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BACKGROUND PAPER

THE VOICE OF THE CHILD IN DIVORCE, CUSTODY AND ACCESS PROCEEDINGS

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The Voice of the Child in Divorce, Custody and Access Proceedings

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INTRODUCTION

In Canada, legislative power with respect to family law is divided between the provincial governments and the Parliament of Canada. By virtue of section 91(26) *Constitution Act*,¹ the federal government has jurisdiction over marriage and divorce. Section 92(13) of the *Constitution Act* vests power in the provinces to enact laws pertaining to property and civil rights. As stated by the Supreme Court of Canada in *Reference Re Section 6 of The Family Relations Act*,² custody and access fall within provincial jurisdiction by virtue of the power in section 92(10). It is important to note that for matters incidental to divorce, which include custody and access as corollary relief, Parliament has jurisdiction.³ Thus, legislative power in the area of family law is shared between the two levels of government.

Historically, children in Canada have been denied the opportunity to participate in decisions of custody and access.⁴ Several reasons have been relied upon as justifications for excluding children from this process. It has been argued that parents are capable of putting forth their children's views in legal proceedings involving divorce, custody and access. As one academic states, "In Canada, it is assumed that in most divorce cases, a child's interest in custody can be protected by the court having heard the arguments of both parents."⁵ Moreover, members of the judiciary, and professionals such as social workers, psychologists and psychiatrists have subscribed to the view that children will be psychologically damaged if they participate in the process. A further reason for denying children the opportunity to directly express their preferences and wishes in family law matters has been that, traditionally, children were not considered to have rights independent of their parents.

The role of the child in family law disputes is undergoing re-examination. It is recognized that a child's perspectives may not be conveyed to the court if counsel for the parents are the sole parties putting forth the evidence. Parents in the midst of a divorce or separation may be vengeful, angry or self-absorbed, and consequently, may not be capable of adequately presenting the views, interests and wishes of the child to judicial decision-makers.⁶ It has also been asserted that prohibiting the child from participating in the process may have life-long adverse

¹ Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act* 1982 (U.K.), 1982, c.11.

² (1982), 26 R.F.L. (2d) 113 (S.C.C.).

³ *Zacks v. Zacks* (1973) 10 R.F.L. 53 (S.C.C.).

⁴ H.T.G. Andrews and P. Gelsomino, "The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View" in *Family Law: Dimensions of Justice* (edited by R. Abella and C. L'Heureux-Dubé), (Toronto: Butterworths, 1983) at 243; and C. Bernard, R. Ward, and B. Knoppers, "Best Interests of the Child Exposed: A Portrait of Quebec Custody and Protection Law" (1992-93), 11 *Can. J. Fam. L.* 57 at 136.

⁵ S. Toope, "The Convention on The Rights of the Child: Implications for Canada" in *Children's Rights A Comparative Perspective* ed. S. M. Freeman (England: Dartmouth Publishing Limited, 1996) at 55.

⁶ J. Begley, "The Representation of Children In Custody And Access Proceedings" (1994), 10 *Solicitors' Journal* 1 at 12; and R. Boll, "Who Speaks For The Child? The Right to Independent Legal Representation." (1993-94), *Law Now* 8 at 9.

repercussions on the child. In recent years, some academics, judges and practising lawyers⁷ have taken the position that it is in the best interests of children that “they participate in decisions that affect them and that they be listened to and taken seriously.” As Judge Nasmith states:⁸

Another myth that needs to be dislodged is that harm befalls a child from participating in the decision-making process. This has often been a rationalization for leaving the child’s voice out. Some experts feel it can be harmful for the child to be left out of the decision-making process. The more paternalistic approach overlooks the reality that the child is already harmed by the turmoil in his home and the stress that litigation has brought upon everyone.

It is argued that children must “become players in decisions that concern them, so that decisions are made with them rather than about them.”⁹ The legal system must not “muffle” the child’s voice; it must err on the side of inclusion rather than exclusion of the child’s views.¹⁰ This will contribute to their self-esteem and grant to children the respect to which they are deserving.¹¹ It is fundamental to note that the child’s preferences and wishes alone will not determine the outcome of the court decision, but rather will be weighed with other evidence presented to the court.¹²

A further reason for reassessment of the child’s role in family law proceedings is the relatively new perception that children have independent rights. Central to a child-centered approach is the notion that children are legal subjects as opposed to legal objects.¹³ This involves, according to commentators, “a philosophical shift from seeing children as extensions of their parents or in the extreme as property of their parents, to seeing them as legal entities in their own rights.”¹⁴ In other words, children are to be considered as “subjects actively involved in the legal process” rather than objects “over which a legal battle is fought.”¹⁵

