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CHILDREN'S RIGHTS AND PARTICIPATION IN THE JUSTICE SYSTEM

WHY CHILDREN'S RIGHTS?



For the powerful, and as far as children are concerned adults are always powerful, rights are an inconvenience. The powerful would find it easier if those below them lacked rights. It would be easier to rule, decision-making would be swifter, cheaper, more efficient, more certain. It is hardly surprising that none of the rights we have were freely bestowed: they all had to be fought for.

Rights are important because those who have them can exercise agency. Agents are decision-makers. They are people who can negotiate with others, who are capable of altering relationships or decisions, who can shift social assumptions and constraints. And there is now clear evidence that even the youngest can do this [...]. As agents, rights-bearers can participate. [...] And participation is a fundamental human right. It enables us to demand rights.

> M. Freeman, Why It Remains Important to Take Children's Rights Seriously, 2007

A RIGHTS-BASED APPROACH IS NECESSARY



"The rights-based approach is of particular importance in the discussion of children's rights because of children's often intense vulnerability, the frequent competition between children's rights and those of adults, and the resulting ease with which a more paternalistic and needsbased approach can be adopted."

> Children: The Silenced Citizens, Final Report of the Senate Standing Committee on Human Rights, 2007 (at pp. 24 and 27)

UN CONVENTION ON THE RIGHTS OF THE CHILD (UNCRC)

- the **UNCRC** is the most widely ratified human rights treaty in history
- Canada played a leading role in its creation and ratified it on December 13, 1991 – over 30 years ago
- the UNCRC sets out various human rights civil, political, economic, social and cultural – that children have that are inalienable, inherent, indivisible and interdependent
- it applies to every child, defined as every human being below the age of 18 (article 1)
- among the rights contained in the UNCRC, as a foundational principle, is the right of children to express their views in all matters affecting them and to have those views taken seriously -- to be heard at all stages of the process, a right directly linked to their best interests (General Comment 14, at para. 4)

GENERAL PRINCIPLES OF THE UNCRC There are **four general principles** of the UNCRC for interpreting and implementing all the rights of the child:

- Article 2 the obligation of State Parties to respect and ensure the rights set forth in the Convention to each child without discrimination of any kind
- Article 3 the obligation for the best interests of the child to be a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies
- Article 6 the recognition that every child has the inherent right to life and the obligation of State Parties to ensure to the maximum extent possible the survival and development of the child
- Article 12 the obligation to ensure that 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; for this purpose, the child shall 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

OTHER RIGHTS

Although all rights are inclusive, indivisible and interdependent, other rights relevant to the family law and domestic violence context include:

Article 9 – child's right not to be separated from her parents against her will except as necessary for the best interests of the child

Article 19 – child's right to be free from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse while in the care of parents(s), legal guardians(s) or any other person who has care of the child

Article 39 – all appropriate measures shall be taken to promote the physical and psychological recovery of a child victim of any form of neglect, exploitation, or abuse... Such recovery shall take place in an environment which fosters the health, self-respect and dignity of the child

STATUS OF THE UNCRC IN CANADA

- the UNCRC has been specifically incorporated into some legislation in Canada, including: preamble to YCJA, An Act respecting First Nations, Inuit and Métis children, youth and families, Ontario's CYFSA and the Immigration and Refugee Protection Act (s. 3(3)(f))
- see also the references to the UNCRC (Articles 3 and 12) in the Legislative Background document to Canada's Divorce Act (https://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/c78/01.html), and technical guide, 'The Divorce Act Changes Explained' (https://www.justice.gc.ca/eng/fl-df/cfl-mdf/dace-clde/index.html)
- even without specific incorporation, our domestic legislation is presumed to conform with international law: R. v. Hape, 2007 SCC 26, at para. 53
- moreover, the values reflected in international human rights law, and specifically those in the Convention, should assist in providing a context for the interpretation of domestic laws, including the Charter: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 70; A.M.R.I. v. K.E.R., 2011 ONCA 417, at para. 82

IMPORTANCE OF CANADA'S INTERNATIONAL OBLIGATIONS

Michel v. Graydon, 2020 SCC 24 (concurring reasons of Wagner C.J. and Martin J., delivered by Martin J., at para. 103):

It is presumed that the legislature takes account of Canada's international obligations, which favour an understanding of legislative intent that is in conformity with customary and conventional international law (Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, at para. 182). Canada is a party to international conventions that affirm the legal principle of "the best interests of the child" (Convention on the Rights of the Child, Can. T.S. 1992 No. 3, art. 3(1); Convention on the Elimination of All Forms of Discrimination against Women, Can. T.S. 1982 No. 31, art. 16(1)(d)). [...] The principles embodied in these Conventions help inform the contextual approach to the interpretation of the Family Law Act, as well as the Divorce Act and the <u>Guidelines</u>, in understanding how to interpret the legislation with a focus on the best interests of the child (Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. <u>69-71</u>). (at para. 103)

UN COMMITTEE ON THE RIGHTS OF THE CHILD

CONCLUDING OBSERVATIONS

CANADA, 2022



- in its June 2022 Concluding Observations, the Committee identified a number of areas where Canada must take urgent measures, including: non-discrimination, the right to life, survival and development, and abuse and neglect (para. 4)
- the Committee also recommended that Canada:
 - Promote the meaningful and empowered participation of all children, within the family, community and schools;
 - Ensure that the views of the child are a requirement for all official decision-making processes that relate to children, including custody cases, child welfare decisions, criminal justice, immigration, and the environment;
 - Ensure that children have the possibility to voice their complaints if their right to be heard is violated with regard to judicial and administrative proceedings, and that children have access to an appeals procedure. (para. 22 (a), (b), (c))
- Concluding Observations can be and have been referred to by courts in legal analysis: Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, at paras. 186-187

UN COMMITTEE ON THE RIGHTS OF THE CHILD GENERAL COMMENTS

- the Committee issues General Comments (currently 25 in total with GC26 being drafted) to clarify the normative content of specific rights/offer guidance re implementation. See, for example:
 - General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UN Doc. CRC/C/GC/14 (2013)
 - General Comment No. 12 (2009): The right of the child to be heard, UN Doc. CRC/C/GC12 (2009)
 - General comment No. 13 (2011) The right of the child to freedom from all forms of violence, UN Doc. CRC/C/GC/13 (2009)
- the authority consensually conferred by States Parties through ratification creates a strong obligation to heed the direction provided in General Comments (UNCRC, articles 4, 43 & 44; see also VCLT, arts. 31(1) & 31(3)(b))

GENERAL COMMENTS

 General Comments of treaty bodies can and have been referred to by courts when interpreting the UNCRC/other treaties – e.g. Divito v. Canada, 2013 SCC 47, at paras. 26-27; Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1, at para 67; Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse), 2021 SCC 43, at para 197; Canadian Doctors for Refugee Care v. Canada (Attorney General), 2014 FC 651, at para. 462; Justice for Children and Youth v. J.G., 2020 ONSC 4716, at para. 62; S.S. v. R.S., 2021 ONSC 2137, at paras. 32-36, 46-47, 49, 54; S.K. v. D.G., 2022 ABQB 425, at paras. 163, 167

THE USE OF GENERAL COMMENTS IN DECISION-MAKING: S.S. v. R.S., 2021 ONSC 2137

31. The "best interests of the child" test in the new <u>Divorce Act</u> effectively implements Article 3(1) of the Convention on the Rights of the Child [...]

