take them into account in their agreements. Mediators need to be trained to involve children in the process in appropriate ways. The use of trained child specialists should be supported to bring children's voices into mediation and collaborative sessions.*<sup>83</sup>

In the past, Family Justice Counsellors have not involved children in family mediation sessions.<sup>84</sup> However, the Family Justice Services Division of the Ministry of Attorney General will begin piloting child-inclusive mediation in the spring of 2007 in several family justice centres across B.C., including at the pilot Family Justice Services Centre in Nanaimo. (A Family Justice Services Centre is referred to as a Family Justice Information Hub in the 2005 report of the Family Justice Reform Working Group).

The University of Victoria's International Institute on Child Rights and Development (IICRD) is leading a pilot project in Kelowna that began in October 2005 called the Meaningful Child Participation in B.C. Court Processes. The pilot uses an impartial interviewer, generally a lawyer but, in some cases, a counsellor, to canvass the views of children aged 8-18 years, with the goal of getting these views before the family law decision-maker.

Before a referral into the pilot may be made, the parties, their lawyers, the decision-maker (judge or master) and the child must consent. If the requisite consents are obtained, then the parents contact an interviewer from a roster and sort out the fees. The interviewer, in the presence of an observer, records the child's views in relation to a series of questions. The interview intake form is available online at: <http://www.iicrd.org/childparticipation/InterviewIntakeForm.doc><sup>85</sup>

Unlike traditional custody and access assessments or voice of the child reports, the interviewer does not analyze or go behind the children's stated views (e.g. to understand why they are as they are). He or she simply records them.

The IICRD will present its findings on the Kelowna pilot project shortly. The IICRD website may be found at: <http://web.uvic.ca/iicrd/>

## IV) CHILDREN'S VOICES OUTSIDE OF COURT

### a) Introduction

As noted in numerous studies and policy documents, only a small minority of post-separation disputes actually go to trial. B.C.'s Ministry of Attorney General, which is steering implementation of the recommendations of the Family Justice Reform Working Group's 2005 report, is piloting a Family Justice Information Hub (now called a Family Justice Services Centre) in Nanaimo. Hubs, or as they are now called, Services Centres, are meant to provide a "front door" to B.C.'s family justice system other than the courthouse. Broadly speaking, they are intended to provide three kinds of family justice services: information, assessment (i.e. evaluating the needs of those who contact the Hubs/Services Centres), and referrals (i.e. matching people, based on the assessment of their needs, with appropriate programs and services).<sup>86</sup> Mediation is one of the services that may be provided at the Family Justice Information Hubs.<sup>87</sup> Dispute resolution services are offered at the pilot Family Justice Services Centre in Nanaimo.

Internationally, there has also been increased interest in collaborative processes, such as mediation, as the primary means to resolve family disputes. New Zealand's Family Court pays for up to six family mediation (called counselling) sessions every year.<sup>88</sup> On July 1, 2006, Australia's introduced mandatory pre-filing mediation for those seeking parenting orders under its family law statute.<sup>89</sup>

The literature on the voice of the child has traditionally centred on litigation. However, as the focus of the family justice systems shifts, so, too, do the parameters of voice of the child policies

and projects. What occurs outside court, particularly at the front end of the family justice system becomes the most fertile ground in which to think about child participation and involvement since this is where most family disputes are resolved.

Although voice of the child is still very much an emerging policy area, informal family negotiations, mediation, and collaborative law provide interesting opportunities for early child-focussed family decision-making. Each is discussed below.

### **b) Informal Family Negotiations**

The review of voice of the child articles undertaken for this paper turned up no articles that specifically studied how parents involved their children in informal negotiations, although many post-separation decisions are made this way. However, there is research, referred to above, suggesting that children are not well informed by parents as to what is happening to their family during separation and divorce.

If children are not being informed about family decisions, it is not much of a leap to conclude that they are infrequently involved in the discussions leading up to the decisions. Joan Kelly, one of the leading family researchers in the U.S., cited a study from 2001 that found only 5% of children in the sample had been fully informed and encouraged to ask questions about their parents' divorce.<sup>90</sup> An Australian survey from 1997 found that half of the children (30/60) had had "no say at all" in the decision about their living arrangements.<sup>91</sup> New Zealand children fared somewhat better: research published in 2000 found that 19% of children had been consulted on initial custody arrangements and 37% about initial access decisions.<sup>92</sup>

Part of the explanation may lie in parents' fears that consulting with their children will harm them:

*Indeed, there is some indication that parents' worries over their children give rise to a tendency to avoid speaking to children about what is happening in the family. The worry seems to give rise to a silencing where it is thought that it is better for children not to know what is happening so that they will be unaffected. So genuinely worried parents may try to keep their children in the dark as a way of safeguarding them from harm for as long as possible. This, of course, is the complete antithesis of allowing children to have a voice and being able to hear what they say. Indeed, it is*

*a very good example of how the welfare principle (acting to protect children) can, at some levels, be experienced as being in conflict with principles of participation (allowing children to have a voice).<sup>93</sup>*

This raises the role of education. Parents may not understand how important and how helpful it may be to their children to have an opportunity for input into decisions that will directly affect them. Parents may worry that asking for input places children in an uncomfortable decision-making role or that asking for input keeps children in the middle of parental conflict. Perhaps the key message of most publicly funded parent education programs – the harm to children of ongoing parental hostilities – is being somewhat misconstrued. While that message continues to be crucial, it is important to be clear that keeping children informed and asking them for relevant input is not the same as putting children in the middle of conflict. This may suggest a place in mandatory parent education for tips on how appropriately to meet children's needs for involvement - be it for information or opportunity for input.

### **c) Parent Education Linked with Children's Programs**

Some jurisdictions, particularly in the United States, link parent education with support groups for children. These groups may encourage the voice of the child by teaching communication skills so that children are better able to express their needs to their parents and parents are better able to hear them.<sup>94</sup> In other linked programs, parents and children meet up, and the children may share feedback with the parents by way of a group newsletter, group letters or stories.<sup>95</sup> The

feedback is of a very general nature, such as: "We wish you would talk about your problems instead of fighting," or "It hurts us when you talk about our other parent because we love them."<sup>96</sup> There are few evaluations of such programs. There is little research on long-term outcomes.<sup>97</sup>

#### **d) Mediation**

The role of children in family mediation is an emerging policy area, not just in B.C. but in other Anglo-American family justice systems. There is a growing recognition that, as a collaborative rather than adversarial process, mediation provides a valuable opportunity to safely facilitate the voice of the child in post-separation decision-making.<sup>98</sup> There is considerable variation, and debate, as to how best to carry this out.

##### *Different Ways to Involve Children in Family Mediation*

Some of the ways to include children in family mediation are:

- Children attend the final mediation session where the agreement is presented to them.
- Children are interviewed and their views reported to the parents in a mediation session. The interview may be conducted by:
  - the mediator, or
  - a third party, such as a child representative or child specialist.
- Children attend the mediation session and present their interests directly, either with the assistance of a support person or alone.

A review of family mediation in other jurisdictions suggests that the children's interview model is the option garnering the most interest.

##### *Australia*

Australia began piloting child-inclusive mediation in October 1997 in both Darwin and Melbourne.<sup>99</sup> It differed from the traditional child-focussed mediation in a key way. In child-focussed mediation, mediators simply encouraged the parents to make their children's needs the focal point of discussions. In child-inclusive mediation, the parents and the children are interviewed separately. The information gathered from that interview is then fed back into the mediation session.<sup>100</sup>

Jennifer McIntosh, a clinical psychologist and family therapist, developed Australia's child-inclusive mediation model with input from Joan Kelly and Janet Johnston. She described it as having four stages:

1. early focussing on children's needs;
2. the children's interview;
3. feeding children's needs and views back to the parents in the mediation; and
4. integrating the children's agenda into the mediation.<sup>101</sup>

The pilot unfolded in the following way. At their individual intake sessions, parents were asked about their children and any specific concerns the parents had in relation to them and the divorce. Educational materials about children's responses to separation and conflict were provided as was information about the inclusion of children's voices in family mediation. The parents' first mediation session then took place.<sup>102</sup>

After the first mediation session, cases were considered for referral into the child-inclusive pilot.<sup>103</sup> The take-up rate was 80 per cent.<sup>104</sup> The selection criteria for participation in the pilot included:

- child was school aged;
- both parents consented to the consultation, and both affirmed their willingness to listen and to discuss their child's views;
- both parents agreed "to the immunity of the child's material from court matters";
- the mediator(s) and the parties thought the child could benefit; and
- the child consented.<sup>105</sup>

If the case was referred to the pilot, then mediators with specialized training interviewed the children under the supervision of a child psychologist. The interview was 60-75 minutes. Confidentiality and feedback to parents was addressed at the outset of the interview. The children were advised that feedback that they did not wish to be shared with their parents would not be discussed during the mediation. Using drawing, play and conversation, the interviewer's task was to canvass the child's "hopes, wishes, and fears" as well as to inquire about how the child was handling the process of change. Children were asked if there was anything they specifically wanted conveyed to their parents or if they had any questions about the mediation or separation that they wanted passed on.<sup>106</sup> Children were not asked to make decisions.<sup>107</sup>

