

IMPLEMENTING CHILDREN'S RIGHTS IN FAMILY COURT CASES

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Children as Full Rights Bearers

The status of children has changed dramatically from the times when children were viewed as property...

Today, children are viewed as individuals who, as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society's full protection.

Michel v. Graydon, 2020 SCC 24 at para. 77

Importance of Canada's International Obligations

- It is presumed that the legislation takes into account Canada's international obligations

Michel v. Graydon, concurring judgment at para. 103

- Principles in International Conventions, such as the *UN Convention on the Rights of the Child (UN CRC)*, help inform the contextual approach to the interpretation of the provincial family law legislation as well as the *Divorce Act*

Michel v. Graydon, concurring judgment at para. 103

Article 12: Children's Right to be Heard under the UN CRC

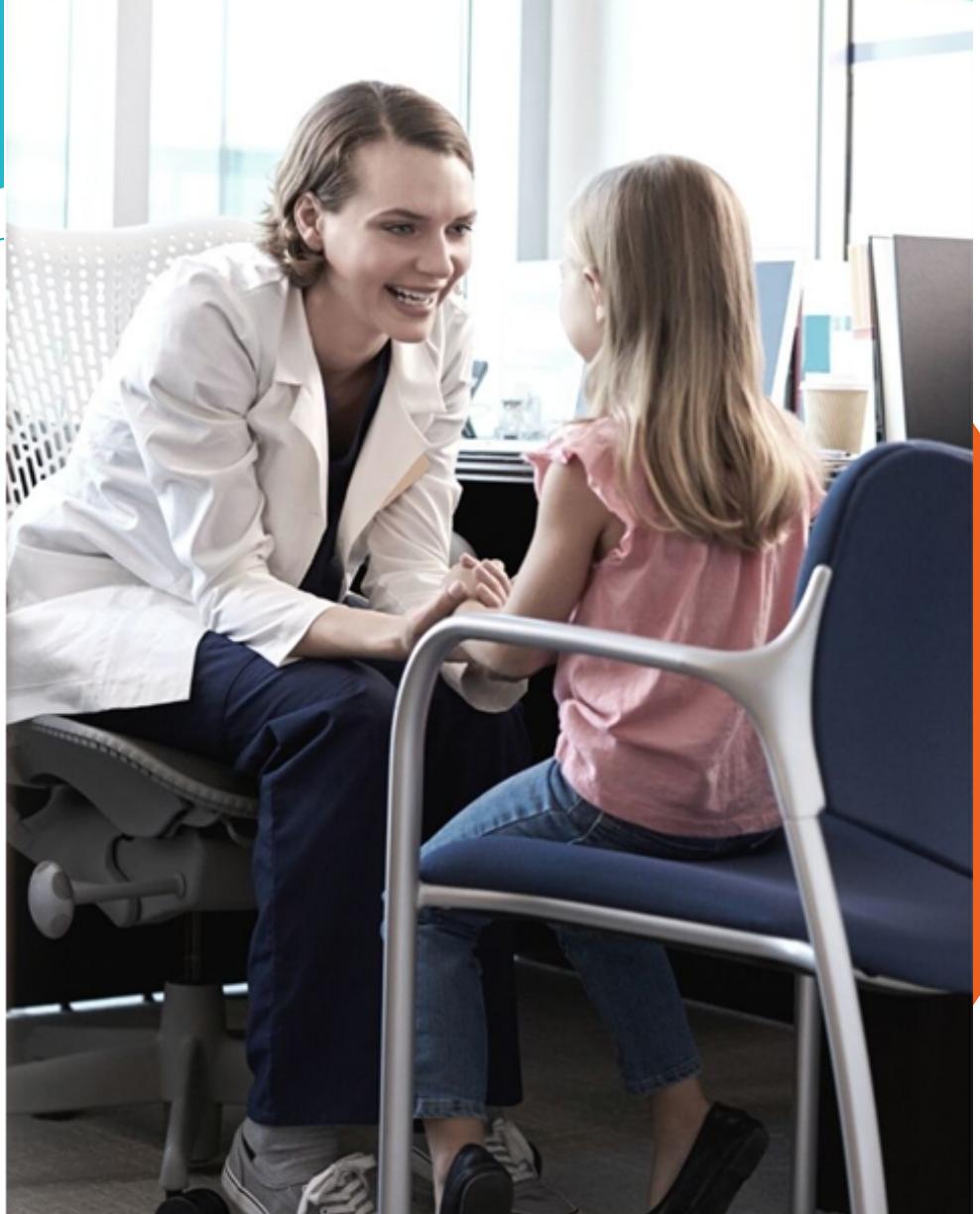
- Article 12(1) provides all children who are capable of forming their own views with two rights
 - i. The right to express their views freely in all matters affecting them
 - ii. The right to have those views given due weight in accordance with the child's age and maturity
- This “right to be heard” specifically applies to any judicial proceeding affecting the child: Article 12(2)

