Hearing the Voice of the Child in Family Proceedings

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HEARING THE VOICE OF THE CHILD IN FAMILY PROCEEDINGS

“The child who is the subject of a custody decision is the person with the most at stake. Paradoxically, if not surprisingly, it is the child’s voice that has often been lost in custody decisions.”

Children are our most precious resource, so why should we not hear from them and give due consideration to their views and preferences in accordance with their age and maturity, when making decision about their lives? In Canada, 4 out of 10 first marriages end in separation and divorce. Consequently, children are exposed to separation and family breakups on a daily basis. Children are caught in the cross fire both physically and emotionally; therefore what they think should matter to the adults making decisions about their living arrangements and schedules. Most children want to know what is going on and have input in decisions. We believe that better outcomes happen for children when they have a voice.

This paper will discuss why a child’s voice should be heard and explore how to hear children in high conflict custody, access and parenting matters.

We want to make clear at the forefront that we are not suggesting that children should be making decisions or choosing one parent over another. It would be extremely unfair to place any child in such a position. We are advocating that children should have a voice but not a choice. Whether we like it or not, children play a role; they are involved in the family dynamics of a break up. Children should be seen as other “actors in a family system rather than objects”.

There have been a number of papers written on The Voice of the Child and Representing Children in the last ten years. We specifically draw your attention to several written by Patricia Herbert Q.C. and Stephen Carter, Nick Bala, Rachel Birnbaum and the Honourable Justice Donna J. Martinson Q.C. and Catherine E. Tempesta as we refer to them throughout the paper. Jennifer Shaften has also created excellent training materials and power points on Representation of Children that has been of great assistance in the preparation of this paper. We hope our paper will serve as a quick reference when making a decision on your files when listening to the Voice of the Child is appropriate. We hope to educate you about the options and help you make informed decisions on how that voice should be heard.


Just as there is no single way to determine “the best interest of the child”, there is no single “best” way to involve children in the process; it may even be appropriate to use more than one method as a case proceeds. The stage and nature of a case, the type of professional resources that are available, as well as the child’s age and capacities are important factors in determining how to engage the child. Further, children should be asked about how they would like to be involved.

**WHY SHOULD WE LISTEN TO AND CARE ABOUT THE VOICE OF THE CHILD?**

In our opinion, the question we should actually ask is: “Why would you not listen to the child?” The old adage, “Children should be seen but not heard”, is outdated and for good reason. Children want to be heard; they want to know what is happening in THEIR lives. Significant research has found a majority of children want to be active participants in family matters and want to be listened to. It has been found children achieve better outcomes in their family separation if they feel they were heard rather than ignored.

Researchers have also noted benefits for parents when children are involved in the process. Parents tend to maintain focus on the child and the child’s needs during the parenting dispute and rarely lose sight of the real needs to be solved in the dispute. Hearing from their children can also allow parents to learn what impact their own behavior is having on their children and take steps to improve. Better outcomes in the family dispute as a whole have been noted when children have been involved in the process.

There is absolutely no evidence that involving children in these processes is harmful to children. Where there is harm to a child, it is as a result of the trauma of the separation or divorce. The pressure is the same whether or not child meets with a social worker, lawyer or judge.

From a legal perspective, we have obligations under both international and domestic law to listen to children and to involve them in the process.

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4 Ibid.


Canada is a signatory to the United Nations Convention of the Rights of the Child ("the Convention")[7]. It was signed by Canada on May 28, 1990 and ratified on December 13, 1991. Alberta was a signatory on January 13, 1999.

The relevant provisions of the Convention on the Rights of the Child which support the child’s right to representation and participation include:

Article 3 (1) states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 4 requires that State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention.

Article 12 (1) State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Article 12 (2) for this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceeding affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of the national law.

The Convention recognizes that children have the capacity to understand their own needs and interests and that capacity evolves to express their needs and interests to the adults charged with making decisions about their future. Therefore as a signatory, our Canadian legal system must have a way to ensure that the views and preferences of children about their needs and interests are presented to judges and all decision makers.

The principles of natural justice encompassed in the Convention require children to have the right to participate and be heard in all decisions affecting them and a right to be informed about proceedings that affect their lives.[8]

The most noteworthy case reviewing Canada’s obligations under the Convention is the decision of Justice Martinson of the Yukon Territory Supreme Court, B.J.G. v D.L.G.[9]. Justice Martinson does a

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