32. Article 3(1) makes the "best interests of the child" the "primary consideration" in all actions concerning children. In General Comment 14, the UN Committee on the Rights of the Child ("Committee) notes that the "concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child": General Comment 14: The right of the child to have his or her best interests taken as a primary consideration UNCRC, 2013, UN Doc. C/GC/14, at para. 4.

33. The Committee explains, at para. 37, that the expression "primary consideration" within Article 3 means that the child's best interests must be given priority over all other considerations, explaining that:

This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

34. The Committee further cautions that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention": at para. 4.

(See also E.M.B. v. M.F.B., 2021 ONSC 4264, at paras. 57-74)

THE USE OF GENERAL COMMENTS IN DECISION-MAKING: S.K. v. D.G., 2022 ABQB 425

[161] There is a presumption that Canadian law conforms to the UNCRC, which informs a contextual analysis: **R v Hape**, <u>2007 SCC 26</u> (CanLII) at para <u>53</u>.

[162] Children are now recognized as "full rights bearers" who merit society's full protection: Michel v Graydon, 2020 SCC 24 [Michel] at para 77. This foundational principle goes beyond simply allowing children to express their views in court proceedings; it includes the right to have those views taken seriously: Committee on the Rights of the Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), UNCRCOR, 2013, UN Doc CRC/C/GC/14 at paras 40, 43. The UN Commentary on the UNCRC have been used by courts to interpret Canada's obligations: see Divito v Canada, 2013 SCC 47, at paras. 26-27; Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, at para 67; Ward v Quebec (Commission des droits de la personne et des droits de la jeunesse), 2021 SCC 43, at para 197.

GENERAL COMMENT NO. 13 -BEST INTERESTS OF THE CHILD

14



there is an inextricable link and complementary role between the assessment of a child's best interests (Article 3) and the child's right to be heard (Article 12) (General Comment 14, at para. 43)



there can be no correct application of Article 3 if the provisions of Article 12 are not respected – similarly, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives (General Comment 14, at para. 43)



rights are inclusive, indivisible and interdependent. An adult's judgment of a child's best interests cannot override the obligation to respect all of the child's rights under the UNCRC (General Comment 14, at paras. 4 & 16)

GENERAL COMMENT NO. 12 – RIGHT TO BE HEARD

- Article 12(1) provides that States Parties "shall assure" the right of the child to freely express his or her views – this leaves no leeway for discretion – the child must be heard if the matter under discussion affects the child (B.J.G. v. D.L.G., 2010 YKSC 44, at para. 3; M. v. F., 2022 ONSC 505, paras. 12-13; Medjuck v. Medjuck, 2019 ONSC 3254, para. 31)
- the fact that a child is very young or in a vulnerable situation "does not deprive him or her of the right to express his or her views..."
- "Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting..."
- there is also an obligation to ensure and facilitate the implementation of article 12 for children experiencing barriers to making their views heard, including Indigenous, minority and migrant children, as well as children with special needs

(General Comment 12, paras. 20-21)

GENERAL COMMENT NO. 13 – RIGHT OF THE CHILD TO FREEDOM FROM ALL FORMS OF VIOLENCE

- the child's right to be heard has particular relevance in situations of violence 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)

GENERAL COMMENT NO. 13 – RIGHT OF THE CHILD TO FREEDOM FROM ALL FORMS OF VIOLENCE

The fundamental assumptions on which this General Comment is based include:

(a) "No violence against children is justifiable; all violence against children is preventable";

(b) A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as "victims";

(c) The concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy;

(d) The principle of the rule of law should apply fully to children as it does to adults;

(e) Children's rights to be heard and to have their views given due weight must be respected systematically in all decision-making processes, and their empowerment and participation should be central to child caregiving and protection strategies and programmes;

(f) The right of children to have their best interests be a primary consideration in all matters involving or affecting them must be respected, especially when they are victims of violence, as well as in all measures of prevention;

[...]

(h) The Committee recognizes the primary position of families, including extended families, in child caregiving and protection and in the prevention of violence. Nevertheless, the Committee also recognizes that the majority of violence takes place in the context of families and that intervention and support are therefore required when children become the victims of hardship and distress imposed on, or generated in, families (at para. 3)

GENERAL COMMENT NO. 13 – RIGHT OF THE CHILD TO FREEDOM FROM ALL FORMS OF VIOLENCE

- 12. Challenges. [...] Legal frameworks in a majority of States still fail to prohibit all forms of violence against children, and where laws are in place, their enforcement is often inadequate.
- 32. Institutional and system violations of child rights. Authorities at all levels of the State responsible for the protection of children from all forms of violence may directly and indirectly cause harm by lacking effective means of implementation of obligations under the Convention. Such omissions include the failure to adopt or revise legislation and other provisions, inadequate implementation of laws and other regulations [...] Also, in the commission of certain acts, professionals may abuse children's right to freedom from violence, for example, when they execute their responsibilities in a way that disregards the best interests, the views and the developmental objectives of the child.
- The Committee recommends training on a child rights approach to article 19 and its application in practice for all professionals and institutions working with and for children, including social workers, lawyers and judges (para. 44(d))
- 54. Judicial involvement. At all times and in all cases, due process must be respected. In particular, the protection and the further development of the child and his or her best interests [...] must form the primary purpose of decision-making [...]

(b) Child victims of violence should be treated in a child-friendly and sensitive manner throughout the justice process, taking into account their personal situation, needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity

CHILDREN AS RIGHTS-BEARERS

Michel v. Graydon, 2020 SCC 24 (concurring reasons of Wagner C.J. and Martin J., delivered by Martin J., at para. 77):

The status of children has changed dramatically from the times when children were viewed as property and the payment of monies for their upkeep was grounded more in grace and generosity than legal duty. 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.