Before the second mediation session, the parents' mediator met with the child interviewer to discuss any dynamics that might prevent the parents from hearing the child's views during the feedback component of the session. The feedback consisted of the interviewer sharing his or her general assessment of the impact of the separation on the child, the child's current needs, and any questions or comments that the child specifically had asked be passed along. The child's needs were then listed on the whiteboard along with those of the two parents.<sup>108</sup> Those leading the child-inclusive model in Australia describe the feedback session as:

*...a highly skilled conversation with parents about their children's responses and needs in light of the separation, where the child consultant functions both as an ally for the children, and a support for the parents' capacity to reflect sensitively on the needs of their children.*<sup>109</sup>

Once the feedback concluded and the interviewer left, the mediation continued. The mediator was to integrate the third agenda, that of the child, into the subsequent discussions.<sup>110</sup>

In lower conflict situations, the child interviewer and the mediator could be the same person. In medium to high conflict families, the roles were separated.<sup>111</sup>

Only mediators with previous experience working with children were selected to participate in the pilot. They received two additional days of specialized training, building on their previous experience. The first day introduced the child-inclusive mediation model. The second dealt specifically with conducting the children's interviews, including topics such as building rapport, clarifying expectations, using drawings and projective material, and confirming what feedback would be given to the parents.<sup>112</sup>

Over the four-month trial, 28 children from 13 families were consulted. The pilot produced favourable outcomes. Over 80% of parents whose children participated in the pilot reported that their children had benefited "a great deal" from the mediation. Only 4% said there had been no benefit. In contrast, 42% of the control group, who participated in traditional mediation where children were not interviewed, stated that the mediation had been of no benefit to their children, and approximately 20% said that their children had benefited "a great deal".<sup>113</sup>

Jennifer McIntosh, the child psychologist who designed the child-inclusive model used in the pilot, wrote of those who had had the opportunity to participate: "Parents and their children concurred that their children gained a sense of relief, a lighter burden, a clearer perspective, and the experience of being heard."<sup>114</sup>

Since the completion of that pilot project, the format of child-inclusive mediation model has become more fluid. The interview of the child may take place over more than one session. The interviewer may also stay on past the feedback session to support child-focussed decision-making. In addition, some mediators like to invite the children back for a follow-up session at the end of the mediation to discuss outcomes.<sup>115</sup>

Interest in the child-inclusive model has spawned a more detailed study in Adelaide, Canberra, and Melbourne that will compare the outcomes for parents and children of the two different family mediation models (i.e. child-focussed vs. child-inclusive).<sup>116</sup> The outcomes studied will include: conflict management, parent-child relationships, contact issues, child adjustment, and children's perception of parental conflict and co-operation.<sup>117</sup>

This study recruited two groups of parents. The first group received traditional mediation services from February to July 2004. The second used the child-inclusive model from August 2004 to March 2005. Across both groups, efforts were made to recruit parents who came for mediation voluntarily and parents who were required to attend, as well as families experiencing various levels of conflict. The study will compare baseline data against information gathered from follow-up interviews scheduled at three months and then at 12 months after completion of the mediation.<sup>118</sup> The end of August 2006 marked the end of the 12-month follow up period. The final report will be available on the Children in Focus website: [http://www.childreninfocus.org/work\\_researchproject.html](http://www.childreninfocus.org/work_researchproject.html). A description of the various tools used in the child inclusive model (e.g. conflict scales, questionnaires, teddy bear cards, and animal story stems) may be found in an earlier article published in the *Journal of Family Studies* in April 2004.<sup>119</sup>

The inclusion and exclusion criteria for participation in the 2004-06 study are:

*1. Inclusion Criteria:*

- *Presenting circumstances: Parents present with child related matters for negotiation (they may also have property issues).*
- *Parents' intent: Both parents demonstrate some intent to consider their children's interests.*
- *Parents' ego capacity: Parents are able (at least in part and with support) to consider and respect the needs of their children, separate from their own.*
- *Children's criteria: At least one child is 5 years or older.*
- *Consent: The consent of both parents and each child is required for participation in the study.*

*2. Exclusion Criteria:*

- *Presenting circumstances: Parents only present for property or finance matters, or both.*
- *Parents' intent: Parent/s show no intent to consider their children's interests (largely due to:)*
- *Parents' ego capacity: Severe personality disorganisation or mental health issues exist, whereby one or both parents are unable to consider and respect the needs of their children, separate from their own.<sup>120</sup>*

The criteria for inclusion are largely the same as those identified in the original 1997 pilot, although a description of the earlier pilot referred to two other selection criteria:

- *Both parents understood and agreed to the immunity of the child's material from court matters.*
- *Each child was likely to benefit from the opportunity to talk.<sup>121</sup> (Apparently, this was a determination of both the parents and also the mediator.)<sup>122</sup>*

New Zealand

New Zealand, too, has begun to pilot a child-inclusive mediation model for use in family disputes.<sup>123</sup>

The Family Court's principal judge supports such a model. In a speech from August 2005 that pre-dated the pilot program, he stated:

*One aspect that is missing from the amendments to the counselling provisions is that children are still unable able to attend any part of the counselling process. Given that 95% of cases are solved in this way, if we are really to uphold the child's right of participation, children need to be able to be involved in the alternative resolution mechanisms, rather than merely the hearing phase. It seems counterproductive on the one hand to be trying to resolve cases without the need for a hearing, and on the other to be attempting to improve the child's right to participation, but only doing so at the hearing itself. While those cases that reach a hearing will see greater involvement of children, the overall number of children able to participate will decrease, rather than increase.*<sup>124</sup>

In December 2006, the Centre for Child and Family Policy Research of Auckland University published a research report on the child-inclusive model entitled, "Hello, I'm a Voice, Let Me Talk".<sup>125</sup> The study looked at 17 separating families with 26 children aged 6 to 18 years of age who had applied for publicly-funded mediation services at the Auckland District Court and who subsequently chose to participate into the child-inclusive mediation model.<sup>126</sup>

The first step in the pilot was providing information about the child-inclusive mediation model to the parents and to the children and obtaining their consent. First parents and then parents and children jointly had to consent to participate in the child-inclusive mediation model.<sup>127</sup>

Once the consent forms were received, the mediator interviewed the children separately from the parents. Children were told of the limits to confidentiality – specifically, that safety issues could not be kept confidential. At the end of the interview, the mediator summarized the child's views back to the child so that the child would know in advance what would be shared with his or her parents. At that point, the child had the opportunity to veto information. The mediator then scheduled a session with the parents alone to go over the child's feedback. The separate session was also designed to allow the parents to reach agreement on as many issues as possible before involving the child again. This opportunity for "parental resolution" was deliberately built into the model because "[t]he child's perception of parental unity is likely to be enhanced by the parental agreements made."<sup>128</sup> Two weeks later, the parents and children met for a final mediation session "to discuss the implementation of the plans and to work on outstanding issues".<sup>129</sup> An independent evaluation followed a month after mediation was completed.<sup>130</sup>

It should be noted that not all families seeking mediation in Auckland were invited to participate in the child-inclusive mediation model. Excluded were parents with mental health problems, those whose disputes centred on division of property and those families in which there had been abuse or "intractable acrimony".<sup>131</sup>

The evaluation reported favourable results, including:

- reduced conflict between parents;<sup>132</sup>
- greater conciliation and communication between parents;<sup>133</sup>
- "universal enhancement of parents' awareness of the impact of conflict and...conciliation on their children's lives"<sup>134</sup>
- easier adaptation on the part of children to their parents' separation or divorce;<sup>135</sup>
- increased opportunity for children to have a voice in post-separation negotiations and planning, which they wanted;<sup>136</sup> and
- high satisfaction levels among children and parents.<sup>137</sup>

The research report also noted that the innovative mediation practice was consistent with children's participatory rights under UNCROC.<sup>138</sup> It was also consistent with the philosophy of child inclusion and consultation found in New Zealand's child protection statute. The author of the report concluded: "It would be both consistent and logical to extrapolate this inclusive practice [found in the child protection context] to the context of family law."<sup>139</sup> The report called children's exclusion from early discussions in disputed family cases "anachronistic" in comparison with the approach taken in child protection matters.<sup>140</sup>

The research paper also highlighted the limitation of "trickle down" mediation policy; that is, the assumption that children whose parents had been offered mediation would see the benefit of that dispute resolution service trickle down to them without direct involvement in the process. The report's introduction noted that research strongly indicated that the trickle-down approach "does not work effectively enough for children..."<sup>141</sup> Later, the researcher stated:

*Historically, it has been assumed that the experience of inclusion will be traumatic for children; however the children themselves tell us they yearn for a chance to make sense of their situation by being a part of the negotiations. It would appear that to be merely a witness to hostility and silence is a far more traumatising prospect for a child...*<sup>142</sup>

### California

The Australian child-inclusive mediation model drew upon the work of Joan Kelly as well as Janet Johnston and the Center for Family in Transition (CFFT) in Marin County, California.<sup>143</sup> Unfortunately, online information about the specifics of the California child-inclusive model is difficult to find. However, it appears to be a more involved, resource-intensive practice than that adopted by Australia.

