

Family

Giving effect to voice of the child

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(March 4, 2021, 10:40 AM EST) -- As the Supreme Court of Canada stressed in its seminal and often cited judgment, *Gordon v. Goertz* [1996] 2 S.C.R. 27, the focus in parenting matters is on the "best interests of the child." Amendments to the *Divorce Act*, effective March 1, now statutorily prescribe the best interests test, and one factor to be considered is the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained (s. 16(3)(e)). Thus, under the new *Divorce Act*, in most provincial statutes and at common law, one aspect of the best interests of the child analysis involves the child's view.

There are many reasons why obtaining the child's view is important, as flagged in the 2018 article by Nicholas Bala and Rachel Birnbaum, "Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases" ((2018) 59 *Les Cahiers de Droit* 787-829). The input of the child's view is important in any analysis of best interests and fundamental to judges making decisions about parenting plans, mediators trying to facilitate a settlement, as well as for parents trying to do the best by their children.

Research suggests that children's inclusion in the decision-making process is important for their long-term well-being and gives them some sense of control at a time of stress and turmoil in their lives. Children also may have important insights to offer to the problems at hand from a unique child's perspective.

The approach of eliciting the views of the child aligns with the directives enunciated in the United Nations Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, which Canada signed on May 28, 1990, and ratified on Dec. 13, 1991.

Broadly stated, the convention addresses every child's right to provision, protection and participation in matters affecting them. Article 3(1) makes a child's best interests a primary consideration in all actions, and Article 12 states that signatory states have an obligation to ensure that the child who is capable of forming his or her own views has a right to express them and to place due weight on these views once expressed.

While children's views and preferences are an important factor in determining which parenting order will be in a child's best interests, they are not the only factor — nor are they necessarily determinative. Instead, the weight accorded to a child's wishes depends on several factors such as age, maturity and, at common law, motivation (i.e., the independence of those views).

In assessing how to give effect to the voice of the child, many counsel defer to the option of the appointment of child's counsel. In Alberta and Ontario, at least, case law from the appellate courts suggests that the efficacy of this option may be limited, however. A more effective and less expensive option may be the "Voice of the Child Report" made available in recent years in many jurisdictions.

As discussed in the literature, there are at least three potential roles for the child's counsel: *amicus curiae*, best interests advocate and the traditional lawyers' role. In Alberta and Ontario, the appellate

courts have made it clear that the proper role of child's counsel is that of traditional advocate, such that the voice of the child may not be elicited by submissions from the child's counsel.

Alberta Court of Appeal authority of *R.M. v. J.S.* [2013] A.J. No. 1390 precludes the child's counsel from making submissions as to the views and wishes of the child, as the lawyer cannot be both advocate and witness. This authority is derived from the seminal Ontario case of *Strobridge v. Strobridge* [1994] O.J. No. 1247, in which the children's lawyer made submissions as to the views and preferences of the children regarding access by the father. The Ontario Court of Appeal stated at para. 36: "[N]or is counsel entitled to become a witness and advise the court what the children's access-related preferences are. If those preferences should be before the court, resort must be had to the appropriate evidentiary means ..."

The Alberta Court of Appeal in *R.M. v. J.S.* similarly disallowed the submissions by child's counsel as to the child's preferences regarding where to live, as "the submissions of the lawyers did not amount to useful evidence." (para. 24). The appellate court stated that the opinion of a qualified expert was needed.

Such qualified expert evidence can be provided by the relatively recently enabled "Views (Voice) of the Child Reports." In Alberta, these reports are enabled through Practice Note 7, which allows a court to order the preparation of the report by a parenting expert, usually a psychologist. As Bala and Birnbaum note, these reports are completed, usually in two interviews, with some commentary on the child's demeanour during the interviews, but no assessment or recommendations from the interviewer.

Too, in Alberta, the process often includes interviews with each parent, and sometimes collateral contacts, resulting in a report that describes what the parents identify as issues regarding the child, what the child says about the parents/family situation or an adolescent's understanding of the pros and cons of a parenting order and his or her appreciation of the implications (PN7, Alberta). The reports are much less expensive than a full assessment or representation by child's counsel and are usually prepared within a few weeks. Given their expeditious preparation and relatively low cost, these reports are an effective way to give voice to the child.

Regardless of the approach, whether through counsel or "voice of the child" expert or both, what is fundamental is the child's need to be protected from parental conflict, particularly in high-conflict cases and the appropriate weight to be given to child-inclusive decision-making or contributory processes.

Whether in the context of parenting co-ordination, mediation, arbitration or court, the child must have a voice, but in our view there should be no melding of the role of lawyer and the role of parenting expert. It is by working together that professionals can both advance the child's rights and interests as well as respect the views, feelings and worries of the child.

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