

Children's Participation In Decision-Making Post Separation: Implications for the Divorce Act, 2020

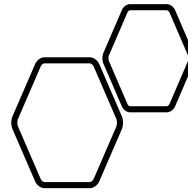
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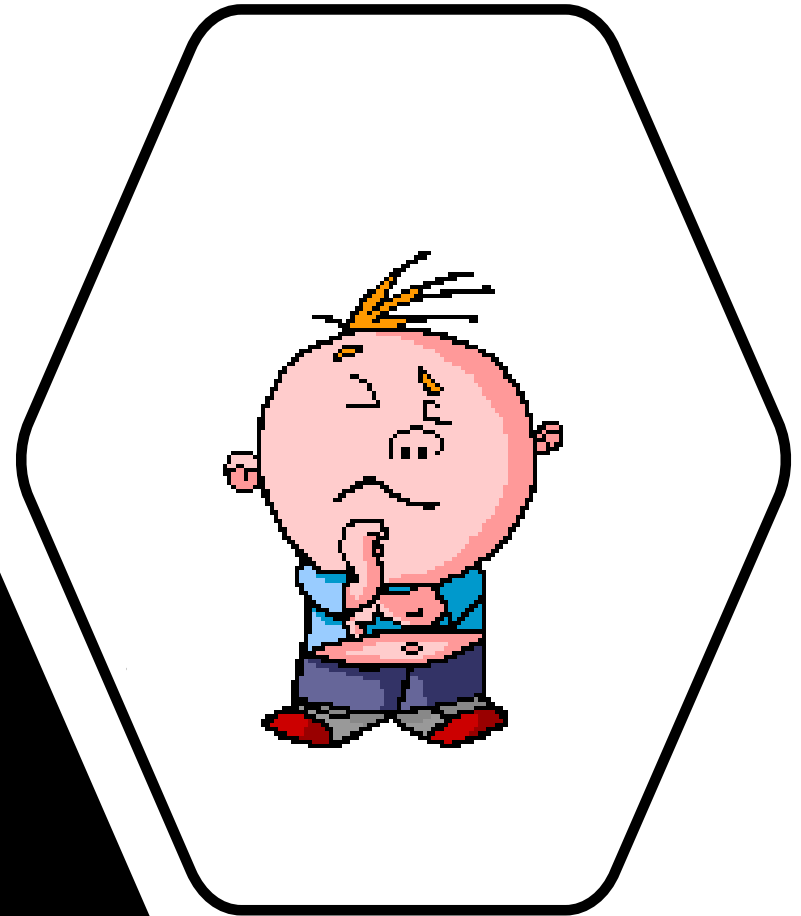
February 3, 2020

Boost Child & Youth Advocacy Centre, Toronto

Learning Goals



- Learn about importance of children's participation
- Learn about the Views of the Child Reports: The concept and results
- Learn about how children are center piece in new Divorce Act