In 1997, a Special Joint Committee of the House of Commons and the Senate was established by the Government of Canada. The mandate of the Joint Committee was to examine issues related to custody and access and “in particular to assess the need for a more child-centered approach to

⁷ See A. Mamo “Child Representation” Chapter 13 at 13-27 in J. McLeod, *Child Custody Law and Practice* (Toronto: Thomson Canada Limited, 1999 Updates) and A. P. Nasmith “The Inchoate Voice” (1991-92), 8 *Can. Fam. L.Q.* 43 at 54. See also Australian Law Reform Commission, *Speaking for Ourselves: Children and the Legal Process* (Commonwealth of Australia, 1996).

⁸ Nasmith, *ibid.*; at 55.

⁹ Bernard et al., *op.cit.*, note 4, at 131.

¹⁰ Nasmith, *op.cit.*, note 7, at 54 and 45.

¹¹ Bernard et al., *op.cit.*, note 4, at 134.

¹² Bernard et al., *op.cit.*, note 4, at 125. As stated by Supreme Court of Canada in *Stevenson v. Florant*, [1925] S.C.R. 532, the wishes of the child are not to be confounded with the interest of the child.

¹³ *Ibid.*, at 122.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, at 131.

family law policies and practices.”¹⁶ The Joint Committee held public hearings at different locations throughout the country. Children, parents and professionals from various disciplines such as lawyers, social workers and psychologists testified before the Committee.

A consistent theme that emerged from the testimony was the need to devise means of ensuring that children participated in decisions regarding custody and access. At the hearings, children and youth said they did not wish to be excluded from proceedings that would have a significant impact on their lives. They asserted that in contrast to their parents, children did not have easy access to lawyers to help them articulate their views to judicial decision-makers. They also said that they lacked the support systems available to their parents.¹⁷ Lawyers and mental health professionals who offered testimony at the Committee hearings agreed that it was important for children to have a “voice” in divorce, custody and access proceedings.

In December 1998, the Committee released its report, *For the Sake of the Children*. The Committee stated that measures must be taken to include children in family law decisions. Reference was made to Article 12 of the United Nations Convention on the Rights of the Child which explicitly states that children have a right to express their views freely in matters that affect them. The Committee concluded that if children were not consulted about these decisions, and if they were denied the right to participate in the decision-making process, they would not readily accept the custody and access arrangements imposed upon them. In the opinion of the Committee, this could have “dire consequences” for the child with “long-term mental health and other negative implications.”¹⁸

The Special Joint Committee made 48 recommendations. Recommendations 3 and 4, reproduced below, are addressed to the participation of children in divorce, custody and access proceedings. They state:¹⁹

3. This Committee recommends that it is in the best interests of children that
 - 3.1 they have the opportunity to be heard when parenting decisions affecting them are being made;
 - 3.2 those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any judge, assessor or mediator making or facilitating a shared parenting determination;
 - 3.3 a court have the authority to appoint an interested third party, such as a member of the child’s extended family, to support and represent a child experiencing difficulties during parental separation or divorce;

¹⁶ Extract from the Journals of the House of Commons, November 18, 1997 in *For the Sake of the Children*, Report of the Special Joint Committee on Child Custody and Access, Joint Chairs The Honourable Landon Pearson and Roger Gallaway, M.P. (Ottawa: Public Works and Government Services Canada, December 1998) at xii.

¹⁷ *For the Sake of the Children*, *ibid.*, at 1.

¹⁸ *Ibid.*, at 22.

¹⁹ *Ibid.*, at 23.

- 3.4 the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the *Divorce Act* or provincial legislation; and
 - 3.5 we recognize that children of divorce have a need and a right to the protection of the courts, arising from their inherent jurisdiction.
4. This Committee recommends that where, in the opinion of the court, the proper protection of the best interests of the child requires it, judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child.