According to information posted on the website of the Australian Department of Families, Community Services, and Indigenous Affairs, Johnston and the CFFT have developed a "separate representation model" in which a child representative - a child psychologist/mediator - feeds back the views of the child into family mediation sessions. Before this occurs, staff assess the children (provided they are over 3 years) and the parents. The assessment of the children focuses on canvassing their views and needs as well as the quality of the attachment and interaction between the children and their parents. The assessment of the parents is meant to determine what might prevent the parent(s)' ability to hear the children's input. Longer-term counselling may be a result of the parental assessment. Children may also participate in short-term play therapy.<sup>144</sup>

Joan Kelly is also in favour of interviewing children to provide feedback for family mediation. She has developed a structured interview format that consists of the following phases:

1. asking if the children understand why they are at the interview;
2. building rapport;
3. asking them what is happening in their lives at the present, including their living arrangements and the times that various activities occur;
4. asking them what they would like to see changed about the present arrangements; &
5. going back over what was said in the interview and asking what information may be shared with the parents.<sup>145</sup>

### Scotland

Scotland was also an early leader in the field of child-inclusive mediation. In 1985, the Lothian Family Conciliation Service (the LFCS) in Edinburgh made it a policy to see children as part of the mediation process: the mediator would either have a separate appointment with the child or would see the child as part of a family meeting.<sup>146</sup>

Children were not seen if:

- one or both parents were against it;
- they did not agree to participate;
- they were too young (not defined) or too anxious; or
- if they were at risk of being manipulated by their parents.<sup>147</sup>

To learn more about how its policy was operating on the ground, the LFCS took part in a two-year study from 1986-1988. In the first phase of the research, every active mediation file was monitored in order to determine the degree of child involvement, the reasons given for (non) inclusion as well as who made the decision to involve the children in the mediation.<sup>148</sup> In the second phase, parents, children and mediators who had taken part in child-inclusive mediation were surveyed about their experiences.<sup>149</sup>

The study found that mediators saw children in 19% of the total number of cases (36/186).<sup>150</sup> The ability to canvass children's views was the most common rationale for children's inclusion in mediation.<sup>151</sup> The most common reasons for their exclusion were the parents' opinion that it was not necessary to involve them or that the children were too young.<sup>152</sup> Parents were the source of the decision in 13 out of the 36 files, mediators 11, and it was a joint decision in another 8 files.<sup>153</sup>

The second phase of the study reported favourable responses from both children and parents. Twenty-five out of the 28 children surveyed reported they had benefited in some way (e.g. improved communication with their parents). Thirteen out of the 15 parents surveyed also reported the sessions to have been beneficial (e.g. improved access).<sup>154</sup>

Despite the early promise of child-inclusive practice at the LFCS, a study published more than a decade later found that few mediators (including lawyer mediators) or solicitors were prepared to speak with children. The majority of mediators saw taking account of children's views and needs as a role for parents.<sup>155</sup> This reluctance to speak to children, even older children, is all the more surprising given that children over 12 years are able to obtain legal aid to retain their own lawyers in Scotland.<sup>156</sup>

However, attitudes may be changing. Joan Kelly, who supports the child interview model of child-inclusive mediation, was invited to speak to Family Mediation Scotland (FMS) in June 2004. FMS mediators were among those professionals interviewed in the 2000 study who hesitated to involve children in family mediation.<sup>157</sup>

### England

In England, government employees provide early dispute resolution services to families involved in private family law disputes. The Private Law Programme (the case management system used in private family cases) contemplates a First Hearing dispute resolution appointment for every file to be held within 4-6 working weeks "from the issue of the application".<sup>158</sup> Guidance issued by the President of the Family Division states that children 9 years and over may attend the dispute resolution appointment "where the local scheme provides for it and where resources exist".<sup>159</sup> The information does not describe how children would be involved in the dispute resolution appointment.

### **e) Hybrid Programs**

#### England – Family Resolutions Pilot Project

Some jurisdictions offer hybrid programs. For example, England trialed a program called the Family Resolutions Pilot from September 2004 to August 2005.<sup>160</sup> It had three elements to it: initial risk assessment, parent education, and dispute resolution (called parent planning meetings).<sup>161</sup>

Children's involvement centred on the dispute resolution and planning phase. Government mediators were authorized to interview the children after completion of the parents' first session and then feed back the children's views to the parents in a subsequent session.<sup>162</sup>

The press labelled the £300,000 pilot a "flop" because so few families participated. There were only 62 referrals.<sup>163</sup> Of those, only 29 completed all three stages of the pilot.<sup>164</sup> The purely voluntary nature of the program was said to be its flaw.<sup>165</sup>

With respect to child involvement, mediators spoke with children in only three of the 31 files that reached the final planning/dispute resolution stage. Evaluators noted that not all opportunities for child involvement were fully realized. Another 6-7 files that reached the final stage of the pilot involved older children, but they were not seen by the mediators.<sup>166</sup> The evaluators concluded that "there appeared to be a lack of clarity amongst practitioners, shared by parents, about the appropriate involvement of children within the process."<sup>167</sup> The age of the children involved in the pilot (average = 5.4 years) was also cited as a possible reason why children were included so infrequently.<sup>168</sup>

Australia – Contact Cases Program

The most elaborate hybrid program operates in Australia. It was piloted in 1999 as a means of dealing with access enforcement problems amongst higher conflict families.<sup>169</sup> Possible elements include parent education, children's groups, individual counselling, mediation, and referrals to supervised access services. General feedback from the children's groups is fed back into the parent education workshops.<sup>170</sup> The children's feedback has been described as the most significant aspect of the program:

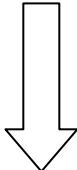
*...The most powerful activity of all, in creating an impetus for change in the parents, is feeding information back to parents about what their own children have said their worries and feelings are, and about the effect the conflict is having on them. This introduces the children's needs onto the agenda.*<sup>171</sup>

The pilot received a favourable evaluation in 2003 by the Sydney Children's Hospital. Eighty-eight percent of clients reported partial or full resolution of their dispute.<sup>172</sup> In July 2005, the Attorney General's Department announced an expansion of the program from five services to 20 across Australia, entailing a \$2.8 million investment of public funds over three years.<sup>173</sup>

**f) Collaborative Law**

Children's involvement in collaborative law could run the gamut from having their views represented by their parents, indirect involvement via an advocate (a trusted adult of the child's choosing or a professional), or direct participation with the assistance of a support person such as a child specialist or coach.<sup>174</sup>

A determining factor is the level of conflict in the family, both between the parents and between the parents and the children.<sup>175</sup> As the degree of conflict increases, the more formal becomes the mechanism used to canvass the voice of the child:<sup>176</sup>

- parents represent the child's interests LOW CONFLICT
  
  - neutral, trusted adult who is familiar with the child represents the child's interests
  
  - 3<sup>rd</sup> party child specialist represents child's interests or acts as a support to the child expressing his or her own interests HIGHER CONFLICT
- 

The child specialist in this context is a neutral advocate whose role is to represent the child's voice in collaborative meetings. This person could be a mediator with child development or mental health training.<sup>177</sup> In addition to interviewing the child to gather his or her views, the child specialist may also:

- present the views of the child in the format requested by the collaborative team;
- advise the team about what information should be collected in order to have a complete picture of the child's interests (e.g. information from the family doctor, teachers, daycare providers); and
- provide information about child development (e.g. advise the team how to answer the child's questions in an age-appropriate way).<sup>178</sup>

## V) CHILDREN AND FAMILY LITIGATION

### a) Introduction

This section of the paper outlines the various ways children may be heard in family litigation. It also outlines international reforms to child-related litigation, such as Australia's Children's Cases Program and the growing reliance on parenting co-ordinators.

### b) Children's Interests through Submissions of the Parents

Traditionally, it was assumed that children's views and interests were adequately represented by the positions advanced by their parents. As one commentator put it, "parents are usually the gatekeepers to their children's rights".<sup>179</sup>

This approach has increasingly come into question. As noted above, parents may not discuss separation-related matters with their children for fear of harming them<sup>180</sup> or because parenting capacity dips in the face of the parents' own process of adaptation post-separation.<sup>181</sup> Some parents, particularly those locked in bitter conflict, may lack the ability to separate the children's interests from their own,<sup>182</sup> or the children's interests may be portrayed in diametrically opposite ways by each parent. Other parents may simply be ignorant of their children's feelings, or at least to the true extent of them:

*...children are very sensitive to their parents' feelings and may hide their own distress so as not to cause further difficulty for their parents:*

*It is clear how fatally easy it is for parents to assume that because the child is not talking and not being openly upset, they are therefore not badly affected by what has happened. Children often need to be given permission to speak as well as have opportunities made and to be given time. (ChildLine, 1998, p. 23; Smith, 1999b, p.34).<sup>183</sup>*

Further, this approach may not fulfill the commitment to children's participatory rights under Art. 12 of UNCROC.