Hearing From Children: Directly and Indirectly

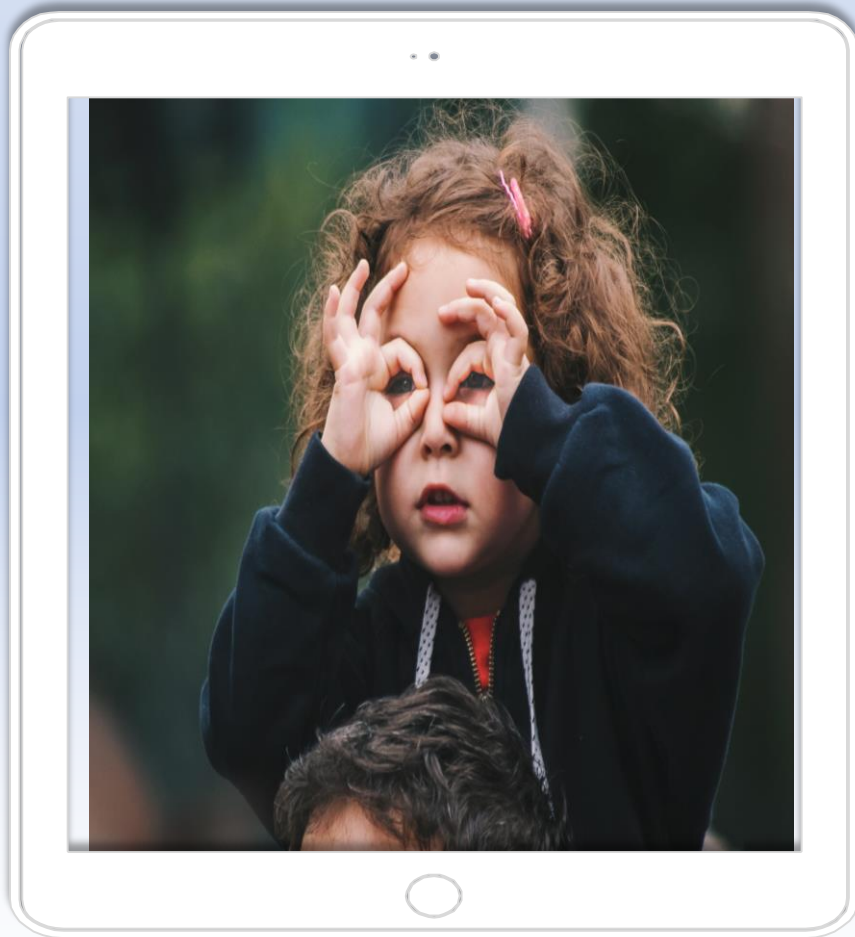
- Hearsay statements from parents
 - » reliability?
- Videos, letters or affidavits of child
 - » reliability?
- Hearsay statements & reports from teachers, doctors, therapists etc.
- Custody assessments – private and government funded
- **Views of child reports**
- Lawyer for child telling court about child's views
- Interview with judge or mediator



Choice vs Voice

“...while most children want to have their views considered, very few want to be placed in the position of having to choose between their parents, as most **want to have strong relationships with both parents,** and do not want to be seen as rejecting either parent.”

Bala, Hebert & Birnbaum, 2017



A child's
rights
perspective

Value of Views of the Child



- Child's views relevant to the welfare of child

"In order to find out what is in the best interests of the children, it seems logical to find out what the children think. How can you assess a child's best interests without hearing from the child?"

Beverley McLachlin, (former) Chief Justice of Canada,

- Parents often not aware of child's true feelings and knowing their views may help parents settle.
- Child engagement may result in better outcomes.

Views of Child Reports

- Views of the child reports increasingly used in Canada to ascertain perspectives and preferences of child
- Child focused, faster and less expensive
 - Useful in negotiation and mediation as well as litigation
 - Some Canadian judges prefer this to judicial interview
- Still controversy and confusion in Canada
 - Only views, or also “facts” related by child?
 - Should reporter comment on reliability?
 - Lack of consistency in process

Varying Terminology & Practices in Canada

- Hear the Child Report (started in BC)
 - BC Practice Guidelines, 2016
- Views of the Child
 - BC, Man, PEI, & NS gov't provides them
 - NB gov't pay if court orders
- Voice of the Child Report
 - Alta QB Practice Note 7
- Voice of the Child Report
 - NS Guidelines, 2015
- In Ontario no policies and very little use before 2016; OCL now provides them as part of their suite of services





The Law Foundation of Ontario

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VOC Project Context

- Started in 2014 with small advisory group who met for over 2 years/once per month.
- Pilot & research rolled out in May 2016 funded by Law Foundation of Ontario.
- Information forms sent to courts, lawyers and judges in pilot sites across Ontario as well as at Ontario-wide professional education programs.
- Court locations aware of project and reports to be filed.

VOC Pilot Project

2016-2017

- ❑ 11 court locations (Toronto, Brampton, Hamilton, Timmins, Ottawa, London, Belleville, Guelph, Milton, Kitchener, & Sault Ste. Marie).
- ❑ Significant administrative support from Office of Children's Lawyer (OCL)
- ❑ Over 120 social workers took training on VOC in March 2016 & January 2017
 - MHP paid rate as OCL (includes travel time, administration, interviews & report preparation).
 - OCL files VOC report; provides ongoing support if case requires s.112 or MHP is required to testify (3 trials to date on VOC, sw did not testify).