THE IMPORTANCE OF CHILD PARTICIPATION TO A BEST INTERESTS ANALYSIS

Courts in Canada have increasingly recognized the significance of child participation in decision-making. In **A.C. v. Manitoba (Director of Child and Family Services)**, 2009 SCC 30, the Supreme Court of Canada stated:

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 paras. 92-93)

M.A.A. v. D.E.M.E, 2020 ONCA 486

 In an appeal of a family law return order in a cross-border removal case involving a non-Hague country, the Ontario Court of Appeal confirmed the child's right to participate as "fundamental to family law proceedings". Citing the UNCRC, the Court held that a determination of best interests must incorporate the child's views. (at para. 46)

Yenovkian v. Gulian, 2019 ONSC 7279

[66] The importance of hearing, and placing appropriate weight on, the views of the child is a critical development in family law. Article 12 of the Rights of the Child Convention provides [...]

[67] [...] It is important to recognize the agency of children, and where possible, to hear their voice before making custody and access decisions which have a profound effect on the life of a child.

PARTICIPATION IS IMPORTANT TO CHILDREN'S WELL-BEING²¹

B.J.G. v. D.L.G., 2010 YKSC 44

• the Court summarized many of the reasons underlying the legal right to be heard found in the social science literature by referring to what children want, the benefits of their input to the decision-making process, and the short- and long-term adverse consequences for them of excluding their participation (at para. 18)

Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner), 2018 ONCA 559

[62] A classic family law custody dispute gave rise to the Children's Lawyer's involvement in this case. Over the past several years, courts have taken great initiative to seek out and consider the views and preferences of the child. Professors Birnbaum and Bala explain:

The movement towards child inclusion in decision-making in education, medical treatment, and various areas of the law, including separation and divorce, has grown over the last decade. Studies have explored children's rights as citizens, children's perspectives on family relationships and what is a family, and children's attitudes about parental separation and participation in the decision-making process about post-separation parenting. Research clearly suggests that children's inclusion in the post-separation decision-making process is important to the promotion of their well-being.

PARTICIPATION IS IMPORTANT TO CHILDREN'S SAFETY

KATELYNN SAMPSON INQUEST - 2015-16

- 7-year-old Katelynn Sampson was beaten by her caregivers over a period of months and died of complications from her injuries on August 3, 2008
- the inquest into her death took place over four months in 2015-16, revealing significant gaps in the various systems meant to protect Katelynn – her voice was conspicuously absent in the provision of services
- the inquest jury made 173 recommendations with a strong child rights focus, including the adoption of "Katelynn's Principle", which states that "the child must be at the centre, where they are the subject of or receiving services through the child welfare, justice and education systems" and "is an individual with rights who must always be seen, whose voice must be heard and who must be listened to and respected"

KATELYNN'S PRINCIPLE: "CHILDREN ARE INDIVIDUALS WITH RIGHTS TO BE RESPECTED **AND VOICES** TO BE HEARD"

- the Child Youth and Family Services Act, 2017 which came into force on April 30, 2018, reflected an important shift to child and youth-centred service delivery, decision-making and language grounded in rights, including the UNCRC
- Katelynn's Principle is reflected in the first sentence of the preamble and the UNCRC is also specifically mentioned, with the aim of the Act "to be consistent with and build upon the principles expressed" in the Convention
- the rights of children and young people receiving services/in care are centered around meaningful engagement with them and respect for their views
- the views of the child are the first-listed and mandatory consideration when a best interests determination is made by decision-makers, with due weight to be given to the child's views in accordance with the child's age and maturity (e.g. s. 74(3))

BEST INTERESTS AND FAMILY ²⁴ VIOLENCE - DIVORCE ACT

Best interests of child

16 (1) The court shall take into consideration **only the best interests of the child** of the marriage in making a parenting order or a contact order.

Primary consideration

(2) When considering the factors referred to in subsection (3), the court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being.

Factors to be considered

(3) In determining the best interests of the child, the court shall consider all factors related to the circumstances of the child, including

(a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
(b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;

(c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;

(d) the history of care of the child;

(e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained;

(f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;

(g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

BEST INTERESTS AND FAMILY VIOLENCE - DIVORCE ACT

Factors relating to family violence

16 (4) In considering the impact of any family violence under paragraph (3)(j), the court shall take the following into account:

(a) the nature, seriousness and frequency of the family violence and when it occurred;

(b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

(c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;

(d) the physical, emotional and psychological harm or risk of harm to the child;

(e) any compromise to the safety of the child or other family member;(f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;

(g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and

(h) any other relevant factor.

Past conduct

(5) In determining what is in the best interests of the child, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order.

BEST INTERESTS AND FAMILY VIOLENCE - DIVORCE ACT

- the Divorce Act makes clear that the best interests of the child is the only consideration in parenting decisions (s. 16(1))
- provides specific factors to be considered in the best interests determination, including the views of the child as a mandatory consideration, with due weight to the child's age and maturity, as well as family violence considerations (ss. 16(3), (4))
- the Divorce Act provides that when considering the best interests factors, a court shall give primary consideration to the child's physical, emotional and psychological safety, security and well-being (s. 16(2))

WILLINGNESS TO SUPPORT THE DEVELOPMENT AND MAINTENANCE OF THE CHILD'S RELATIONSHIP WITH THE OTHER SPOUSE (S. 16(3)(C))

- the "friendly parent rule" is one of the best interests criteria, intended to reflect the importance of developing and maintaining the child's relationship with the other parent (s. 16(3)(c))
- while an important principle, it must be considered in light of the Act's family violence provisions to ensure that it is in fact in the best interests of the particular child
- this includes considering the overarching principle found in s.
 16(2) i.e. that developing and maintaining the child's relationship with the other spouse must be consistent with the child's physical, emotional and psychological safety, security and well-being

ABILITY TO COMMUNICATE AND COOPERATE (S. 16 (3)(I))

 s. 16(3)(i) provides that the court must consider the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child

 this too must be interpreted in light of the Act's family violence provisions to ensure that such communication and cooperation are in fact consistent with the child's physical, emotional and psychological safety, security and well-being

NO PRESUMPTION RE SHARED PARENTING OR "MAXIMUM" PARENTING TIME

- the Divorce Act does not contain a presumption that joint/shared parenting is in the best interests of children
- It no longer has the marginal note "Maximum Contact" (1985 Divorce Act) or "Maximum Parenting Time" (Bill C-78); it is now "Parenting time consistent with best interests of child"
- this is reflected in the language of s. 16(6) which states that in allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child
- looking at the Act as a whole, s. 16(6) does not espouse maximum parenting time but only as much parenting time as is consistent with the child's physical, emotional and psychological safety, security and wellbeing

PARENTING TIME CONSISTENT WITH THE BEST INTERESTS OF THE CHILD: BARENDREGT V. GREBLIUNAS, 2022 SCC 22

[133] What is known as the maximum contact principle has traditionally emphasized that children shall have as much contact with each parent as is consistent with their best interests. A corollary to this is sometimes referred to as the "friendly parent rule", which instructs courts to consider the willingness of a parent to foster and support the child's relationship with the other parent, where appropriate: see Young, at p. 44. Both of these considerations have long been recognized by the <u>Divorce Act</u>: see <u>Divorce Act</u>, pre-amendments, ss. 16(10) and 17(9); and <u>Divorce Act</u>, post-amendments, ss. 16(6) and 16(3)(c).

