

Part Two – Practical Guide/Checklist: Implementing Children’s Participation Rights in All Family Court Proceedings

SAFEGUARDS AND GUARANTEES

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Note: This guide is complementary to Part One of the FREDA Centre Learning Brief, *Implementing Children’s Participation Rights in All Family Court Proceedings*. Part One contains additional information and all supporting references.

SAFEGUARD ONE: PRIORITIZE COURT PROCEEDINGS AND AVOID UNNECESSARY DELAYS

WITHIN THE FAMILY LAW PROCEEDING

- Use all the tools at your disposal to ensure, to the greatest extent possible, timely and cost-effective proceedings.
- Consider requesting one judge for all the court proceedings, where appropriate.

IDENTIFY OTHER RELATED PROCEEDINGS (CRIMINAL, CHILD PROTECTION, AND/OR IMMIGRATION) AND COORDINATE WITH THEM

- Determine whether there are criminal, child protection, and/or immigration proceedings relating to the same family under:
 - s. 16(3) and 7.8 of the 2021 Divorce Act.
 - Relevant provincial/territorial legislation.
- If yes,
 - Obtain relevant information, including court orders.
 - Consider steps to coordinate the proceedings to:
 - avoid conflicting outcomes and unreasonable delay; and
 - prevent the child from participating repeatedly.

SAFEGUARD TWO: OBTAINING THE VIEWS OF THE CHILD – WHO AND HOW

WHO – WHICH CHILDREN?

- ALL children who are capable of forming their own views can express their views, including cases involving allegations of violence and/or alienation.
- In deciding capacity consider that:
 - o The capacity required to be heard should be a low one – focusing primarily on cognitive capacity; other factors should generally be considered when deciding the weight to be attached to the views.

- There is a presumption of capacity.
- There should be no age limits and capacity must be assessed on a case-by-case basis.
- ☐ Provide the child with information and advice about their choices and potential consequences so the child can choose whether to participate and have a say in how they participate.

HOW TO OBTAIN CHILDREN'S VIEWS AND PREFERENCES

Methods Will Vary Across Canada

Examples could include:

- ☐ Full parenting assessments.
- ☐ Evaluative views of the child reports prepared by a mental health professional.
- ☐ Non-evaluative views of the child reports prepared by a mental health professional or another trained person, including a lawyer.
- ☐ Judicial interviews (which can be in addition to other methods – see “Judicial Interviews” below)
- ☐ Affidavit evidence of a child (often not recommended) or various forms of hearsay evidence.

Role of Legal Representation in Obtaining Views and Preferences

- ☐ A lawyer usually cannot “give evidence” about a child’s views and preferences, but instead facilitates the presentation of such evidence (see also legal advice/representation below).

Choosing the Method

- ☐ Consider that the child has the right to be heard in judicial proceedings, either:
 - directly; or
 - through a representative/appropriate body.
- ☐ Consider the UN Committee on the Rights of the Child recommendations that:
 - the child should have a choice about how to participate; and,
 - wherever possible, the child must be given the opportunity to be directly heard in any proceeding and advised of that option.
- ☐ Take steps to ensure that proceedings are accessible and child appropriate, considering the:
 - five-step implementation process; and
 - nine basic requirements recommended by the UN Committee on the Rights of the Child.

Timing – When to Obtain Children’s Views

- ☐ Consider that participation should begin early in the process and should form part of the decision-making processes at initial case conferences or other judicial settlement meetings, as well as in motions and trials
- ☐ Remember that:
 - participation is a process, not a momentary act; and

- children should not be interviewed too often forensically, especially with respect to traumatic matters.

CHILDREN'S PARTICIPATION THROUGH A JUDICIAL INTERVIEW

- Consider requesting/facilitating a judicial interview, in addition to, or instead of, other methods, particularly if the child wishes to meet with the Judge at a:
 - case conference;
 - other judicial settlement meeting; or
 - hearing/trial.
- Note that the purpose of a judicial interview is often 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;
 - ensure that the judge has understood the views and feelings of the child; and
 - ensure that child understands the judge's task and the nature of the court process.

SAFEGUARD THREE: ESTABLISHING RELEVANT FACTS INCLUDING THOSE RELEVANT TO THE CHILD'S VIEWS

ESTABLISHING RELEVANT FACTS

- Consider how the decision-maker, whether a judge, mediatory, arbitrator, or otherwise, will obtain ALL facts necessary to determine the child's best interests, as described in domestic law and the UN Convention on the Rights of the Child.

ESTABLISHING FACTS RELEVANT TO AND SUPPORTING THE CHILD'S VIEWS

- Take steps to ensure that, during arbitrations, mediations, judicial hearings, and the like, that the decision-maker has the information necessary to give due weight to, and to take seriously, the child's views.

SAFEGUARD FOUR: THE NEED FOR QUALIFIED PROFESSIONALS

- When deciding whether to obtain a parenting assessment:
 - Be clear about its purpose, given its cost, intrusive nature, and the time it takes. What does it add to what is known?
 - Determine what specific professional qualifications are required, including:
 - expertise in matters related to child and adolescent development; and
 - specific expertise about the nature, prevalence, and potential consequences of family violence on the child's present and future safety, security, and well-being.