Divorce Act Requirements: the Child's Views and Preferences

- Court shall consider the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained: s. 16(3)(e)
- No limit on which children and which type of case
- The *Divorce Act* Legislative objectives state that:
 - Canada is a party to the *UN CRC*
 - And refer to Article 12

Child Rights Safeguards / Guarantees in Court Processes

-  Ensuring child's right to express their views
-  Establishing relevant facts
-  Avoiding delays in decision making
-  Using qualified professionals
-  Ensuring appropriate "legal reasoning"
-  Making sure there are mechanisms to review or revise decisions
-  Using child rights impact assessments
-  Legal representation



Hearing Children

AN ACCESS TO JUSTICE ISSUE

... We as a society must seek to simultaneously protect and empower children because they are ends in themselves. They are individuals who are justly entitled to the full protection of the *Charter*.

They are entitled to education, health care, and an adequate standard of living. They are entitled to be heard and to be treated with dignity.

Why Access to Justice for Children Matters –
CLE BC Access to Justice for Children: Child Rights in Action Conference, May 11, 2017

Remarks of the Honourable Robert J. Bauman, Chief Justice of BC at paras. 20 & 21

G (BJ) v. G (DL), 2010 YKSC 44

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

- flexible legal framework found in the Convention.

At para. 4

Meaningful Participation

TO PARTICIPATE MEANINGFULLY, CHILDREN SHOULD:

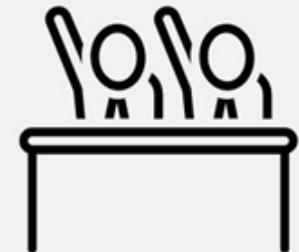
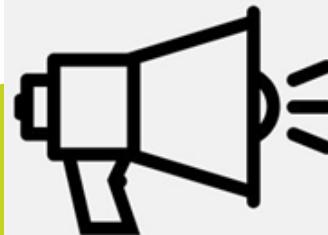
Be informed, at the beginning of the process, of their legal right to be heard

Be given the opportunity to fully participate early and throughout the process

Have a say in the manner in which they participate

Be informed of both the result reached and the way in which their views have been taken into account

Have their views considered in a substantive way



At which stage of proceedings are children's voices heard?

CHILDREN HAVE LEGAL RIGHTS TO BE HEARD DURING ALL PARTS OF THE JUDICIAL PROCESS

JUDICIAL
FAMILY CASE
CONFERENCES

SETTLEMENT
CONFERENCES

COURT
HEARINGS OR
TRIALS

An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate.



How can children participate in the legal process?

EVIDENCE PRESENTED BY A NEUTRAL THIRD PARTY

such as a social worker or psychologist, using a comprehensive assessment or “views of the child” report .

EVIDENCE PRESENTED BY A PARENT, LAWYER OR REPRESENTATIVE

such as a through “in court” testimony of witnesses, letters by or audio/visual recordings of the child, evidence of what the child has said, or an expert report.

There are many ways a child’s views can be obtained, depending on their circumstance and maturity. The method does not need to be intrusive.