[134] Although Gordon placed emphasis on the "maximum contact principle", **it was clear that the best** interests of the child are the sole consideration in relocation cases, and "if other factors show that it would not be in the child's best interests, the court can and should restrict contact": Gordon, at para. 24; see also para. 49. But in the years since Gordon, some courts have interpreted what is known as the "maximum contact principle" as effectively creating a presumption in favour of shared parenting arrangements, equal parenting time, or regular access: Folahan v. Folahan, 2013 ONSC 2966, at para. 14 (CanLII); Slade v. Slade, 2002 YKSC 40, at para. 10 (CanLII); see also F. Kelly, "Enforcing a Parent/Child Relationship At All Cost? Supervised Access Orders in the Canadian Courts" (2011), 49 Osgoode Hall L.J. 277, at pp. 278 and 296-98. Indeed, the term "maximum contact principle" seems to imply that as much contact with both parents as possible will necessarily be in the best interests of the child.

[135] These interpretations overreach. It is worth repeating that what is known as the maximum contact principle is only significant to the extent that it is in the child's best interests; it must not be used to detract from this inquiry. It is notable that the amended <u>Divorce Act</u> recasts the "maximum contact principle" as "[p]arenting time <u>consistent with best interests of child</u>": s. 16(6). This shift in language is more neutral and affirms the child-centric nature of the inquiry. Indeed, going forward, the "maximum contact principle" is better referred to as the "parenting time factor".

[...]

[164] [...] the question before the trial judge was not how to best promote the parenting time factor; it was how to best promote the best interests of the children. These considerations are not synonymous. Nor are they necessarily mutually reinforcing. Courts should only give effect to the parenting time factor to the extent that it is in the best interests of the child.

FAMILY VIOLENCE: BARENDREGT V. GREBLIUNAS, 2022 SCC 22 (CONT'D)

(v) Family Violence as a Relevant Factor

[141] In this case, the acrimonious relationship between the parties — featuring abusive conduct during the marriage, at separation, and at trial — was a significant factor in the trial judge's relocation analysis. On appeal, the father argues that such "friction" is "not unusual for separating couples": R.F., at para. 35.

[142] Since Gordon, **courts have increasingly recognized that any family violence or abuse may affect a child's welfare** and should be considered in relocation decisions: see Prokopchuk v. Borowski, <u>2010 ONSC 3833</u>, 88 R.F.L. (6th) 140; Lawless v. Lawless, <u>2003 ABQB 800</u>, at para. <u>12</u> (CanLII); Cameron v. Cameron, <u>2003 MBQB 149</u>, 41 R.F.L. (5th) 30; Abbott-Ewen v. Ewen, <u>2010 ONSC 2121</u>, 86 R.F.L. (6th) 428; N.D.L. v. M.S.L., <u>2010 NSSC 68</u>, 289 N.S.R. (2d) 8, at paras. <u>22-23 and 35</u>; E.S.M. v. J.B.B., <u>2012 NSCA 80</u>, 319 N.S.R. (2d) 232, at paras. <u>55-57</u>. Courts have been significantly more likely to allow relocation applications where there was a finding of abuse: Department of Justice, A Study of Post-Separation/Divorce Parental Relocation (2014), at ch. 3.3.4.

[143] The suggestion that domestic abuse or family violence has no impact on the children and has nothing to do with the perpetrator's parenting ability is untenable. Research indicates that children who are exposed to family violence are at risk of emotional and behavioural problems throughout their lives: Department of Justice, Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce (February 2014), at p. 12. Harm can result from direct or indirect exposure to domestic conflicts, for example, by observing the incident, experiencing its aftermath, or hearing about it: S. Artz et al., "A Comprehensive Review of the Literature on the Impact of Exposure to Intimate Partner Violence for Children and Youth" (2014), 5 I.J.C.Y.F.S. 493, at p. 497.

[144] **Domestic violence allegations are notoriously difficult to prove**: P. G. Jaffe, C. V. Crooks and N. Bala, "A Framework for Addressing Allegations of Domestic Violence in Child Custody Disputes" (2009), 6 J. *Child Custody* 169, at p. 175; A. M. Bailey, "Prioritizing Child Safety as the Prime Best-Interest Factor" (2013), 47 Fam. L.Q. 35, at pp. 44-45. As the interveners West Coast LEAF Association and Rise Women's Legal Centre point out, family violence often takes place behind closed doors and may lack corroborating evidence: see S. B. Boyd and R. Lindy, "Violence Against Women and the B.C. Family Law Act: Early Jurisprudence" (2016), 35 C.F.L.Q. 101, at p. 115. Thus, proof of even one incident may raise safety concerns for the victim or may overlap with and enhance the significance of other factors, such as the need for limited contact or support.

FAMILY VIOLENCE: BARENDREGT V. GREBLIUNAS, 2022 SCC 22 (CONT'D)

[145] The prospect that such findings could be unnecessarily relitigated on appeal will only deter abuse survivors from coming forward. And as it stands, **the evidence shows that most family violence goes unreported**: L. C. Neilson, Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases (2nd ed. 2020), 2017 CanLIIDocs 2 (online), at ch. 4.5.2.

[146] The recent amendments to the <u>Divorce Act</u> recognize that findings of family violence are a critical consideration in the best interests analysis: s. 16(3)(j) and (4). The <u>Divorce Act</u> broadly defines family violence in s. 2(1) to include any violent or threatening conduct, ranging from physical abuse to psychological and financial abuse. Courts must consider family violence and its impact on the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child.

FAMILY VIOLENCE: BARENDREGT V. GREBLIUNAS, 2022 SCC 22 (CONT'D)

[169] The mother's need for emotional support was a relevant consideration in the best interests analysis. The mother followed the father to Kelowna, but her family remained in Telkwa. A move that can improve a parent's emotional and psychological state can enrich a parent's ability to cultivate a healthy, supportive, and positive environment for their child. Courts have frequently recognized that a child's best interests are furthered by a well-functioning and happy parent: Burns v. Burns, 2000 NSCA 1, 183 D.L.R. (4th) 66, at pp. 81-82; L. (S.S.) v. W. (J.W.), 2010 BCCA 55, 316 D.L.R. (4th) 464, at para. 33; Bjornson, at para. 30; Orring v. Orring, 2006 BCCA 523, 276 D.L.R. (4th) 211, at para. 57.