### c) Assessments and Expert Evidence

Assessments and expert reports provide a second way of canvassing children's views without involving them directly in the family litigation. In a full custody and access report, typically, the assessor will speak to both parents and each child separately and will observe the children in the care of each of the parents. Interviews with others, such as teachers, doctors, or grandparents, are also often done. Children are not asked directly with whom they would prefer to live.<sup>184</sup>

There are variations on the assessment theme. Focussed custody and access assessments that centre on a specific issue, such as parental conflict over the meals provided to children in the two

homes, are possible. Views of the child reports are also available. These may be used, for example, to explore why a youth is refusing to go on scheduled access visits.

All three kinds of reports canvass the child's views. These are also accompanied by the assessor's analysis, explaining, for example, the broader family context.

Supporters say that such reports are a suitable, safe vehicle through which children may express their views while being spared any sense of decision-making responsibility.<sup>185</sup> They also provide the court with independent information about the child.<sup>186</sup>

Critics say that the kinds of indirect questions posed to children during assessments (e.g. what would it be like to live with mom?) may not actually assist the report writer to determine the views of the child,<sup>187</sup> one of the factors in the best interests of the child test in s. 24 of the *FRA*. Further, if a voice-of-the-child mechanism is too oblique, it may not satisfy the child's right to consultation on decisions that affect him or her set out in Art. 12 of UNCROC. Also, by interposing a professional between the child and the decision-maker, there is a risk that the child's views may be misinterpreted or diluted.<sup>188</sup> Finally, custody and access reports are expensive and potentially intrusive for the child.<sup>189</sup>

#### **d) Children and Legal Counsel**

##### *Different Models of Legal Representation*

The views of the child may also be put forth by legal counsel. There are three different kinds of roles that lawyers may play with respect to the representation of children in family law disputes.

First, a lawyer may act as an *amicus curae* (friend of the court). The lawyer is not acting for the child but rather as a neutral officer on behalf of the court. The lawyer's function is to ensure that the court has the most complete information before it on which to make a decision. An *amicus curae* may investigate the child's views and put these before the court, but would not advocate the child's position.<sup>190</sup>

Another model of legal representation for children is a best interests' advocate, also called a litigation guardian or a guardian *ad litem*. Once again, the child does not instruct the litigation guardian. In this model, the lawyer presents to the court his or her opinion of what outcome would be in the best interests of the child. It is important to note, however, that the child's preferences may conflict with the best interests' assessment of the litigation guardian.<sup>191</sup>

Finally, a lawyer may act as a traditional advocate. The child instructs the lawyer, and the lawyer advocates on the basis of those instructions.<sup>192</sup>

Some commentators see the multiplicity of models of legal representation for children as indicative of "lingering judicial and societal confusion relating to the proper role for counsel in representing children".<sup>193</sup> For those who espouse this view, the role confusion "has had an effect of perpetuating paternalism and stifling the custodial preferences of the child in spite of [independent representation's] ostensible objective to protect and promulgate the interests of the child in contested custody and access matters".<sup>194</sup>

Certainly, the various models of representation carry with them different policy ramifications with respect to issues such as appointment, responsibility for legal fees, confidentiality and solicitor-client privilege. As one example, if the child is not the client, then solicitor-client privilege does not attach to conversations between the child and the lawyer.<sup>195</sup> This has led some best interests' representatives to avoid meeting with children for fear that they may be subject to cross-examination by other counsel.<sup>196</sup>

##### *Children's Lawyers in Canada*

Not every jurisdiction in Canada provides separate representation for children. Ontario provides the most comprehensive model of representation through its Office of the Children's Lawyer (OCL), part of its Ministry of the Attorney General. The OCL employs both social workers and

lawyers who work together closely. In custody and access cases, the OCL either provides a lawyer for the child, prepares a report, or, in exceptional circumstances, both. Under the Ontario model, the court requests the assistance of the OCL, but the OCL must consent to become involved and also determines what professional service will be provided.<sup>197</sup> Publicly funded legal representation for children in disputed custody and access cases is also relatively common in Alberta, Quebec, and the Yukon.<sup>198</sup> Interestingly, although the Quebec statutory provision refers to legal representation as a means to safeguard “the interest” of a child, its Court of Appeal has not interpreted that phrase to mean that lawyers should act as best interests’ advocates. Rather, in the 2002 decision of *M.F. v. J.L.*, the appellate court held that lawyers ought to play a traditional advocate role in relation to young people who had “the capacity and the desire to express [their] wishes.”<sup>199</sup>

Section 2 of the B.C. *FRA* contemplates a best interests’ advocate, called a “family advocate”. However, the family advocate program is no longer funded. Private arrangements are sometimes struck. For example, some parties agree to split the cost of a separate lawyer for the child. There are no guidelines to clarify what role lawyers are to play in representing children in *FRA* disputes.<sup>200</sup>

	Role of Children’s Lawyer?	Who Pays?	Pilots?
<p><b>B.C.</b> <i>Family Relations Act</i>, R.S.B.C. 1996, c. 128, s. 2</p>	<p><b>2</b> (2) Despite any other Act and subject to the law of Canada, a family advocate may attend a proceeding under this Act or respecting the</p> <ul style="list-style-type: none"> <li>(a) adoption of a child,</li> <li>(b) guardianship of a child, guardianship of the person of a child or guardianship of the estate of a child,</li> <li>(c) custody of, maintenance for or access to a child,</li> <li>(d) alleged commission by a child of a Provincial or federal offence, or</li> <li>(e) <i>Child, Family and Community Service Act</i>,</li> </ul> <p>and may intervene at any stage in the proceeding to act as counsel <b><u>for the interests and welfare</u></b> of the child.</p>	<p>Ministry of Attorney General, but funding has not been available since 2003.</p>	
<p><b>AB</b> <i>Family Law Act</i>, S.A. 2003, c. F-4.5, s. 95</p>	<p><b>s. 95</b> (3) The court may at any time appoint an individual to represent <b><u>the interests</u></b> of a child in a proceeding under this Act.</p>	<p>The parties, including the child, if appropriate. (Legal Aid may also be</p>	<p>In the Speaking for Themselves pilot (2005-2008), children receive short term counselling + independent lawyer. Eligibility is based on:</p>

	Role of Children's Lawyer?	Who Pays?	Pilots?
<b>AB</b>	(4) Where the court appoints an individual under this section, the court shall allocate the costs relating to the appointment among the parties, including the child, if appropriate.	available.)	<p>1) allegation of violence &amp; 2) high conflict residence or parenting time dispute.</p> <p>It is paid for by the Ministry of Children's Services (funder of the \$925,000 pilot).</p> <p>The government is beginning to offer specialized training for lawyers working with children. Lawyers whose fees are to be paid from the public purse (i.e. through Legal Aid or through the child welfare system) must have completed the 2.5 day Child Representation Workshop. There is no cost to attend.<sup>201</sup></p>
<b>SK</b>	<b>N/A</b>		
<b>MB</b>	<b>N/A</b>		
<b>ON</b> <i>Courts of Justice Act, R.S.O 1990, c. C-43, s. 89(3.1)</i>	The lawyer, provided through the Office of the Children's Lawyer, is to play a combination of all three possible roles (amicus curae, guardian <i>ad litem</i> and traditional advocate). The child's representative is to represent the children's legal interests on a solicitor-client basis but the child does not instruct the lawyer. The children's lawyer does not represent the best interests of the child as this is the issue the court must decide. <sup>202</sup>	The OCL is part of the Ontario Ministry of the Attorney General	
<b>PQ – Code of Civil Procedure, R.S.Q. c. C-25, Art. 394.1</b>	<b>394.1.</b> Where, in a proceeding, the court ascertains that the interest of a minor... is at stake and that it is necessary <b>for the safeguard of his interest</b> that the minor...be represented, it may,	Court decides.	