The objective of this paper is to examine ways in which the voices of children can be heard in the context of divorce, custody and access disputes. At the outset, discussion will be provided regarding the dichotomy between child protection and the promotion of children's rights. An examination of Article 12 of the United Nations Convention on the Rights of the Child²⁰ will also be undertaken. The notion that children should have the right to independent legal representation will next be explored. Three different models of legal representation will be canvassed. The paper will also examine methods by which the voice of the child can be heard directly by the court. A discussion will ensue on the transmission of the views, interests, and wishes of the child by third parties to legal decision-makers. Woven throughout the sections are suggestions to policy makers and legislators concerning support mechanisms and advocacy services that should be available to children. Proposals contained in this paper will enable the federal and provincial governments to consider ways in which children can be given the opportunity for more direct involvement in family law proceedings. It is a central thesis of this paper that children be given real, and not merely symbolic, roles in legal hearings that affect their lives.²¹

The following words from members of the judiciary in British Columbia and Ontario merit consideration:

If we learn as much as we can about the children of relationship, their needs, their affective ties, their capabilities, their interests, or as much as we can about the abilities of those adults willing to care for them, we will be able to make orders that will best take advantage of the adult abilities available to fulfill the child's needs. To accomplish this task requires that we hear the voice of the child.²²

²⁰ UNGA Resolution, November 20, 1989, U.N. Doc A/Res/44/25. In force September 2, 1990.

²¹ See H.D. Davidson, "The Child's Right To Be Heard and Represented" in *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law*, ed. C. Price Cohen and H.D. Davidson, (U.S.A.: American Bar Association Center on Children and the Law, 1990) at 164.

²² C. Huddart and J. Ensminger, "Hearing the Voice of Children" (1991-92), 8 *Can. Fam. L.Q.* 95 at 96.

...

We must not be afraid of the truth; we must allow the child's voice to be heard. We must have definitions and guidelines from the legislatures as well as clear and consistent rulings from the courts to entrench the child's rights to be heard if we are to continue the slow march towards integrity in family law.²³

²³ Nasmith, *op.cit.*, note 7, at 66.

1.0 THE CONCEPT OF CHILDREN'S RIGHTS

1.1 The Emergence of the Notion of Children's Rights

Historians have argued that childhood, to a large extent, is a social construct. According to Philippe Aries, in his renowned treatise *Centuries of Childhood*,²⁴ the concept of childhood emerged relatively recently, in the past 400 to 600 years.²⁵

In the Middle Ages, the notion of childhood did not exist. Children dressed in the same manner as adults and they engaged in the same pastimes. Their education was carried out by means of apprenticeship during which they worked side by side with adults.²⁶ It was not until the Renaissance and the Reformation that the concept of childhood developed. During this period, children were perceived as innocent and weak. They were considered to be in need of discipline to ensure that they developed into appropriate human beings.²⁷ As Michael Freeman states in *The Rights and Wrongs of Children*, children in this era “were subjected to a special sort of treatment, a sort of quarantine before they were allowed to join adult society.”²⁸ Segregation of children from adults became the prevalent practice.²⁹ From the 1500s, children were not considered to have independent wills and, consequently, young persons were in total subjection to their parents.³⁰ The Victorian period, in particular, was characterized by the severe discipline of children and repressive child-rearing practices.

It was only in the latter part of the twentieth century, and specifically the 1970s and early 1980s, that the concept of children's rights emerged.³¹ A gradual shift could be discerned from a proprietorial view of children to a perception that children had independent rights.³² There was “recognition that children have interests, perhaps even rights, that need to be considered distinctly and separately from those of adults, and particularly their parents...”³³

²⁴ (New York: Alfred A. Knopf, 1962).

²⁵ See discussion in M. Freeman, *The Rights and Wrongs of Children* (Dover, N.H.: F. Pinter, 1983) at 8.

²⁶ Freeman, *ibid.*, at 9. See discussion by S. Scott in “From Major to Minor: An Historical Overview of Children's Rights and Benefits” (1993), 9 *Journal of Law and Social Policy* 222 at 229.

²⁷ *Ibid.*

²⁸ *Ibid.*, at 10.

²⁹ *Ibid.*, and Scott, *op.cit.*, note 26, at 230.

³⁰ *Ibid.* See discussion at 13.

³¹ M. Freeman, “Whither Children: Protection Participation, Autonomy?” (1994), 22 *Man. L.J.* 307 at 320; and Freeman, *ibid.*, at 20.

³² C. Barton and G. Douglas, *Law and Parenthood* (London, England: Butterworths, 1995) at 423.

³³ H.T.G. Andrews and P. Gelsomino, “The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View” in *Family Law: Dimensions of Justice*, ed. R. Abella and C. L'Heureux-Dubé (Toronto: Butterworths, 1983) at 241; and C. Bernard, R. Ward, and B. Knoppers, “Best Interests of the Child Exposed: A Portrait of Quebec Custody and Protection Law” (1992-93), 11 *Can. J. Fam. L.* 57 at 122-123.