Demographic Results

CHILDREN: 86 children (38 boys, 48 girls)

- Average age: 12 years of age (range is 6-17 years of age)
- Most common issue in dispute is parenting arrangements
 - 11 cases where children have not had access to a parent in 6 months to 2 years.

OUTCOME of CASES:

- 70% cases settled as **direct result of VOC** (as reported by the parent/guardian/lawyer/judge)
 - 5 cases collapsed as parents did not consent after order made
 - 3 cases referred to child welfare
 - 1 dispute filed (case has since settled; access to father).
 - 2 cases where s.112 ordered after VOC

Interviewed

- ❑ 34 children: 22 girls/12 boys
- ❑ 41 parents/guardians: 21 mothers/2 maternal grandmothers/18 fathers
- ❑ 29 clinicians: 26 females/3 males
- ❑ 35 parents' lawyers: 25 females/10 males
- ❑ 28 judges: 20 females/8 males



Results of Views of Child Reports

- Parents, children and professionals generally satisfied
 - Parents report that they feel it is neutral as it only reports what their child said, and not negative comments about either parent or their parenting abilities/weaknesses.
- Facilitated settlements (lawyers, judges)
- In a few cases, child disclosed abuse which resulted in child welfare report or OCL undertook fuller assessment [Triage function]
- Very helpful for judges
- Much less expensive than alternatives



Lessons Learned



- VOC is a cost-effective approach for *some* cases
 - Does **NOT** replace assessments, child legal representation, child-inclusive mediation, or even judicial interviews.
 - But in some cases, a relatively fast and inexpensive option that can facilitate settle and help court hear from children.
 - Can also identify whether case requires more extensive assessment (e.g., abuse, mobility) or referral to child welfare (acts as a **triage process**).
 - Provides a ‘voice’ to children where they may have none.
 - In some cases, a good triage function.



**Bill C-78:
Amendments to the Parenting Provisions
of the Divorce Act**

Bill C-78: Overview

Bill C-78 re-enforces current trends- received royal assent on June 21, 2019

- New concepts replace proprietary & archaic “custody” & “access”
 - More significant in provinces without recent reform e.g., Ontario
- New obligations on parents and their counsel to consider harm of conflict on children, and consider use of ADR
- Provides consistency for “best interests”
- Law governing relocation applications will significantly change
- Bill C-78 also improves disclosure of financial records for support applications, facilitates gov’t support recalculation services and gov’t enforcement, allows for implementation of *Hague Convention on Child Protection* (1996). [in force later]

Bill C-78: New Concepts

No longer **custody** and **access**

decision-making responsibility means the responsibility for making **significant decisions** about a child's well-being, including in respect of:

- (a) health;
- (b) education;
- (c) culture, language, religion and spirituality; and,
- (d) significant extra-curricular activities.

parenting time means the time that a child of the marriage spends in the care of a person referred to in subsection 16.1(1), whether or not the child is physically with that person during that entire time;

Bill C-78: Parenting Time & Decision- Making

Parenting order

16.1 (1) A court of competent jurisdiction may make an order **providing for the exercise of parenting time or decision-making** responsibility in respect of any child of the marriage, on application by:

- (a) either or both spouses; or
- (b) a person, other than a spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent.

Terms and conditions

16.1(5) The court may...impose any terms, conditions and restrictions that it considers appropriate.

Parenting time — schedule

16.2 (1): Parenting time **may** be allocated by way of a **schedule**

Day-to-day decisions

16.2 (2) Unless the court orders otherwise, a person to whom parenting time is allocated under paragraph 16.1(4)(a) has exclusive authority to make, during that time, day-to-day decisions affecting the child [similar to FLA s. 32(5))]

Bill C-78: Encourages non-court “family dispute resolution”

Family dispute resolution process

7.3 To the extent that it is appropriate to do so, **the parties to a proceeding shall try to resolve the mattersthrough a family dispute resolution process.**

Duty to discuss and inform

7.7 (2) It is ... the duty of **every legal adviser...**

(a) to encourage the person to attempt to resolve the matters through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.

Family dispute resolution process

16 (6) Subject to provincial law, the [interim or final parenting] order **may direct the** parties to attend a family dispute resolution process.