	Role of Children's Lawyer?	Who Pays?	Pilots?
PQ	<p>even of its own motion, adjourn the hearing of the application until an attorney is appointed to represent him.</p> <p>The court may also make any order necessary to ensure such representation, in particular, rule on the fees payable to the attorney and determine who will be responsible for their payment.</p> <p>(N.B. The Quebec Court of Appeal concluded Art. 394.1 signalled a traditional lawyer-client relationship, at least with regards to capable or mature children. See <i>MJ c. JL</i>, [2002] R.J.Q. 676 (C.A.), leave to appeal to the SCC refused [2002] C.S.C.R. no. 218 (Q.L.)).</p>		
<p><b>NB</b></p> <p><i>Family Services Act</i>, c. F-2.2, s. 7</p>	<p><b>7</b> In any proceeding with respect to the custody of a child, whether under this or any other Act, the court shall,</p> <p>(a) if the Minister is not a party to the proceeding, advise the Minister of the proceeding, in which case the Minister may intervene in the proceeding and may take whatever steps he considers necessary to ensure that the interests and concerns of the child are properly represented separate from those of any other person, including the appointment of counsel or a responsible spokesman to assist in the representation of <b><u>the interests and concerns of the child</u></b>...</p>	New Brunswick Government	
NS	The court may appoint a lawyer for a child in appropriate circumstances. <sup>203</sup>		

	Role of Children's Lawyer?	Who Pays?	Pilots?
<b>NS</b>	It is unclear what type of role this lawyer plays in relation to the child.		
<b>NL</b>	N/A		
<b>PEI</b>	N/A		
<b>YK,</b> <i>Children's Act</i> , R.S.Y. 2002, c. 31, s. 168	<p>s. 168 (2) In proceedings under this Act, the official guardian shall have the exclusive right to determine whether any child requires separate representation by a lawyer or any other person that will be paid for at public expense chargeable to the Yukon Consolidated Revenue Fund.</p> <p>It is unclear what role the lawyer plays in relation to the child.</p>	Yukon Government	
<b>NWT</b>	<p>Legal Aid may provide a lawyer to a child old enough to instruct counsel, where the parents' lawyer have indicated separate representation is required.<sup>204</sup></p> <p>It is unclear what type of role this lawyer plays in relation to the child.</p>		
<b>NUN</b>	<p>Legal Aid may provide a lawyer to a child old enough to instruct counsel, where the parents' lawyer have indicated separate representation is required.<sup>205</sup></p> <p>It is unclear what type of role this lawyer plays in relation to the child.</p>		

Children's Lawyers in New Zealand

Of the international jurisdictions canvassed for this paper, New Zealand offers the most extensive legal representation for children in family disputes. Not only does the *Care of Children Act 2004*, permit separate representation, it requires the appointment of a lawyer in certain circumstances:

*7(1) A Court may appoint a lawyer to act for a child who is the subject of, or who is a party to, proceedings (other than criminal proceedings) under this Act.*

*(2) However, unless it is satisfied the appointment would serve no useful purpose, the Court must make an appointment under subsection (1) if the proceedings –*

*(a) involve the role of providing day-to-day care for the child, or contact with the child; and*

*(b) appear likely to proceed to a hearing.*

*(3) To facilitate performance of the lawyer's duties and compliance with section 6 (child's views), the lawyer must, unless he or she considers it inappropriate to do so because of exceptional circumstances, meet with the child. ...*

A lawyer for the child is the most common voice-of-the-child mechanism in New Zealand. This is true of the recently reformed *Care of Children Act 2004* and of the legislation's previous iteration.<sup>206</sup>

The scope of the children's lawyer's work is set by the judge in a "brief". The brief details a description of the issues to be addressed, the desired timeframe, and any reporting requirements.<sup>207</sup> Typically, the family court pays for the lawyer's services although it may require the parents to contribute to the cost.<sup>208</sup> The service is not inexpensive: in 2000-01, legal representation for children cost New Zealand approximately \$11 million, up from \$5.7 million five years earlier.<sup>209</sup>

The four main responsibilities of a children's lawyer are to:

1. explain the court process to the child;
2. represent the child in court and in negotiations regarding care arrangements for the child;
3. put the child's views "and all issues relevant to the child's welfare and best interests" before the court; and
4. explain the judge's decision to the child.<sup>210</sup>

New Zealand's children's lawyers fall somewhere between traditional advocates and best interests advocates. Section 7 of the *Care of Children Act 2004* states that they are "to act for a child," which would seem to suggest a traditional role. However, a 2001 Practice Note observes that while a children's lawyer is under a duty to put the child's wishes and views before the Court, the lawyer has a further duty to inform the court of "other factors that impact on the child's welfare".<sup>211</sup> The Practice Note instructs lawyers to try to resolve any conflict between "a child's wishes/views and information relevant to the best interests of the child". Where this cannot be done, the lawyer may advocate the child's wishes, but invite the court to appoint a second lawyer to argue the best interests issue (called counsel to assist the court).<sup>212</sup> Thus, there are potentially two types of legal representatives for children in New Zealand, although appointments of children's lawyers greatly outstrip appointments of counsel to assist the court. In 2000-2001, for example, New Zealand spent approximately \$11 million on children's lawyers compared with \$503,695 on counsel to assist the court.<sup>213</sup>

Although its model of child representation requires a greater financial commitment than that of other jurisdictions, it is seen as successful. The New Zealand Law Commission studied dispute resolution mechanisms in family court in a 2003 report and concluded that children were "well represented" in family proceedings, although there remained some room for improvement.<sup>214</sup>

Children reported to researchers at the Children's Issues Centre at Otago University that they had felt listened to. Most felt that being represented allowed their views to have an impact on the court's decision.<sup>215</sup> The judiciary also had favourable opinions of the program, noting that children's counsel play a "pivotal role" in difficult custody and access cases.<sup>216</sup>

Indeed, support is growing for New Zealand's separate representation model and for more direct forms of eliciting children's voices. For example, in the June 11, 2004, *K v. K*<sup>217</sup> decision, the High Court stated that psychologists' reports should not be used for the sole purpose of canvassing the views of the child. The Court voiced a clear direction for obtaining the views of the child through a judicial interview or through counsel for the child.<sup>218</sup> In a speech called, "The Family Court and the Future," given on July 15, 2004, the Principal Judge of New Zealand's Family Court told attendees that "the wishes of children are required to be more directly obtained and to be very clearly fed into the decision making process".<sup>219</sup> He also commented that the Australian Children's Cases Pilot (which embraces a more active role for judges) was "worthy of close consideration"<sup>220</sup> and indicated at the end of his address:

*...if we are to adopt a less adversarial style of resolution of care cases, there must I think be better ability to involve children of the correct age, in the process. Our cases must not merely be about children but must involve them. I think we must advance beyond the sometimes equivocal submissions of counsel for the child to children being at Court and seeing the Judge and expressing a view.*<sup>221</sup>

#### Children's Lawyers in Australia

Australia has taken quite a different approach to the issue of lawyers for children. Sections 68L and 68LA of its *Family Law Act, 1975* clearly contemplate a best interests' advocate. While the lawyer must put the child's views, if any, before the court (s. 68LA(5)), the statute obliges the lawyer to form an independent view of what constitutes the child's best interests and to act upon it (s. 68LA(2)). The statute clearly states that the children's lawyer is not the child's legal representative and is not bound by the child's instructions (s. 68LA(4)). The *Act* also explicitly allows a children's lawyer to disclose to the court any information shared with him or her by the child that would be in the child's best interests, even if the child disagrees (ss. 68LA(7) & (8)).

However, the Family Court of Australia's 2003 *Guidelines for Child Representatives* refer to the possibility of children obtaining a "direct representative":

#### **5. Relationship with the child**

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##### **5.1 Information which should be explained to the child**

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*Despite the inability to guarantee the child a confidential relationship, the Child's Representative should, however, strive to establish a relationship of trust and respect. This is assisted by explaining the role of the Child's Representative, including:*

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- *that where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the Child's Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court;*

It is not known how many applications for direct representatives are approved.<sup>222</sup> However, it appears that Australia's model is the mirror opposite of New Zealand's in situations where there is a conflict between the child's best interests and the child's wishes. In Australia, the default is

representation of the child's best interests with provision for the additional appointment of a direct representative. In New Zealand, as discussed above, the default is representation of the child's wishes with provision for the additional appointment of a best interests' representative.

Unlike its neighbour, Australia does not appoint children's lawyers in the majority of contested child-related proceedings. The 1994 case of *Re K* set out the circumstances in which best interests representation could be justified:

- (i) *Cases involving allegations of child abuse, whether physical, sexual or psychological.*
- (ii) *Cases where there is an apparently intractable conflict between the parents.*
- (iii) *Cases where the child is apparently alienated from one or both parents.*
- (iv) *Where there are real issues of cultural or religious difference affecting the child.*
- (v) *Where the sexual preference of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare.*
- (vi) *Where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare.*
- (vii) *Where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children.*
- (viii) *Where neither party may be a suitable resident parent.*
- (ix) *Any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent.*
- (x) *Where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practicable purposes exclude the other party from the possibility of access to the child.*
- (xi) *Cases where it is proposed to separate siblings.*
- (xii) *Custody cases where none of the parties are legally represented.*
- (xiii) *Applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.*<sup>223</sup>

Although the *Re K* criteria are tied to particularly difficult facts, they caused a jump in publicly funded appointments in Australia. The year following the decision marked a 31% increase in appointments, and they continued to climb. For example, in 1994/95, there were 2,608 appointments of children's representatives while in 2002/03, there were 3,874, representing a 67% increase. Children's representatives accounted for 10.6% of the total family legal aid budget in 2002-03.<sup>224</sup>

Legal Aid Commissions responded differently to the increased demand (and, in some cases, reduced budgets). Some restricted possible applications. The Legal Aid Commission of Western Australian considered applications based only on the first and sixth of the *Re K* factors.<sup>225</sup> Legal Aid Victoria adopted a means test and capped child representative funding at \$15,000.<sup>226</sup>

In 2003, the government amended the *Family Law Act, 1975* to permit orders seeking contributions from the parents. Section 117(3) permits the court to "make an order...to the effect that each party to the proceedings bears, in such proportion as the court considers just, the costs of the independent children's lawyer..."<sup>227</sup> The *Act* specifies such an order cannot be

made against a legally aided party or one that would suffer financial hardship if she or he had to shoulder a portion of the costs of the children's lawyer (s. 117(4)). It is not clear if this amendment has had much impact.