[170] It is also simplistic to suggest that emotional support for the mother was the only benefit that weighed in favour of relocation. The trial judge described, in great detail, how the continuing animosity between the parents would impact the children should they stay in Kelowna. He also noted that the move would provide the mother with the benefit of housing support, childcare, better employment, and opportunities to advance her education: paras. 1, 44 and 46-47.

[171] These considerations all have direct or indirect bearing on the best-interests-of-the-child assessment. Relocation that provides a parent with more education, employment opportunities, and economic stability can contribute to a child's wellbeing: Larose v. Larose, 2002 BCCA 366, 1 B.C.L.R. (4th) 262, at paras. <u>6 and 19</u>; H.S. v. C.S., 2006 SKCA 45, 279 Sask. R. 55, at para. <u>26</u>; see also E. El Fateh, "A Presumption for the Best?" (2009), 25 Can. J. Fam. L. 73, at pp. 80-83.

[172] Similarly, the additional support of family and community at the new location can enhance the parent's ability to care for the children: D.A.F. v. S.M.O., <u>2004 ABCA 261</u>, 354 A.R. 387, at para. <u>17</u>. Extended family, for example, can provide additional support to children while their parents begin to navigate the new terrain of post-separation life: *Harnett v. Clements*, <u>2019 NLCA 53</u>, 30 R.F.L. (8th) 49, at paras. <u>22 and 42</u>; C.M. v. R.L., <u>2013 NSFC 29</u>, at para. <u>139</u> (CanLII).

[173] It is often difficult to disentangle the interests of a parent from the interests of a child. Indeed, "the reality that the nurture of children is inextricably intertwined with the well-being of the nurturing parent" is far from novel: Pelech v. Pelech, <u>1987 CanLII 57 (SCC)</u>, [1987] 1 S.C.R. 801, at p. 845; see also Willick, at pp. 724-25, per L'Heureux-Dubé J. A child's welfare is often advanced in tandem with improvements in the parent's financial, social, and emotional circumstances. The trial judge found this to be the case here.

FAMILY VIOLENCE: A.M.R.I. V. K.E.R., 2011 ONCA 417

[75] This case is a powerful illustration of this point. A mere five months before the hearing of the Hague application, the IRB had concluded that the child was at sufficient risk of persecution, due to harm at the hands of her mother, to warrant recognition of refugee status. In these circumstances, while the IRB ruling granting refugee status to the child was not dispositive of whether the grave risk of harm exception to return under art. 13(b) of the Hague Convention was established, it nonetheless gave rise to a rebuttable presumption that this exception was engaged.

[...]

[82] Finally, and importantly, the requirement that a Hague Convention judge consider a risk of persecution on a Hague application involving a refugee child accords with the requirements of the Convention on the Rights of the Child [...] The CRC provides that the best interests of the child shall be "a primary consideration" in "all actions concerning children" and, in some circumstances, may require the separation of the child from his or her parents: arts. 3 and 9.

[...]

[120] An order of return under the Hague Convention has a profound and often searing impact on the affected child. Where the proposed return engages the child's <u>s. 7 Charter</u> rights, as in this case, meaningful procedural protections must be afforded to the child. In our view, these include the right to (1) receive notice of the application; (2) receive adequate disclosure of the case for an order of return; (3) a reasonable opportunity to respond to that case; (4) a reasonable opportunity to have his or her views on the merits of the application considered in accordance with the child's age and level of maturity; and (5) the right to representation.

FAMILY VIOLENCE: M.A.A. V. D.E.M.E., 2020 ONCA 486

[45] Here, the application judge determined that Ontario could not exercise jurisdiction to make custody and access orders because **she was not satisfied on a balance of probabilities that the children would suffer serious harm if returned to Kuwait.** In coming to this conclusion, **she discounted the children's evidence on the basis that it was the product of the mother's inappropriate influence. She made this assessment in the face of uncontradicted evidence from three separate OCL experts that the children's views were in fact independent.** She did not explain why this expert evidence should be rejected. **This was an error.**

[46] The right of children to participate in matters involving them is fundamental to family law proceedings. Canada has adopted the Convention on the Rights of the Child, effectively guaranteeing that their views will be heard. A determination of best interests -- which is engaged in all child-related matters -- must incorporate the child's view.

FAMILY VIOLENCE: S.S. v. R.S., 2021 ONSC 2137

27. A human rights-based approach to the new <u>Divorce Act</u> calls on courts to recognize, respect and reflect each child as an individual distinct from their parents, and to empower children to be actors in their own destiny.

28. In practice, it requires judges to probe into each child's lived experience, to meaningfully consider their views and preferences, and to craft an order that promotes that child's best interests and overall well-being. The "family violence" provisions in the amended legislation, in particular, empower courts to protect children from unique forms of violence that can have devastating lifelong impacts.

[...]

39. A human rights-based approach fundamentally recognizes children as subjects of law rather than objects of their parents. **Making children more visible in legal proceedings that affect their rights is fundamentally important in Canada because children are not guaranteed legal representation in family law proceedings.**
BARRIERS TO PARTICIPATION: "PARENTAL ALIENATION"

- despite the legal obligations created by the UNCRC and a broadening consensus recognizing children as competent actors in their own lives, there remains an implementation gap, with concerns from some that participation will unduly burden children and harm them by placing them in the middle of adult conflicts
- significant among these is the concern that participation, including legal representation, will make children targets for parental alienation
- although separating parents do sometimes engage in this type of behaviour and must be actively discouraged from doing so, these allegations have the potential to minimize and even silence the voice of the child, (see A.M. v. C.H., 2019 ONCA 764, at para. 75;
 Bouchard v. Sgovio, 2021 ONCA 709, at para. 75), often causing great distress to the child. Moreover, the therapeutic interventions forced on children in some cases to address alleged alienation are concerning, arguably violating their right to make treatment decisions, which go to their fundamental rights to personal and psychological integrity. (See, for example, Children's Aid Society of Peel Region v. F.(K.J.), 2009 ONCJ 198, at para. 16; A.M. v. C.H., 2019 ONCA 764, at paras. 81, 84, 86-91; V.L. v. M.L., 2019 ONSC 7367, at paras. 124-126)
- decision-makers must be cautious not to automatically discount a child's views / avoid legal representation for the child when concerns about parental manipulation are raised. An approach which considers the extent to which the child's views are rooted in reality, or *might reasonably be perceived as such by the child*, is preferable, as it considers the situation from the child's perspective

BARRIERS TO PARTICIPATION: "PARENTAL ALIENATION"