Two decisions rendered by the United States Supreme Court were catalysts for the new perception of children in North America. In *Re Gault*,³⁴ the court emphasized that children, like adults, are entitled to the protections enumerated in the U.S. Constitution. In the words of Mr. Justice Fortas, “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.”³⁵ The Supreme Court held that juveniles accused of crimes are to be accorded the following constitutional rights: notice of the criminal charges, the right to counsel, the privilege against self-incrimination, and the opportunity to confront and cross-examine witnesses. In *Tinker v. Des Moines School District*,³⁶ the United States Supreme Court reiterated that “minors, as well as adults, are protected by the Constitution and possess constitutional rights.”

In the 1970s, members of the judiciary, academics, as well as legal and non-legal professionals, began to advocate the notion that children are autonomous individuals whose rights should be acknowledged and respected. For example, in the 1975 Ontario judgment *Re Brown*,³⁷ Stortini Co. Ct. J. stated:

Every child should have certain basic rights such as: the right to be wanted, the right to be healthy, the right to live in a healthy environment... and the right to continuous loving care.

In the same year, the British Columbia Royal Commission on Family and Children’s law produced a report that contained an extensive discussion of “Children’s Rights.”³⁸ The Commission recommended that a Bill of Rights for children be promulgated by the provincial legislature. Some of the rights articulated by the Royal Commission were:³⁹

- the right to be consulted in decisions related to guardianship, custody or a determination of status;
- the right to independent adult counselling and legal assistance in relation to all decisions affecting guardianship, custody, or a determination of status;
- the right to an explanation of all decisions affecting guardianship, custody, or a determination of status;
- the right to an environment free from physical abuse, exploitation and degrading treatment;
- the right to health care necessary to promote physical and mental health and to remedy illness;

³⁴ 387 U.S. 1 (1967).

³⁵ Ibid.

³⁶ 393 U.S. 503 (1969). This case involved the right of students to freedom of expression. Students in an Iowa high school wore black armbands to express their objection to U.S. involvement in the Vietnam War.

³⁷ (1975), 9 O.R. (2d) 185 at 192; 21 R.F.L. 315 at 323 (Ont. Co. Ct.).

³⁸ Part III (Victoria: Queen’s Printer, 1975).

³⁹ Ibid., at 6-7.

- the right to an education which will ensure every child the opportunity to reach and exercise his or her full potential;
- the right to a competent interpreter where language or a disability is a barrier in relation to all decisions affecting guardianship, custody, or a determination of status; and
- the right to be informed of the rights of children and to have them applied and enforced.

In some provinces such as Ontario, there were attempts to introduce children's rights legislation through private members bills.⁴⁰

1.2 Child Liberationists and Child Protectionists: Two Models

Two principal schools of thought have developed with respect to the concept of children's rights. They are conventionally regarded as the child liberationist or self-determination model, and the child protectionist or nurturance model. Americans John Holt and Richard Farson, in their respective 1970s publications, *Escape from Childhood*⁴¹ and *Birthrights*,⁴² are pioneers of the child liberationist model. They subscribe to the view that self-determination is the root of children's liberation.⁴³ According to these theorists, children's rights can only be realized when children have absolute autonomy to decide for themselves what is best for them. This includes the right to sexual freedom, the right to choose their mode of education, the right to be free from corporal punishment, and the right to choose where they will reside. It also encompasses the right to economic power which involves the right to work and achieve financial independence, the right to political power such as the right to vote, and the right to the information received by adult members of society.⁴⁴

Another advocate of the child liberationist school, Hillary Rodham, also takes the position that children are the best judge of their own interests. In an article published in 1973 in the Harvard Education Review entitled "Children Under the Law,"⁴⁵ Rodham argues that because children have interests independent of their parents, they cannot be represented by anyone other than themselves. She asserts that the competence of children to make their own decisions must be recognized, and that children should be treated as rights-bearing individuals rather than as members of families. Rodham advocates the reversal of the presumption of incapacity for

⁴⁰ See, for example, Bill 86 (Children's Rights Act, 1984) of the 4th Session of the 32nd Legislative Assembly of Ontario, First Reading, May 29, 1984.

⁴¹ (New York: E.P. Dutton, 1974).

⁴² (New York: MacMillan, 1974).

⁴³ See discussion in M. Wald, "Children's Rights: A Framework for Analysis" in *Children's Rights in the Practice of Family Law* (Toronto: Carswell, 1986) at 4.

⁴⁴ Freeman, op.cit., note 31, at 312-314.

⁴⁵ (1973), 43 *Harvard Educ. R.* 487.

children, the abolition of minority status, and the endowment to children of the same rights as adults.⁴⁶

Advocates of the child protectionist or nurturance model take the position that because the physical and mental capabilities of children are different from those of adults, children require protection. As one author observes, the “irrelevance of age” asserted by child liberationists “does not square with our knowledge of biology, psychology, or economics.”⁴⁷ Proponents of the nurturance model argue that children are dependent, vulnerable and at risk of abuse. They advocate the provision of environments and services that will benefit children and allow them to develop into mentally and physically healthy adults.