The debate over the proper role of the independent children's lawyer in Australia continues. Some commentators press for direct representation (where the child is competent and has views he or she wants to express to the court),<sup>228</sup> opining this necessary to implement Art. 12 of UNCROC fully.<sup>229</sup> On the other hand, the (then) Chief Justice of the Family Court spoke favourably of the best interests' model of advocacy,<sup>230</sup> particularly after the issuance of the Family Court's *Guidelines for Child Representatives* which were designed to set minimum standards for the conduct of children's lawyers.<sup>231</sup> However, he also noted in 2002 and again in 2003, that many children felt disempowered by family proceedings.<sup>232</sup> The Family Law Council, an advisory body to the Attorney General, also came down in favour of best interests representation "especially given the legislative requirement for the court to make a decision in the best interests of the child"<sup>233</sup> although the Council acknowledged that direct representation would be appropriate in certain limited circumstances:

- the child is competent;
- the child has a strong view about the outcome;
- there is a conflict between the child's wishes and what the children's lawyer considers to be in the best interests of the child; and
- after being told that the children's lawyer plans to make submissions contrary to his wishes, the child seeks legal representation to advance the child's arguments.<sup>234</sup>

The Council was of the view that, where it was required, direct representation could be facilitated by joining the child as a party to the litigation. Its opinion differed from the instructions regarding direct representation in the 2003 *Guidelines for Child Representatives* insofar as the Council thought it unnecessary for the child to instruct his or her direct representative through a next friend. Rather, the Council thought a competent child could instruct the lawyer directly.<sup>235</sup>

Although much thought has been given to legal representation of children in Australia, the primary mechanism for canvassing the views of the child continues to be family reports, written by child mediators or welfare officers.<sup>236</sup> In 2005, Parliament again undertook major amendments to the *Family Law Act, 1975* in its *Shared Parental Responsibility Bill* (Schedules 1 & 2 of the Bill came into force July 1, 2006).<sup>237</sup> However, these changes are not anticipated to change the way children's views are brought to the fore. Rather, some commentators view the amendments as parent- rather than child-focused:

*In contrast [to New Zealand], in Australia the policy focus on "shared parenting" appears to have gained momentum and shifted the focus away from interests of the children to the interests of their parents...*<sup>238</sup>

The recent reform agenda and the \$400 million investment (the largest ever) in Australia's family justice system:

*...whilst promoting the objective of both parents having a significant role in their children's lives, are silent as to what active and meaningful role children and young people might have in their parents lives and in contributing to the re-formation of their post-divorce family.*<sup>239</sup>

#### Children's Lawyers in Scotland

The *Children (Scotland) Act 1995* provides Scottish children with a relatively strong framework respecting their right to be heard. For example, s. 6 provides that "a person" who makes a major decision regarding a parental responsibility or right must have regard for the views of the child concerned. The section, thus, addresses a child's views in out-of-court decision-making.

In addition, legal aid is available in Scotland to allow children in family proceedings to obtain independent legal advice.<sup>240</sup> The lawyer may help the child to complete an F-9 Form, which allows children to express their “views for the future” to the decision-maker.<sup>241</sup> More will be said of this court form in the next section. Alternatively, the lawyer may write to the decision-maker on the child's behalf<sup>242</sup> or may apply to add the child as a party.<sup>243</sup>

Normally, it is children 12 years and older who are eligible for publicly funded legal representation.<sup>244</sup> However, when Scotland introduced the *Children (Scotland) Act 1995*, it made the following consequential amendment to the *Age of Legal Capacity (Scotland) Act 1991*, which may permit even younger children to instruct a lawyer:

*(4A) A person under the age of sixteen years shall have legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so; and without prejudice to the generality of this subsection a person twelve years of age or more shall be presumed to be of sufficient age and maturity to have such understanding.*

*(4B) A person who by virtue of subsection (4A) above has legal capacity to instruct a solicitor shall also have legal capacity to sue, or to defend, in any civil proceedings. ...*

In spite of the ability for children to have separate legal representation in family proceedings in Scotland, it is common for children's views to be canvassed in other ways, such as through reports prepared by *curators ad litem* or social work reports.<sup>245</sup>

#### Children's Lawyers in England

Separate representation for children is also possible in England under two different family court rules. Rule 9.5 of the *Family Proceedings Rules 1991* authorizes the appointment of a *guardian ad litem*. Although *guardians ad litem* are appointed in almost all child protection cases, in private family disputes such appointments are rare, although on the rise.<sup>246</sup> Mature children may also rely on R. 9.2A, described in a recent consultation paper as allowing “children of sufficient age and understanding to participate in proceedings without a guardian.”<sup>247</sup>

Some courts rely on Rule 9.5 more heavily than others. Because there was concern about the “excessive use”<sup>248</sup> of the rule in some areas – there was even reference to a “Leeds Syndrome”<sup>249</sup> – the President of the Family Division issued a practice direction in 2004 to limit appointments to cases involving issues of “significant difficulty”:

*3.1 Where a CAF/CASS [Child and Family Court Advisory and Support Services] officer has notified the court that in his opinion the child should be made a party (see FPR rule 4.11B(6)).*

*3.2 Where the child has a standpoint or interests which are inconsistent with or incapable of being represented by any of the adult parties.*

*3.3 Where there is an intractable dispute over residence or contact, including where all contact has ceased, or where there is irrational but implacable hostility to contact or where the child may be suffering harm associated with the contact dispute.*

*3.4 Where the views and wishes of the child cannot be adequately met by a report to the court.*

*3.5 Where an older child is opposing a proposed course of action.*

*3.6 Where there are complex medical or mental health issues to be determined or there are other unusually complex issues that necessitate separate representation of the child.*

*3.7 Where there are international complications outside child abduction, in particular where it may be necessary for there to be discussions with overseas authorities or a foreign court.*

3.8 Where there are serious allegations of physical, sexual or other abuse in relation to the child or there are allegations of domestic violence not capable of being resolved with the help of a CAFCASS officer.

3.9 Where the proceedings concern more than one child and the welfare of the children is in conflict or one child is in a particularly disadvantaged position.

3.10 Where there is a contested issue about blood testing.<sup>250</sup>

Ironically, the 2004 Practice Direction did not have the intended effect, and appointment orders made pursuant to Rule 9.5 increased. The President of the Family Division issued further guidance on the subject on February 25, 2005, indicating that the increased appointments of guardians in private family proceedings had created "an intolerable strain on an already overstretched CAFCASS". The President specified that, barring exceptional circumstances, only a Circuit Judge should make orders for separate legal representation for children in private family cases.<sup>251</sup>

The Department for Constitutional Affairs is currently reviewing its policies on legal representation of children in contested family cases. Its consultation paper is posted online at: [http://www.dca.gov.uk/consult/separate\\_representation/cp2006.htm](http://www.dca.gov.uk/consult/separate_representation/cp2006.htm)

Although some of the situations identified in the 2004 Practice Directive where separate representation could be appropriate indicate a voice-of-the child leaning (e.g. paragraphs 3.2, 3.4 and 3.5),<sup>252</sup> the primary focus of a guardian is to advocate the welfare of the child.<sup>253</sup>

The primary vehicle for putting the child's views before the court in a contested family case remains a report prepared by government staff. The report writer interviews the parents and the child, and, if the child is old enough to express his or her views, these are included in the report. The report contains a recommendation as to what would be in the child's best interests.<sup>254</sup>

#### Children's Lawyers in the United States

The Family Law Section of the American Bar Association approved *Standards of Practice for Lawyers Representing Children in Custody Cases* in August 2003. The impetus for their creation was the fact that:

*...[c]hildren's lawyers have had to struggle with the very real contradictions between their perceived roles as lawyer, protector, investigator, and surrogate decision-maker. This confusion breeds dissatisfaction and undermines public confidence in the legal system. ...<sup>255</sup>*

The *Standards* go on to propose two separate categories of children's lawyers: a child's attorney and a best interests attorney, defined as follows:

1. "Child's Attorney": A lawyer who provides independent legal counsel for a child and who owes the same duties of undivided loyalty, confidentiality, and competent representation as are due an adult client.
2. "Best Interests Attorney": A lawyer who provides independent legal services for the purpose of protecting a child's best interests, without being bound by the child's directives or objectives.<sup>256</sup>

Where the child's attorney is asked by the child to advocate a position that could put the child at risk of serious harm (e.g. the child wants to stay with a parent who is sexually abusing him or her), the lawyer is to try to attempt to persuade the child to adopt a different position. Failing that, the child's attorney may request the appointment of a best interests attorney.<sup>257</sup>

According to the document, situations that may warrant the appointment of a separate children's lawyer include:

- a. Consideration of extraordinary remedies such as supervised visitation, terminating or suspending parenting time, or awarding custody or visitation to a non-parent;

- b. Relocation that could substantially reduce the child's time with a parent or sibling;
- c. The child's concerns or views;
- d. Harm to the child from illegal or excessive drug or alcohol abuse by a child or a party;
- e. Disputed paternity;
- f. Past or present child abduction or risk of future abduction;
- g. Past or present family violence;
- h. Past or present mental health problems of the child or a party;
- i. Special physical, educational, or mental health needs of a child that require investigation or advocacy;
- j. A high level of acrimony;
- k. Inappropriate adult interference or manipulation;
- l. Interference with custody or parenting time;
- m. A need for more evidence relevant to the best interests of the child;
- n. A need to minimize the harm to the child from the processes of family separation and litigation; or
- o. Specific issues that would best be addressed by a lawyer appointed to address only those issues, which the court should specify in its appointment order.<sup>258</sup>

#### e) Direct Evidence of Children

In addition to written reports and children's lawyers, another vehicle to canvass the voice of the child is the child's direct testimony. This may take the form of *viva voce* (live) testimony, videotaped or written testimony or through an interview with the judge. Each will be discussed in turn.