- the specter of alienation may side-step a more nuanced examination of the complexities of child-parent relationships both pre- and post-separation
- there may be any number of factors at play, ranging from a child's natural affinity for one parent to realistic estrangement from the other parent due to abusive or other less-than-ideal parenting behaviours
- allegations of alienation risk silencing children (and women) such that evidence of family violence and negative parenting is not presented; deflecting attention from scrutiny of child risk in family violence cases and from research that demonstrates child resistance to contact and child harm are better explained by factors other than those proposed by parental alienation theory; and ignoring emerging evidence that parental alienation "remedies" are harming many children (see https://www.learningtoendabuse.ca/docs/WHO-May13-2019.pdf; Drozd, L., & Bala, N. (2017), Introduction, In Judge, A., & Deutsch, R. M. (Eds.), Overcoming parent-child contact problems: Family-based interventions for resistance, rejection, and alienation, Oxford University Press, p. 2; Morrison, F., Tisdall, E.K.M., & Callaghan, J.E.M., Manipulation and Domestic Abuse in Contested Contact Threats to Children's Participation Rights, (2020) 58:2 Fam Court Rev 403–416; M.P.M. v A.L.M., 2021 ONCA 465, at para. 34
- current research suggests that the "best explanation is a multi-factor systemic view of the phenomena" (J. Kelly and J. Johnston, The alienated child: A reformulation of parental alienation syndrome, 39:3 Family Court Review 249 (2001))
- claims of parental alienation as a "syndrome" have been widely discredited

BARRIERS TO PARTICIPATION: CONSENT TO TREATMENT

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- Ontario's Health Care Consent Act (HCCA) provides that "a person is presumed to be capable with respect to treatment" (s. 4(2)); provincial/territorial legislation varies PEI and the Yukon also have legislation that explicitly recognizes that capable persons of any age have the right to make treatment decisions for a cross-Canada summary, see https://cps.ca/en/documents/position/medical-decision-making-in-paediatrics-infancy-to-adolescence
- it does not provide any minimum age for capacity to make medical treatment decisions (A.C. v. L.L., 2021 ONSC 6530, at para. 35)
- if the health practitioner believes the child has the capacity to consent to treatment, they must abide by the child's wishes. If the health practitioner determines the child is not capable of consenting, s. 20 of the HCCA outlines who may give consent on behalf of the child (substitute decision-maker)
- as found in Gegus v. Bilodeau, 2020 ONSC 2242 (at paras. 48-51), "[...] the HCCA contemplates situations in which only one parent, by court order or separation agreement, has the authority to give consent on behalf of a child when the child is determined to be incapable. The determination of whether only one parent should have this authority is determined under the appropriate legislation, in this case, the Children's Law Reform Act". See also Warren v. Charlton, 2022 ONSC 1088, at paras. 12-14

BARRIERS TO PARTICIPATION: CONSENT TO TREATMENT

- contrary to the direction of the HCCA, a number of family law courts have determined that decision-making authority for treatment decisions can be conferred on a parent, when the parents cannot agree, having regard to the best interests of the child, even when no finding of incapacity has been made with respect to the child under the HCCA
- this has arisen in cases where children have been ordered to participate in reunification therapy without their consent, or where a parent has been given the right to make a vaccination decision regardless of any finding of incapacity by a treatment provider with respect to the child (e.g. AM v. CH, 2019 ONCA 764, at para. 71; M.P.M. v. A.L.M., 2021 ONCA 465, at paras. 35-37; Bouchard v. Sgovio, 2021 ONCA 709, at paras. 72, 74, 81; J.N. v. C.J., 2023 ONCA 77; CMG v DWS, 2015 ONSC 2201, at paras. 48 & 52; BCJB v. E-RRR, 2020 ONCJ 438, at paras. 241 & 243; 2021 ONSC 6294 (aff'd); 2022 ONCJ 500. (For a proper framing of the issue, see A.C. v. L.L., 2021 ONSC 6530, at para. 34 and 39; see also A.B. v. C.D., 2020 BCCA 11, at paras. 130-143 under BC's legislative scheme)
- this has the effect of undermining children's agency, the presumption of capacity under the HCCA and the right to consent to treatment decisions

LIVED REALITIES OF CHILDREN IN FAMILY VIOLENCE AND ALIENATION CASES

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Young people who have been excluded from court processes or whose views have been minimized have spoken out about:

- their lived realities; and
- harmful consequences for them
- including being arrested, often publicly, and being forced to participate in reunification therapy against their will

https://www.youtube.com/channel/UCnKAbkPgNqNsGWW1p4 LwFqw?view_as=subscriber

https://www.youtube.com/watch?v=14dFKCxp6QQ

THE RIGHT TO BE HEARD IS NOT DISCRETIONARY

 as found by the YKSC in B.J.G v. D.L.G, 2010 YKSC 44 (at para. 13), and cited with approval by the ONSC in Medjuck v. Medjuck, 2019 ONSC 3254 (at para. 31):

There is no ambiguity in the language used. The [UNCRC] is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.

 see also F.(M.) c. L.(J.), 2002 CanLII 63106 (QcCA) (at para. 35), a case involving allegations of alienation and the role of child's counsel

GIVING DUE WEIGHT TO THE CHILD'S VIEWS

- once heard, consistent with article 12, the Divorce Act and provincial/territorial legislation requires children's views be given due weight in accordance with the child's age and maturity
- the UN Committee on the Rights of the Child urges the avoidance of tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight (General Comment 12, at para. 132)
- the Committee further states:

If the child is capable of forming her or his 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.

(General Comment 12, at para. 44)

- this belies the oft-heard phrase that "children should have a voice but not a choice"
- children must be informed as to how their views have been interpreted and used and, where necessary, provided with the opportunity to challenge and influence the analysis of the findings (General Comment 12, at para. 134(i))

THE PROPER QUESTION: SK v. DG, 2022 ABQB 425

The proper question in my view [257] is: Why should I not follow the child's wishes? If we accept that a childcentered approach in decisions of this nature is appropriate, the burden should not be on the child to prove why their views should be considered. The adults should have to demonstrate why what the child wants is not in their best interests. The international and domestic legal framework discussed above is not an abstract notion of justice for children. One must try to appreciate their lived experience through their lens, take their views seriously, and engage in a subjective consideration of what they consider important to them.

REALIZING THE CHILD'S RIGHT TO BE HEARD

The UN Committee on the Rights of the Child identifies five steps to facilitate the child's right to be heard:

- Preparation: the child needs to be informed of right to express an opinion, know their options, and consequences of the choices
- Hearing: the context in which the child participates needs to be enabling and encouraging
- Assessment: good practice developed to assess capacity and the child's views must be given due weight
- Feedback: the child should be informed of the outcome of the process and explained how their views were considered
- Complaints: the child should be informed of what complaint procedures or remedies may be in place

General Comment 12, at paras. 40-47

There is an obligation to assess the capacity of the child to form an autonomous opinion to the extent possible

A child's capacity must be assessed individually with no age limitation and no starting presumption of incapacity



It is not necessary that the child have comprehensive knowledge of all aspects of the matter affecting them, but that they have sufficient understanding to be capable of appropriately forming their own views on the matter

(General Comment 12, at paras. 20-21)

Capacity refers to cognitive capacity to form views and communicate them:

B.J.G. v. D.L.G., 2010 YKSC 44, at para. 27

EFFECTING CHILDREN'S PARTICIPATION IN FAMILY JUSTICE PROCESSES

There are various mechanisms by which children's views can be included in family court processes:

- legal representation
- Views/Voice of the Child Reports
- parenting assessments
- judicial interviews
- direct evidence from the child (testimony, affidavit)
- evidence from the parties or other witnesses

But not all methods of hearing from the child are created equally...