SAFEGUARD FIVE: JUDICIAL AND OTHER DECISION-MAKING (LEGAL REASONING) - INCLUDING HOW TO ASSESS THE WEIGHT TO BE ATTACHED TO A CHILD'S VIEWS

THE DECISION-MAKING PROCESS – GIVING DUE WEIGHT TO A CHILD'S VIEWS

- Consider each of these statements from the UN Committee on the Rights of the Child:
 - The views of the child must be seriously considered when the child is capable of forming her/his/their own view.
 - If the child is capable of forming her/his/their own views in a reasonable and independent manner, the decision-maker must consider the views of the child as a significant factor in the settlement of the issue.
 - Age alone cannot determine the significance of a child's views as their level of understanding is not uniformly linked to their biological age. A child's development can be affected by information, experience, environment, social and cultural expectations, and levels of support.
 - Maturity refers to the ability to understand and assess the implications of a particular matter:
 - Maturity in the context of Article 12 is the capacity to express views on issues in a reasonable and independent manner.
 - Consider the impact on the child; the greater the impact of the outcome on the child's life, the more relevant the appropriate assessment of the maturity of that child.
- Consider the evolving capacity of the child and the direction and guidance from parents.
- Review and apply the relevant case law found in your jurisdiction together with the Supreme Court of Canada cases in our paper.

THE ACTUAL DECISION – EXPLAINED AND PROVIDED WITHOUT DELAY

- Advocate/make submissions on behalf of the child to ensure that decisions are explained, and that the decisions state explicitly:
 - The factual circumstances regarding the child relied upon.
 - The best interests elements that have been found relevant and how they have been weighted.
 - The relevant child rights legal principles and how they have been applied.
 - The reasons, clearly stated, for the decision, if the decision differs from the views of the child.
- Take steps, including making submissions, to ensure that the decision is provided in a timely manner, considering the significant impact of the decision on the child's life.
- Take steps to ensure that the child is informed about the outcome, and how the child's views were taken seriously.

SAFEGUARD SIX: THE CHILD'S RIGHT TO HAVE THE DECISION REVIEWED FOR CORRECTNESS AND APPEALED IF APPROPRIATE

- Take steps to ensure that the child:
 - knows about the right to appeal;
 - is given advice about the likelihood of success; and
 - has assistance with the appeal, when appropriate.
- Consider that the UN Committee on the Rights of the Child states appeal/review procedures should be accessible to the child or the child's representative.

SAFEGUARD SEVEN: KEEPING GOVERNMENTS ACCOUNTABLE TO MAKE DECISIONS IN CHILDREN'S BEST INTERESTS

- Be aware that a child rights approach requires governments to do Child Rights Impact Assessments, with input from children, for all government decisions, including budget decisions.
- Consider advocating:
 - broadly, for increased funding to ensure that all child rights under the Convention are realized; and,
 - when appropriate, for increased government funding for independent legal representation for a child.

SAFEGUARD EIGHT: MAKING SURE THAT CHILDREN HAVE ALL APPROPRIATE LEGAL REPRESENTATION WHEN THEIR BEST INTERESTS ARE BEING FORMALLY ASSESSED BY COURTS

PURPOSE OF LEGAL REPRESENTATION FOR CHILDREN

- Keep in mind that when a child's best interests are being formally assessed by courts, legal representation can be critical to the implementation of all the safeguards in court processes.

Legal Information

- Consider the following legal information, which would benefit children in court processes:
 - their legal rights generally;
 - their rights to participate and the choices available;
 - the way the court processes work; and
 - the role of the judge.

Legal Advice

- ❑ Consider the following benefits of a lawyer providing legal advice relevant to the child's specific circumstances. The advice could include:
 - ❑ Considering the child's views and advising on how their views will be taken into account;
 - ❑ Advising the child about options for presenting their views and the merits of each in the child's circumstances;
 - ❑ Exploring relevant facts generally and those supporting the child's views; and
 - ❑ Advising the child generally on potential court processes, including settlement discussions, and potential outcomes, including the advantages and disadvantages of each.

Legal Representation in Court Proceedings

- ❑ Consider that if the lawyer providing information and advice outside the court process cannot participate in settlement discussion or contested hearings/trials, the child's rights identified by that advice cannot be implemented.
- ❑ Consider the following benefits a lawyer can provide to a child, consistent with a child rights approach to their best interests:
 - ❑ A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds.
 - ❑ At a contested hearing/trial the lawyer can participate on the child's behalf:
 - ❑ in the presentation and testing of evidence;
 - ❑ with respect to parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility; and (d) the appropriateness of a critique report;
 - ❑ in guarding against unreasonable delay; and
 - ❑ by advancing and protecting children's rights during final submissions, including:
 - ❑ submissions on the relevant law;
 - ❑ how the child's views are weighed; and
 - ❑ the weight to be given to the parenting assessment in the context of all of the evidence.
 - ❑ Once the court's decision is provided, a lawyer can also:
 - ❑ explain the decision to the child;
 - ❑ review the ultimate decision for correctness;
 - ❑ recommend appealing the decision if appropriate; and
 - ❑ conduct the appeal.