##### Viva Voce Testimony

One way for a judge to know a child's views is for the child to appear in court and testify. Like any witness, a child who testifies would be subject to cross examination.

Few jurisdictions have embraced this option. This is likely because it is thought that making the child a witness in an adversarial proceeding could be damaging for the child<sup>259</sup> and damaging to the continuing relationships in his or her family.<sup>260</sup> As one Ontario judge stated, it would be "ironic in the extreme" to harm a child in order to make a decision regarding his best interests.<sup>261</sup> There is also the concern that the court setting inhibits child witnesses and negatively affects the quality of their evidence.<sup>262</sup> Because the law considers children under a legal disability, there is the added complexity of proving competency.<sup>263</sup>

Quebec's *Civil Code* takes a different approach. Article 34 provides:

*34. 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.*

Given Art. 34, children are more likely to testify in family cases in Quebec than elsewhere in Canada. Procedural changes have been made to accommodate the young witnesses. For example, the questions that are to be put to the child are first screened by the court. Once screened, they are asked by either the judge or the lawyer for the child rather than by the parents' lawyers (or by the parents themselves). As well, the parents may be asked to leave the courtroom during the child's testimony.<sup>264</sup>

British Columbia's *Evidence Act* has incorporated some protective elements regarding child witnesses. For example, children may testify by closed circuit television (CCTV) unless one of the parties proves to the court that receiving the child's testimony in this way would violate the principles of fundamental justice (s. 73). The *Act* also permits children to testify behind screens, but only in cases alleging physical or sexual abuse (s. 72).

#### Videotaped Testimony

In some cases, child witnesses may make videotaped statements. Section 715.1 of the *Criminal Code*, for example, makes the option of videotaped statements available to complainants who allege sexual offences.<sup>265</sup> Some provinces, such as Saskatchewan and Ontario, have adopted parallel provisions in their provincial evidence statutes regarding videotaped statements.<sup>266</sup> B.C., however, has not followed suit.

#### Written Testimony

Another mode of direct evidence is written testimony. This may take the form of an affidavit, a fill-in-the-blanks court form, or as a brief, verbatim statement of the child's views as is the case in the IICRD-led pilot project in Kelowna.

Scottish family law, for instance, leaves considerable room for children's written evidence. While it is possible for a child to apply to be added as a party to the dispute and to file affidavit material,<sup>267</sup> more commonly children's written evidence comes in a court form called the F-9 Form. (Please see Appendix A for a copy of a blank F-9 Form.)

Under Chapter 33 of the Sheriff Court Ordinary Cause Rules, an action in which a s. 11 order – an order relating to parental responsibilities or rights, guardianship or the administration of a child's property – is sought triggers an obligation to give notice to the child who would be the subject of the order (R.33.7(1)(h)). This notice, called intimation, is carried out through the F-9 Form. In addition to notifying the child that a major decision involving the child is about to be made, the form also allows the child to express any views "about his future".<sup>268</sup>

If a child has submitted a completed F-9 Form or has indicated on the Form that the child wishes the Sheriff (judge) to consider his or her views, the Rules provide that the Sheriff cannot issue an order without first having provided an opportunity for the child to express those views and having attached "due weight" to them (R. 33.19).

A child in Scotland may seek the assistance of a lawyer to help complete the F-9 Form.<sup>269</sup> Such assistance is publicly funded, and, if a child does not know how to go about finding a lawyer, the Scottish Child Law Centre offers referrals.<sup>270</sup>

A 2004 study found that most sheriffs who had received F-9 Forms found them "significant" since their completion often triggered an interview with the child or independent legal representation of the child.<sup>271</sup> Their evidentiary value dropped, however, where they were tainted by obvious parental influence.<sup>272</sup>

Despite its promise, the F-9 Form has been described as ineffective.<sup>273</sup> First, Sheriff Court Rule 33.7(7) allows the parent initiating the family law proceeding to request the court to dispense with the notice requirement (intimation) to the child. Many lawyers routinely seek dispensation for any child under 12 years (a threshold age in the Scottish family statute). Although reasons must be given to support the dispensation sought, it is often enough to cite "the child's tender years".<sup>274</sup> The court may then grant dispensation without further enquiry into the child's capacity.<sup>275</sup>

Other difficulties with the F-9 Form include its language: some children found the form hard to understand.<sup>276</sup> Also, it could be intercepted by the child's parents<sup>277</sup> or its value lessened if a parent tells the child what to write in it.<sup>278</sup>

Child respondents in a feasibility study on voice of the child in family proceedings thought they would consider completing the F-9 Form, provided they received it, although some said they would need help to do so.<sup>279</sup>

### Interview with a Judge

Finally, an interview with the judge is another method of putting the child's views directly before the decision-maker. It is an option whose appeal ebbs and flows.

Its shortfalls may be summarized as follows:

*...the judicial interview is far from the ideal way of ascertaining a child's wishes because:*

- 1. it is conducted in an environment which is intimidating;*
- 2. it is conducted by one who is not skilled in asking questions of children and interpreting their answers;*
- 3. the short time of the interview makes it unlikely that the perceptions of the child explaining or representing her wishes can be considered with sufficient depth; and*
- 4. the interview may be seen as a violation of the judge's function as an impartial trier of fact, in part because the judge need assume an inquisitor role when questioning children.<sup>280</sup>*

Some judges, however, support judicial interviews of children. For example, the (then) Chief Justice of Australia's Family Court stated that judges should consider interviewing older children more often.<sup>281</sup> He described a case in which he extended an invitation to speak

with children through the children's lawyer. The invitation was issued because of the gap in time between the report concerning the children and the hearing. The Chief Justice was concerned about the risk that the report no longer reflected the children's views.<sup>282</sup>

Judges in Germany are required to speak with children face-to-face. German law views children as "possessors of their own basic rights in custody and access proceedings" entitled "to make their personal relationships to both parents...known to the court".<sup>283</sup> Case law has held that children over four years are considered capable of expressing their views to the judge, although, in practice, some Family Court judges do not interview children until they are school aged.<sup>284</sup>

The interview takes place in the absence of the parents and any lawyers. The judge notes down the conversation for the record, and then reports back to the parents and their lawyers on the child's views as well as the judge's impression about the child.<sup>285</sup>

German judges are supported in this role in that they receive specific training - educational theory, psychology as well as skills development – regarding how to speak with children. However, declining budgets have had an impact on training programs.<sup>286</sup>

An appellate judge from Germany addressing the 4<sup>th</sup> World Congress on Family Law and Children's Rights, held in Capetown, South Africa in March 2005, stated that a sensitively handled judicial interview "can boost the child's self-esteem" because the process recognizes the child as a person in his own right and allows the child to know his views are being taken seriously.<sup>287</sup> The conversation between the judge and the child may also serve to re-assure the child that the final decision is in the hands of the judge and relieve the child's misplaced sense of guilt over the separation.<sup>288</sup>

Family lawyers in B.C. interviewed as part of the IICRD's project on meaningful child participation in family court processes were largely against the idea of judicial interviews.<sup>289</sup> Some judges also expressed discomfort with this practice.<sup>290</sup> Young people, however, expressed favourable opinions of such interviews and appreciated the opportunity to speak directly with the decision-maker.<sup>291</sup>

Several family statutes from other Canadian jurisdictions specifically permit judicial interviews of young people. These include the statutes of Newfoundland and Labrador, PEI, Ontario, the Northwest Territories, and Nunavut.<sup>292</sup>

## **f) Other Child-Related Reforms to Family Litigation**

### *Australia's Children's Cases Program*

Much of the concern regarding children's direct involvement in family proceedings relates to the adversarial nature of litigation. It is a trite observation that adversarial legal proceedings are not well suited to the resolution of family disputes.<sup>293</sup> Lawsuits are thought to damage ongoing relationships, the very kind that characterize family disputes, and, as the Family Justice Reform Working Group pointed out in its May 2005 report, the civil justice system was not designed to address the emotional needs of those undergoing separation or divorce.<sup>294</sup>

Australia has attempted to address this root issue – the problems that arise from the adversarial nature of family proceedings – by adopting a different court model for the determination of child-related issues, such as custody or access. What began as a pilot project in the Family Court registries of Sydney and Parramatta in 2004 has now been enshrined in Australia's family statute.<sup>295</sup> The proceedings are less adversarial, and the judge plays a much more active role. In the children's cases format, the judge plays an almost inquisitorial function. He or she maintains greater control by deciding:

- the issue(s) in dispute;
- what evidence is called; and
- the way the evidence is received.<sup>296</sup>

The judge is also empowered to make decisions (e.g. on a particular factual issue) at any point during the hearing. Thus, judgement need not be given in its totality at the end of the hearing.<sup>297</sup>

Other departures from the traditional hearing format include:

- the focus is on the future rather than the past;<sup>298</sup>
- the atmosphere is less formal: lawyers do not wear robes, for example, nor are there formal requirements as to where lawyers should sit in the courtroom relative to parties;<sup>299</sup>
- there may be direct discussions between the judge, the parties, and the parties' lawyers, and the family consultant (mediator) – as opposed to the usual pattern of direct examination by one lawyer followed by cross examination by the other lawyer;<sup>300</sup>
- the judge has authority to dispense with the traditional rules of evidence, including those governing hearsay or opinion evidence;<sup>301</sup> and
- a family consultant is available from the first day of hearing to assist.<sup>302</sup>

On July 1, 2006, the children's cases format became the standard hearing format for all cases in Australia's Family Court that involve children's matters.<sup>303</sup> Australia expects that the new system will result in shorter, faster, and, consequently, less costly hearings.<sup>304</sup> It is also expected that the new format will do no further harm to families. A study of the children's cases pilot project published in March 2006 found that the new format did no further harm to the co-parenting relationship or the children's post-separation adjustment.<sup>305</sup>

Interestingly, although the children's cases model marks a significant departure from traditional adversarial family proceedings, the process for hearing children's voices remains the same. The model is still predicated on the use of family reports or a best interests' representative, although judicial interviews are also possible in some cases.<sup>306</sup>

B.C.'s Family Justice Reform Working Group supports Australia's children's cases program model. It recommended that a similar model be tested in B.C.<sup>307</sup>

#### *New Zealand – Parenting Hearings Programme*

On November 1, 2006, New Zealand began to pilot a less adversarial hearing format called the Parenting Hearings Programme in six court locations.<sup>308</sup> The program is based on Australia's children's cases program.<sup>309</sup> The pilot will run for two years.<sup>310</sup>

Like the Australian model, New Zealand's Parenting Hearings Programme differs from traditional family litigation in that the process is:

- managed more closely by the judge;
- less formal; and
- faster (designed to be completed within 2-3 months).<sup>311</sup>

It differs from the Australian model in that a mediator is not present in the hearings. Some commentators in New Zealand have noted that it may be difficult for judges in New Zealand to wear two hats: that is, to have mediation and adjudication functions during the same hearing.<sup>312</sup>

Disputed family cases enter the Parenting Hearings Programme in two ways. Cases that have been through mediation and have not resolved are streamed into the new hearing format. Urgent (without notice) applications, such as cases which involve issues of violence or abuse are also accepted.<sup>313</sup>

There are two hearings possible in the parenting hearings programme, a preliminary hearing and a final one.<sup>314</sup> Before the preliminary hearing is scheduled, parents watch a DVD that explains the court process. The DVD is consistent with Parenting Through Separation courses in that it also aims to educate parents about the harmful effect of parental conflict has on children.<sup>315</sup>

At the preliminary hearing (said to last up to two hours), the judge explains the process. Each parent then has the opportunity to say what the main issues are and how they ought to be resolved. The parents may do this in their own words or through their lawyers. The judge also consults the lawyer for the child.<sup>316</sup> The judge then leads a round-table discussion with the parents and the lawyers.<sup>317</sup> The New Zealand Family Courts brochure says: "This part of the hearing may be a little like a mediation conference."<sup>318</sup> Apart from their mediation function, the judges may also hear evidence on disputed facts during the preliminary hearing and decide all outstanding issues, if there is sufficient evidence.<sup>319</sup>

If more evidence is needed, a final hearing is scheduled within two months of the preliminary hearing. The judge directs what evidence may be brought at the final hearing. The judge also decides whether an expert report (e.g. a psychological, medical or cultural report) is required. Some judges interview the children before the final hearing.<sup>320</sup>

Giving judges a more directive role is meant to reduce delays and to reduce harm to the parents caused by voluminous, unnecessary affidavit evidence that is often filed in traditional family litigation.<sup>321</sup> The judge may also limit what questions may be asked by lawyers at the final hearing with the goal of preventing "the case getting bogged down in issues that aren't really relevant to working out what's best for the children."<sup>322</sup>

#### *Parenting Co-ordinators (Special Masters)*

Another innovation in children's cases from the United States is the use of a parenting co-ordinator. This idea was conceived by a group of lawyers and psychologists working in Denver, Colorado in the early 1990s as a response to high conflict families.<sup>323</sup> Its use has spread across the United States and also into Canada.

While there are variations, parenting co-ordinators are typically mental health professionals, such as social workers, psychologists, psychiatrists or marriage counsellors. Some states also permit the appointment of family lawyers or family mediators.<sup>324</sup>

They typically work with parents who are entrenched in conflict; that is, those who cannot communicate without arguing and who have (or who are likely to have) ongoing conflict, particularly about the implementation of family law orders.<sup>325</sup> Parenting co-ordination may be used proactively, that is the appointment of the co-ordinator made simultaneously with the final order governing custody and access, but more frequently, parents are referred to parenting co-ordinators because they have established a pattern of chronic re-litigation.<sup>326</sup>

Child-related issues, such as access, are often a flashpoint. For example, disputes arise over holiday scheduling, transportation of the children to and from access visits, what the children eat when they are with each parent, bedtime routines, the participation of other people in scheduled access visits (e.g. a new partner), minor alterations of the access schedule so that the children can attend a special event or occasion, and child care arrangements.<sup>327</sup>

The tasks of a parenting co-ordinator may be divided into four broad areas: assessment, education, resolution of minor conflicts (mediation-arbitration), and recommendations to the court.<sup>328</sup> First, they assess the difficulties the parents are having in order to try to identify the underlying causes of the conflict. The point of the assessment is to be able to make appropriate referrals and to tailor advice.<sup>329</sup> Their educative role includes topics such as communication, child development, conflict resolution skills, and the negative effect of continuing parental conflict on the family's children.<sup>330</sup> Their third function is to resolve disputes. The parenting co-ordinator tries to help the parents reach agreement; however, unlike many court-based mediators, they can go one step further and arbitrate the issue if agreement is not possible.<sup>331</sup> Their final function is to make recommendations to the court.

Parenting co-ordinators address voice-of-the child issues in that their task is often to mediate or to decide child-related disputes. In fulfillment of their duties, they are empowered to speak with the children.<sup>332</sup>

**APPENDIX A**

**Scotland's F-9 Form**

Form F9                      Form of intimation in an action which includes a crave for a section 11 order

Rule 33.7(1)(h)              Court Ref. No.

**PART A**

**This part must be completed by the Pursuer's solicitor in language a child is capable of understanding**

To (1)

The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:-

(a) (3) and (4)

(b) (5)

(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at (7) by (8). An envelope which does not need a postage stamp is enclosed for you to use to return the form.

**IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.**

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

**NOTES FOR COMPLETION**

- (1) Insert name and address of child.
- (2) Insert relationship to the child of party making the application to court.
- (3) Insert appropriate wording for residence order sought.
- (4) Insert address.
- (5) Insert appropriate wording for
- (6) Insert appropriate wording for

contact order sought.

any other order sought.

(7) Insert address of sheriff clerk.

(8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service.

(9) Insert court reference number.

(10) Insert name and address of parties to the action.

**PART B**

**IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM**

To the Sheriff Clerk, (7)

Court Ref. No. (9)

(10).....

**QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE? (PLEASE TICK BOX)**

YES	<input type="checkbox"/>
NO	<input type="checkbox"/>

If you have ticked YES please also answer Question (2) or (3)

**QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE? (PLEASE TICK BOX)**

YES	<input type="checkbox"/>
NO	<input type="checkbox"/>

If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

**BOX A:**

(NAME) .....
(ADDRESS) .....
.....

Is this person -	A friend?	<input type="checkbox"/>	A relative?	<input type="checkbox"/>
	A teacher?	<input type="checkbox"/>	Other?	<input type="checkbox"/>

OR

**QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE? (PLEASE TICK BOX)**

**YES**

**NO**

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

**BOX B:**

**WHAT I HAVE TO SAY ABOUT MY FUTURE:-**

**NAME:** .....

**ADDRESS:** .....

**DATE:** .....

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<sup>3</sup> *Ibid.* at 68 & 69.

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<sup>10</sup> E. Kay M. Tisdall *et al.*, *supra* Note 5 at 23, citing Buchanan *et al.*, 2001 and Butler *et al.*, 2002.

<sup>11</sup> Joan B. Kelly, *supra* Note 4 at 149.

<sup>12</sup> E. Kay M. Tisdall *et al.*, *supra* Note 5 at 23-24.

<sup>13</sup> Joan B. Kelly, *supra* Note 4 at 148.















