ACCESS TO JUSTICE FOR CHILDREN

- Access to justice is a fundamental right in itself and an essential prerequisite for the protection and promotion of all other human rights
- Access to justice for children requires the legal empowerment of all children and includes access to information and effective remedies to claim their rights, including through legal and other services, child rights education, counselling or advice and support from knowledgeable adults

Report of the UN High Commissioner for Human Rights: Access to Justice for Children (2013) (cited in S.K. v. D.G., 2022 ABQB 425, at paras. 158-159)

GENERAL COMMENT 14: BEST INTERESTS AS A PRIMARY CONSIDERATION

The child's best interests is a threefold concept:

- 1) a substantive right: best interests as a primary consideration
- 2) a fundamental interpretative right: if more than one interpretation possible, the interpretation which most effectively serves the child's best interests should be chosen
- 3) a rule of procedure

(General Comment 14, at para. 6)

PROCEDURAL SAFEGUARDS TO IMPLEMENT THE CHILD'S BEST INTERESTS

The UN Committee on the Rights of the Child identifies eight **procedural safeguards** to guarantee the implementation of the child's best interests

General Comment 14, at paras. 85-99:

(i) the right of the child to express his or her own views

- (ii) establishment of facts
- (iii) time perception
- (iv) qualified professionals

(v) legal representation

 (vi) legal reasoning – decisions must explain how the decision was reached, how factors were weighted, and how the child's views were considered (see also S.S. v. R.S., 2021
 ONSC 2137, at para. 54)
 (vii) mechanisms to review or revise decisions
 (viii) child rights impact assessments



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LEGAL REPRESENTATION – A PROCEDURAL SAFEGUARD TO ENSURE IMPLEMENTATION OF THE CHILD'S BEST INTERESTS

- the child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and other equivalent bodies
- in such cases, the child should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision

(General Comment 14, para. 96)



GENERAL COMMENT NO. 5: GENERAL MEASURES OF IMPLEMENTATION OF THE CONVENTION

General Comment No. 5 states that "for rights to have meaning, effective remedies must be available to redress violations" (at para. 24) This includes the provision of child-friendly information, advice, advocacy, including support for self-advocacy, access to independent complaints procedures and the courts with necessary legal and other assistance (at para. 24)

OTHER INTERNATIONAL STANDARDS

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- interpretation of the UNCRC may have regard to the provisions of other treaties (article 31(3)(c), VCLT) and children may avail themselves of the provisions most conducive to the realization of their rights in any national or international law in force in the State (article 41, UNCRC)
- The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) recognize the right to "legal personality" and the right to equality before the law without discrimination, including the right to a fair trial
- General Comment No. 32 of the Human Rights Committee on article 14 of the ICCPR confirms the right to a fair trial encompasses civil as well as criminal proceedings (at para. 3), and specifically recognizes that "the availability of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way" (at para. 10)

REPORT OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS: ACCESS TO JUSTICE FOR CHILDREN (2013) 40. As children are usually disadvantaged in engaging with the legal system, whether as a result of inexperience or lack of resources to secure advice and representation, they need access to free or subsidized legal and other appropriate assistance to effectively engage with the legal system. Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults.

43. While the right to free legal assistance is not explicitly provided for in international law outside the criminal law context, access to legal and other assistance in these matters is essential for ensuring that children are able to take action to protect their rights...

UN HUMAN RIGHTS COUNCIL **RESOLUTION: "RIGHTS OF** THE CHILD: **ACCESS TO JUSTICE FOR** CHILDREN" (2014) 3. Recalls that children are entitled to the same legal guarantees and protection as are accorded to adults, **including all fair trial guarantees**, while enjoying at the same time the right to special protection because of their status as children; [...]

9. Also reaffirms the need to respect all legal guarantees and safeguards at all stages of all justice processes concerning children, including due process, the right to privacy, the guarantee of legal aid and other appropriate assistance under the sae or more lenient conditions as adults, and the right to challenge decisions with a higher judicial authority;

[...]

11. Stresses that children should have their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parent or other legal guardian;

COUNCIL OF EUROPE: GUIDELINES ON CHILD-FRIENDLY JUSTICE (2010)

As a fundamental principle, the Guidelines articulate that the rule of law should apply fully to children as it does to adults, emphasizing that elements of **due process** such as the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, **should be guaranteed for children as they are for adults and should not be minimized or denied under the pretext of the child's best interests.** (at para. III(A)(2))

Re legal representation, the Guidelines provide, inter alia, that:

37. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.

38. Children should have access to free legal aid, under the same or more lenient conditions as adults.

[...]

40. Children should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.

INTERNATIONAL ASSOCIATION OF **YOUTH AND** FAMILY JUDGES AND **MAGISTRATES: GUIDELINES ON CHILDREN IN** CONTACT WITH THE JUSTICE SYSTEM (2017)

- the Guidelines highlight the child's "right to legal or other appropriate assistance for the preparation and presentation of their case" as one of the most important procedural safeguards in criminal, civil, child protection and administrative law procedures
- they recommend that children be provided with access to legal assistance and representation in their contacts with the justice system "whenever their interests are at stake"
- children must have their own counsel and representation, in their own name, with the lawyer expressing and defending exclusively the views of the child
- lawyers' obligations include providing children with all necessary information; advising and guiding children throughout the proceedings; expressing the child's views to the court; and being present throughout
- children's communications with their lawyers must take in place in conditions that guarantee full privacy and confidentiality; that children be provided with free legal aid supported by the State; and that lawyers for children have special knowledge and training on children's rights, as well as communicating with children at their level of understanding 57

ROLE OF CHILD'S LAWYER

- goes beyond simply advising decision-makers about the views of the child; it requires participation throughout the process to protect the child's interests – this may include appeals, as necessary
- includes ensuring the process is timely, fair and child-friendly; offering confidential communications/legal advice; canvassing settlement options; establishing relevant facts through investigation, presentation, and testing of evidence; and making legal arguments which ensure that decision-makers interpret the evidence in a manner that is favourable to the child-client