Benefits of including the Child's Voice

LESSEN CONFLICT

Children's involvement can refocus all parties towards the best interest of the child, which, in turn, can reduce the intensity and duration of the conflict.

BETTER DECISION MAKING

Hearing from children can help ensure decisions made will work for them, which will increase their longevity and parental compliance.

BENEFITS FOR THE CHILD

Being actively involved can empower children and grow their confidence and self-esteem.



THE UN CONVENTION APPROACH TO FAMILY VIOLENCE AND ALIENATION

Protecting All Children from Violence in their Homes

- The Convention applies to every child, no matter what age, and no matter what issues arise
 - Article 1: A child means every human being below the age of 18 years
- Article 19 specifically protects a child from all forms of violence: “while in the care of parent(s), legal guardian(s) or any other person who has care of the child”
- This includes: all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse

Child's Relationship with Parents/Guardians

- Article 9(3) protects the right of the child who is separated from one (or both) parents to maintain personal relations and direct contact with both parents **except if it is contrary to the child's best interests**



General Comments: Family Violence & Alienation Cases

- “The right of the child to freedom from all forms of violence”

General Comment 13, 2011

- “The right of the child to be heard”

General Comment 12, 2009

- “The right of the child to have his or her best interest taken as a primary consideration”

General Comment 14, 2014

Some General Comments: Family Violence & Alienation Cases

- The child's **right to be heard has particular relevance in violence situations** and the participation right commences with very young children who are particularly vulnerable to violence

General Comment 13, para. 63

- Securing and promoting children's fundamental **rights to respect for their human dignity and physical and psychological integrity**, through the prevention of all forms of violence, is essential for promoting the full set of child rights in the Convention

General Comment 13, para. 13

Some General Comments: Family Violence & Alienation Cases

- An adult's judgment of a child's best interest cannot override the obligation to respect all the child rights under the Convention

General Comment 13 – right to be free from violence, para. 61;
General Comment 14, para. 4

- This includes rights under Article 12

All Children – All Cases

- The Yukon Supreme Court concluded that the Convention **does** not make an exception for cases involving high conflict, including those dealing with domestic violence, alienation, or both, adding that
 - It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the cases or the view that decision maker may hold about children's participation

Justice Martinson (sitting as a Deputy Judge), *G(BJ) v. G(DL)*, 2010 YKSC 44 at para. 13

- This approach was adopted by the Ontario Superior Court of Justice in 2019

Justice Kristjanson, *Medjuck v. Medjuck*, 2019 ONSC 3254 at para. 31

All Children – All Cases

THE COURT IN MEDJUCK ALSO CONCLUDED THAT

- A child capable of forming views and communicating them should generally be allowed to express them in judicial proceedings (though in some cases the alienating behaviour may be such that the child is really not capable of forming the child's own views)
- In many cases, including high conflict cases, the focus will be on the weight attached to the views, not on whether the views should be expressed
- Obtaining views from all sorts of children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working well

Judicial Interviews



IN HIGH CONFLICT CASES

Some children want to speak directly with judges. This can be true especially in high-conflict cases with a history of violence or trauma. Children may want to express their views directly to ensure nothing is lost in translation.

See Joan B. Kelly, *Child Participation in Divorce Process: The Structured Child-focused Interview Process*.

Judicial Interviews Framework

- Authority to Meet with a Child
- Why Meet with a Child
- When to Meet with a Child
- Where to Meet with a Child
- Who Attends the Meeting
- Practical Tips

This information, including the tips, has taken into account the extensive work in this area by Justice Martinson, Professor Nicholas Bala and Dr. Rachel Birnbaum.