Child-Centred Best Interests Factors: Parenting Orders and Contact Order: s. 16(3)

16(3) In making orders court shall consider “only” best interests, but all circumstances, *including*:

- Child’s needs (age and stage)
- Child’s relationship with spouse, siblings, grandparents and any other person who “plays an important role” in child’s life
- History of care of child
- Child’s cultural, linguistic, religious and spiritual upbringing and heritage, “including Indigenous” heritage
- any “family violence”

Best interests – views of child

- s.16(3)(e) specifies that in making a parenting plan, parents, professionals and the courts “*shall*” consider “the child’s views and preferences, giving due weight to the child’s age and maturity, unless they cannot be ascertained.”
- Statutory codification of existing caselaw, but this provision establishes an obligation on both the court making a parenting decision, and the parties presenting a case, to make reasonable efforts to “ascertain” the views and preferences children.
- Consistent with *Convention on Rights of Child*
- Bill C-78 likely to increase Canada-wide awareness of judges, lawyers and parents of importance of child’s perspectives, and encourage views of child reports, judicial interviews etc.

Definition of “family violence” is broad

s. 2: family violence means any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person — and in the case of a child, the direct or indirect exposure to such conduct — and includes:

- (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
- (b) sexual abuse;
- (c) threats to kill or cause bodily harm to any person;
- (d) harassment, including stalking;
- (e) the failure to provide the necessaries of life;
- (f) psychological abuse;
- (g) financial abuse;
- (h) threats to kill or harm an animal or damage property; and,
- (i) the killing or harming of an animal or the damaging of property.

But application to be nuanced

16(4) In considering the impact of any family violence... 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.

Parenting Plans



16.6 (2) “**parenting plan** means a document or part of a document that contains the elements relating to parenting time, decision-making responsibility or contact to which the parties agree.”

Parents encouraged to make their own plan, using mediation, lawyers or their own resources

Parents “may” submit a parenting plan to court. If they do, the court “shall” include the parenting plan in the parenting order, **UNLESS** the court determines it is not in the child’s best interests, **AND THEN** court may make amendments to the plan

Resources to Help Make Parenting Plans

- **Justice Canada**
 - **Making plans: A guide to parenting arrangements after separation or divorce - How to put your children first**
 - http://www.justice.gc.ca/eng/fl-df/parent/mp-fdp/En-Parenting_Guide.pdf
 - **Parenting Plan Checklist -**
 - <http://www.justice.gc.ca/eng/fl-df/parent/ppc-lvppp/index.html>
 - **Parenting Plan Tool**
- <https://www.justice.gc.ca/eng/fl-df/parent/ppt-ecppp/form/form.html>
- **www.ourfamilywizard.com (annual fee)**
- **AFCC-O Parenting Plan Guide & Template:**
- <https://afccontario.ca/parenting-plan-project>

“Legal Advisers”: s. 7.7(2)

- Encourage parties to use FDRP, unless inappropriate to do so.
- Inform parties of “family justice services” that might assist in resolving matters, and complying with court orders.
- And must inform clients (parents) of their duties under the Act:
 - Avoid conflict
 - Focus on best interests of child, including support for relationship of child with other parent
 - Obey court orders
- Informing parents of their duties to be “good parents” is not just an ethical (and after Bill C-78 a statutory) duty, and will help their children adjust to separation, but in the event of litigation it will also advance their position in court as judges will consider this under Bill C-78
- Ethical duties of family lawyers evolving – recognize duties to children:
 - John-Paul Boyd (2019):
<http://www.slaw.ca/2019/02/08/the-need-for-a-code-of-conduct-for-family-law-disputes-part-2/>
 - e.g., carefully consider tone of communication with other parent
 - e.g., Bala, Hebert & Birnbaum(2017, Can Bar Review)
<https://cbr.cba.org/index.php/cbr/article/view/4428>

Department of Justice Canada is developing materials and training on Bill C-78



Visit the Department of Justice website (<https://www.justice.gc.ca/eng/>) regularly for updates to information for families, legal advisers and service providers.



New documents such as: The “Divorce Act Changes Explained” - explains the change and the reason for the change for most of the amendments to the *Divorce Act*.



Updates to documents such as [*Making plans: A guide to parenting arrangements after separation or divorce*](#)



Training modules and materials will also be available for professionals.



Thank You for Listening

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