ONTARIO (CHILDREN'S LAWYER) v. ONTARIO (INFORMATION AND PRIVACY COMMISSIONER), 2018 ONCA 559

- The UNCRC "requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests, including privacy." (para. 51)
- Like solicitor-client privilege, the confidential relationship between the Children's Lawyer and children is "fundamental to the proper functioning of our legal system" and the protection of that relationship "has a central importance to the legal system as a whole". (at paras. 52 and 56)
- The Children's Lawyer's "fiduciary duties to the child require undivided loyalty, good faith and attention to the child's interests, to the exclusion of other interests, including the interests of the child's parents, the interest of the Crown and the interests of MAG". (at para. 69)
- (The only way that the role of the Children's Lawyer differs from that of a conventional solicitor-client relationship is that the child is entitled to a <u>heightened</u> protection of confidentiality as mandated by the Convention. (at para. 88)

JUSTICE FOR CHILDREN AND YOUTH v. J.G., 2020 ONSC 4716

- this appeal decision addresses significant issues about the rights of a child to independent legal advice in the context of a high conflict dispute between his parents over custody and access
- it relied upon the UNCRC and its General Comments (at paras. 61-62)
- the Court held that access to legal advice is a fundamental right in Canada that is not limited to adults. Children are entitled to seek legal advice without permission from their parents or the court. (at paras. 51 & 63)

THE INTERESTS AT STAKE

- the interests at stake in certain family law matters are arguably of the highest order, including:
 - children temporarily or permanently removed from the care of their parents in child protection proceedings
 - children whose relationships with parents are significantly impacted by parenting/decision-making responsibility orders, including those where police enforcement, reversal of custody or intrusive therapeutic interventions may be ordered:

Moreover, the trial judge's order has the potential to dramatically change J.B.'s life. In the light of that potential, he ought to be able to participate in the proceeding that will determine with whom and under what terms he lives, independently of either the alienating or alienated parent. (SGB v SJL, 2010 ONCA 578, at para. 16)

these cases may engage a child's s. 7 Charter rights to security of the person, including both physical & psychological integrity, and as such, must conform to the principles of fundamental justice (see New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3 S.C.R. 46; J.T. v. Newfoundland and Labrador (Child, Youth and Family Services), [2015] N.J. No. 390 (C.A.); A.M.R.I. v. K.E.R., 2011 ONCA 417); Re R.A., 2002 YKTC 28, at paras. 167-168; Bouchard v. Sgovio, 2021 ONCA 709, at paras. 107, 108, 110, 112-113; Nova Scotia (Community Services) v. T. C., 2010 NSSC 69, at para. 41; S.K. v. D.G., 2022 ABQB 425, at para. 306)

UNACCEPTABLE RISK OF ERROR



 the Supreme Court of Canada in New Brunswick (Minister of Health and Community Services) v. G.(J.), [1999] 3
 SCR 46, identified the section 7 interests at stake for parents and children and the risk of error in a child protection case caused by a lack of representation:

Without the benefit of counsel, the appellant [mother] would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's section 7 right to security of the person. (at para. 81)

 it is suggested that the same analysis applies to the need for legal representation for the child since it is the child, more than anyone else, who is most significantly affected by the court's decisions in family law matters

FUNDAMENTAL JUSTICE

 the need for procedural safeguards, including legal representation, was also confirmed by the Ontario Court of Appeal in A.M.R.I. v. K.E.R., 2011 ONCA 417, in the context of a refugee child who was the subject of a return order under the Hague Convention:

An order of return under the Hague Convention has a **profound and often searing impact on the affected child**. Where the proposed return engages the child's s. 7 *Charter* rights, as in this case, **meaningful procedural protections must be afforded to the child.** In our view, these include the right to:

- (1) receive notice of the application;
- (2) receive adequate disclosure of the case for an order of return;
- (3) a reasonable opportunity to respond to that case:

(4) a reasonable opportunity to have this or her views on the merits of the application considered in accordance with the child's age and level of maturity; and

(5) the right to representation

LEGAL REPRESENTATION AS A CRITICAL ASPECT OF CHILDREN'S ACCESS TO JUSTICE

- these cases demonstrate that enhanced compliance with the principles of the UNCRC is frequently achieved through litigation
- a number also serve to highlight that legal representation for children in cases where their best interests are being assessed is a critical means of actualizing their rights, particularly where there is a conflict between the parties in the decision, as is the case in all family law proceedings

Giving people rights without access to those who can present those rights and expertly, without the right to representation, is thus of little value. But this is to acknowledge that we must go beyond rhetoric. Rights without remedies are of symbolic importance, no more. And remedies themselves require the injection of resources, a commitment on behalf of all of us that we review rights with respect, that we want them to have an impact on the lives of all people... (M. Freeman, Why It Remains Important to Take Children's Rights Seriously, 2007)

ADEQUATE RESOURCES



- to give effect to children's meaningful participation in family court processes, States Parties must allocate sufficient resources to ensure children have access to legal representation
- lack of funding for legal representation for children is contrary to Canada's implementation obligations under article 4 of the UNCRC which include facilitating children's access to the courts with necessary legal assistance
- in Canada, the unmet need for legal services has been widely acknowledged despite the fact that legal representation in the family justice system has been identified as an important element of access to justice with significant consequences for the long-term well-being of children (Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, Final Report: Meaningful Change for Family Justice: Beyond Wise Words (2013))
- Courts should not be unduly burdened with concerns regarding available resources when exercising their discretion to appoint lawyers for children: "it is the function of judges to apply the law, not to serve as a gatekeeper for public resources" (A. Daly, Children, Autonomy and the Courts: Beyond the Right to Be Heard (2018), at 233)

FURTHER INFORMATION

- C. Tempesta, Legal Representation as a Necessary Element of Children's Access to and Participation in Family Justice, in M. Paré et al. (Eds.), Children's Access to Justice: A Critical Assessment (2022)
- CBA Child Rights Toolkit, <u>https://www.cba.org/Publications-</u> <u>Resources/Practice-Tools/Child-Rights-Toolkit</u>
- The Hon. D. Martinson and C.E. Tempesta, Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation, (2018) 31:1 Can. J. Fam. L. 151
- The Hon. D. Martinson and Dr. M. Jackson, Using the Principles of Statutory Interpretation to Support the Equality Rights of Women and Children in Family Violence Cases (June 2021), online: FREDA Centre for Research on Violence Against Women and Children, <u>https://www.fredacentre.com/wpcontent/uploads/Martinson and Jackson Divorce Act 2021</u> <u>EN.pdf</u>
- P. Jaffe et al., Risk Factors for Children in Situations of Family Violence in the Context of Separation and Divorce, (February 2014), Department of Justice (Canada), online: <u>https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rfcsfvfreevf/rfcsfv-freevf.pdf</u>
- L.C. Neilson, Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases, 2nd ed. (2020), online: <u>2017 CanLIIDocs 2</u>

THANK YOU

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