Purpose for Meeting with Children

- The purpose of a judicial interview is NOT to gather evidence or to have a child provide information about a factual matter.
- Instead, it can:
- Enable children to be more involved and connected with the proceedings
 - Make sure the judge has understood the views and feelings of the child
 - Make sure the child understands the judge's task and the nature of the court process
 - Judicial interviews can take place in addition to other methods of obtaining views
 - They can be used at any stage of the court process

G (BJ) v. G (DL), 2010 YKSC 44

- Giving children the opportunity to speak directly to the judge, who will be making a decision that could profoundly affect their lives, provides meaningful participation, consistent with the values and principles found in the Convention

At para. 56

- Professor Nicholas Bala and Dr. Rachel Birnbaum conclude that

all children should be regarded as having the right to decide whether they want to meet with the person who may be making very important decisions about their future.

At para. 56

Interplay between Best Interests and the Child's Wishes

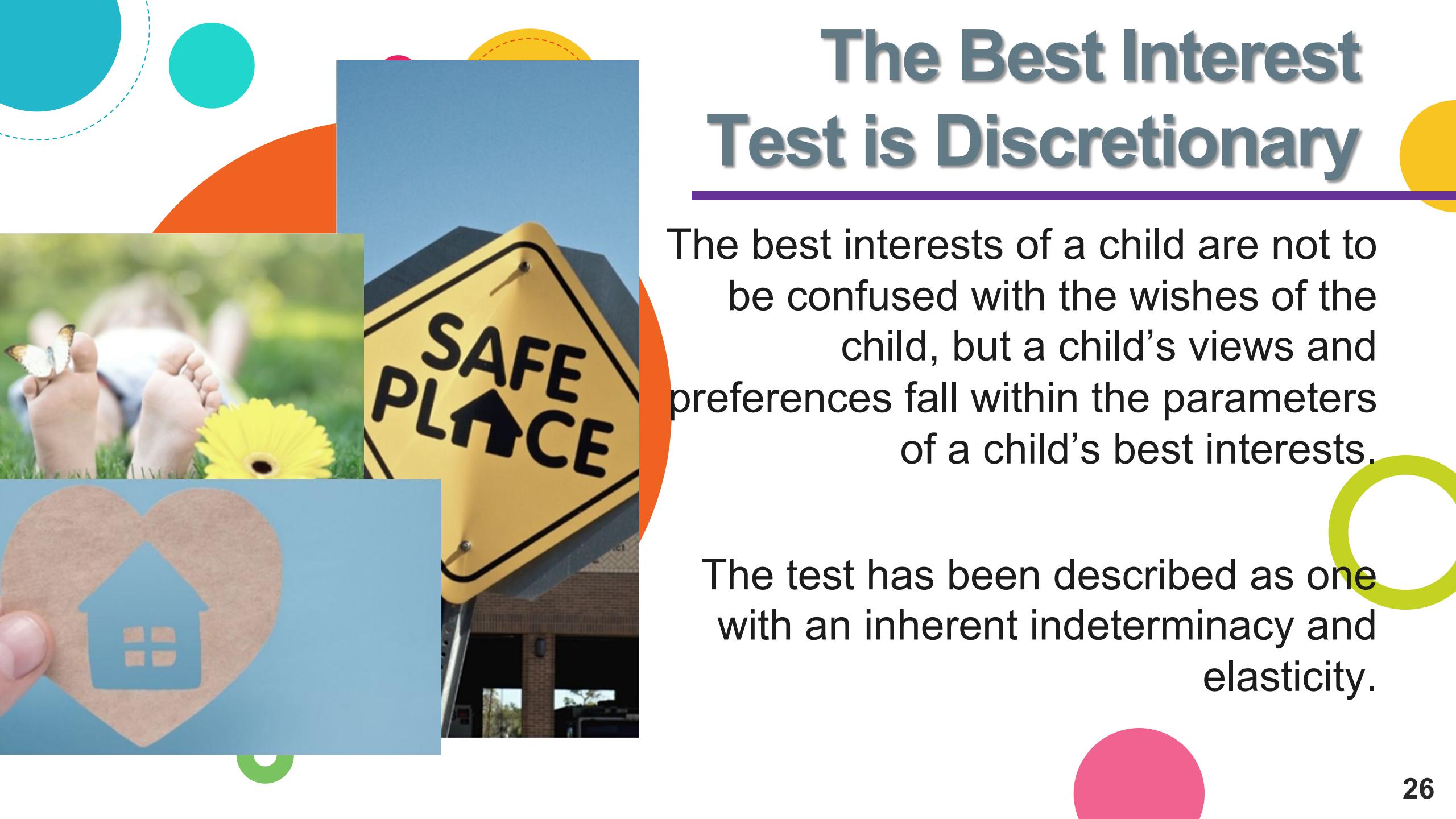
The more a court is satisfied that a child is capable of making a mature, independent decision on his or her own behalf, the greater the weight that will be given to his or her views when a court is exercising its discretion under s.25(8). In some cases, courts will inevitably be so convinced of a child's maturity that the principles of welfare and autonomy will collapse altogether and the child's wishes will become the controlling factor...

At para. 87

The statutory factors reflect decades of careful study into children's needs and how the law can best meet them ... with our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures.

At para. 92

Justice Abella



The Best Interest Test is Discretionary



The best interests of a child are not to be confused with the wishes of the child, but a child's views and preferences fall within the parameters of a child's best interests.



The test has been described as one with an inherent indeterminacy and elasticity.

Weight to be Given to a Child's Views

Weight should be given in accordance with their age and their maturity. This includes their ability to understand and assess the implications of a particular matter.

If the child is forming a view in a reasonable and independent manner, then the views must be considered as a significant factor in family cases.

LCT v. RK, 2018 BCSC 1016 at para. 34



Models of Representation for Children

AMICUS CURIAE (FRIEND OF THE COURT)

Meets with the child to obtain their views but does not advocate for them; there is no confidentiality

BEST INTEREST OR LITIGATION GUARDIAN

Makes recommendations based on what the lawyer considers is in the child's best interests.

LAWYER

Traditional solicitor/client role

"So long as the forum is the court-room, the child's lawyer should represent his or her young client in a way which reflects equal participation with the other parties in this forum" – Justice Abella in Re: W1980 CanLii 1958 (ON CJ)



Our Model of Representation

SOLICITOR-CLIENT MODEL

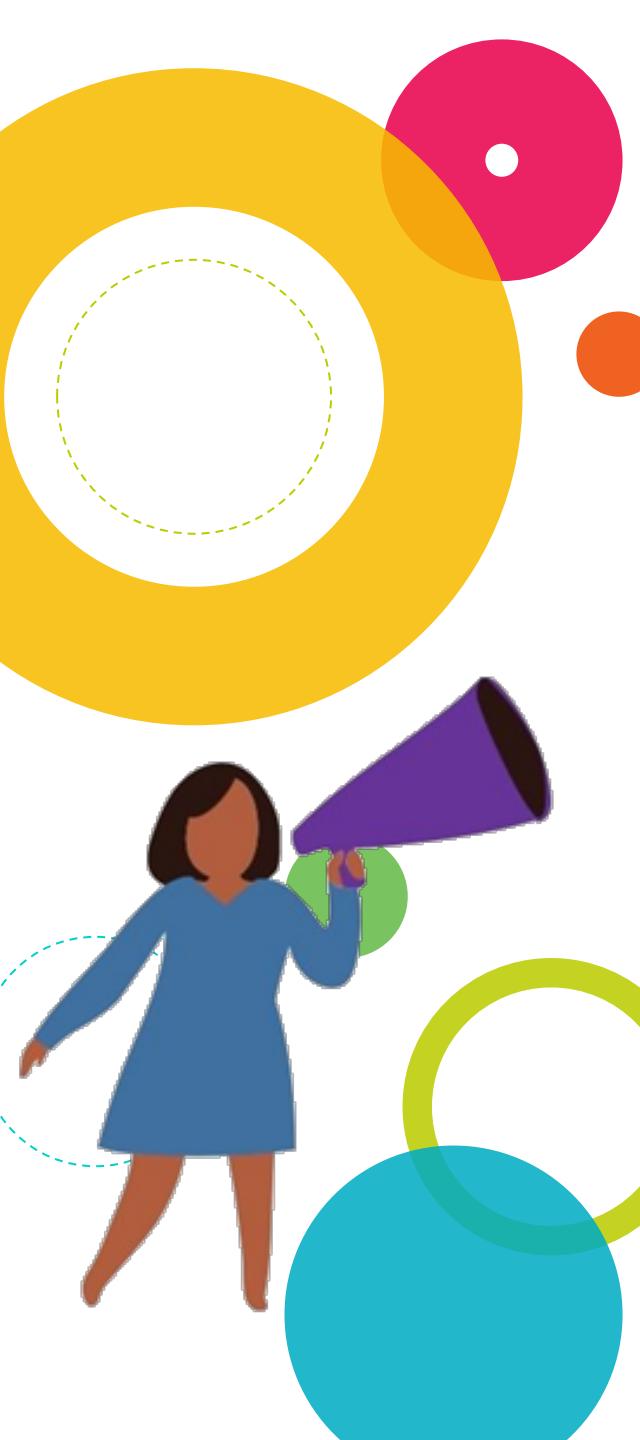
For young people under the age of 19. We take instruction from the child, who is our client.

NOT A BEST-INTEREST MODEL

We represent the child's views, not our own view of the case or what is 'best'.

PRIVILEGED AND CONFIDENTIAL

Our files, conversations, and notes are privileged. Interviews with the child are confidential. Parent or guardian conversations are not privileged.



Representing a client in these cases usually involves executing a client's instructions and, without being misleading, attempting to show through the evidence that these instructions or wishes best match the child's needs.

A mother who wishes custody of her child expects her lawyer to present her case in such a way that her wishes are shown to be in the best interests of the child. It is, in most cases, an articulation of the client's subjective assessment, rather than the lawyer's. It should be no different when the client is a child.

Where the child has expressed definite views, these views, rather than those of the child's lawyer, should determine what is conveyed to the court.



A child's rights approach includes obtaining evidence that supports the child's voice



REPRESENTATION IS NOT LIMITED OR LIMITING

The lawyer for the child has an obligation to work for their clients as they would on any retainer.

REPRESENTATION IS NOT AN ALTERNATIVE

VOC reports, section 211 reports, or a ‘child specialist’ in a collaborative setting all may have a place in a family file. Representation does not replace them.

ADVOCACY AT EVERY STAGE

Distinguishes the role of the children’s lawyer: Obtaining evidence, making sure legal arguments, which favour the child’s position, are made before the court.

NO DENIAL OF JUSTICE FOR CHILDREN

Lawyers for parents/guardians have the opportunity to make legal submissions at all stages of family law cases. Children should not be denied this aspect of fundamental justice.

Donna J. Martinson & Caterina E. Tempesta, “Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation” (2018) *Canadian Journal of Family Law*, 31 (1): 151 at 184



Voting with their Feet

In order for custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child.

O'Connell v. McIndoe, 1998 CanLii 5835 (BCCA) at para. 13

See *Shapiro v. Shapiro* (1973), 33 DLR (3d) 764 (BCCA) and *Alexander v. Alexander* (1988), 15 RFL (3d) 363 (BCCA)

Court Participation

HARMFUL TO CHILDREN?

If done in a manner sensitive to the child's particular circumstances, including their age, maturity, and social context, affording children the opportunity to participate in family court proceedings will not harm them or expose them to further conflict. Rather, it can benefit them by ensuring that they understand why their input is sought; how, what, and with whom it will be shared; how it will be factored into the decision-making process; and by providing children with some control over their participation in the process, including the right not to participate, if that is their wish.

In most cases, it is the fact of the conflict that is harmful, not the expression of the child's views.

Martinson & Tempesta, *Young People as Humans*, at 167



Cost of Non-Participation

Non-participation can increase children's feelings of isolation and loneliness throughout the divorce process. It can also lead to anger and frustration, particularly for older children.