Despite the philosophical shift from the perception of children as extensions of their parents to the view that children are rights-bearing individuals, courts and legislatures in North America have not taken a coherent approach with respect to the subject of children’s rights.⁴⁸ Harvard Law Professor Martha Minow states that “a heated debate about whether the rights of adults should extend to children occupies litigation and social commentary.”⁴⁹ In “Essay on the Status of the American Child 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen,” Gill argues that children are currently in a transitional state between chattels and persons with full constitutional rights.⁵⁰ While there is acknowledgement that children should have the right to make decisions that have an impact on their lives, there is also recognition that children are in need of protection. As one author aptly frames the dilemma, “it is no easy matter to find one concept capable of integrating with any coherence children’s demand for autonomy with the realities of their dependence and vulnerability.”⁵¹

International conventions such as the United Nations Convention on the Rights of the Child⁵² as well as proposed Bill of Rights⁵³ seem to incorporate both the child liberationist and child protectionist concepts of children’s rights. For example, the right to be free from poverty, the right to adequate health care, the right to a proper education, the right to adequate housing and the right to adequate nutrition do not entail giving children autonomy to make decisions for themselves. As observed by Michael Wald in “Children’s Rights: A Framework for Analysis,”⁵⁴ the contrary is the case. The assertion of such rights acknowledges that children are

⁴⁶ See “Hillary Clinton Child Saver: What She Values Will Not Help the Family,” *Harper’s Magazine*, 1992, October Issue, at 74 for a discussion of Rodham-Clinton’s views.

⁴⁷ Freeman, *op.cit.*, note 25, at 23.

⁴⁸ Wald, *op.cit.*, note 43, at 6.

⁴⁹ M. Minow “Interpreting Rights: An Essay for Robert Cover” (1987), 96 *Yale Law Journal* 1860, at 1863.

⁵⁰ (1991), 17 *Ohio North L. R.* 543. See also G. Russ, “Through the Eyes of a Child, Gregory K.: A Child’s Right to Be Heard”(1993), 27 *Fam. L.Q.* 365 at 370-371.

⁵¹ D. Nelken “Afterward: Choosing Rights for Children” in *Children’s Rights and Traditional Values*, eds. G. Douglas and L. Sebba. (Vermont: Ashgate Publishing Company, 1998) at 315.

⁵² UNGA Resolution, November 20, 1989, UN Doc A/RES/44/25. In force September 2, 1990. See also Recommendation 1286 (1996) of the Parliamentary Assembly of the Council of Europe on a European Strategy for Children adopted January, 1996, 4th sitting.

⁵³ See for example, British Columbia Royal Commission on Family and Children’s Law, *op.cit.*, note 38.

⁵⁴ Wald, *op.cit.*, note 43 at 11.

incapable of providing for themselves and, consequently, require the protection, care, guidance and support of adults. Similarly, provisions that stipulate that children have the right to be free from sexual or physical abuse should be viewed as protections for young persons rather than rights to autonomy and self-determination. Granting such “rights” to children does not alter the legal or social status of young persons. Rather it reinforces the notion that children lack the capacity to care for themselves and require the protection of adults to ensure their proper growth and development.⁵⁵

It is important to note, however, that these international documents⁵⁶ and proposed Children’s Bill of Rights also contain provisions that seek to give young persons the autonomy to make decisions for themselves in different spheres. They include the right to make medical decisions, the right to legal counsel, the freedom to practice a religion of one’s choice, freedom of expression and thought, and the right to information and privacy. The primary principle underlying these rights is that children have the capacity and maturity to make decisions that have a significant impact on their lives. It rejects the arbitrary age limits imposed by parents, the courts, and the legislatures which obstruct young persons from making these decisions in different contexts. Another rationale underlying the articulation of these rights is that if children are to be held responsible for their conduct, as is evidenced by such criminal legislation as the *Young Offenders Act*⁵⁷ in Canada “they should be given rights commensurate with their responsibilities.”⁵⁸

Proponents of children’s rights should seek to accommodate both the empowerment and protection objectives of the child liberationist and child nurturance models. As Freeman states “... to take children’s rights more seriously, requires us to take more seriously both the protection of children and recognition of their autonomy, both actual and potential.”⁵⁹ This paper is concerned with the rights of children in the context of divorce, custody and access. It will seek to propose statutory and non-statutory changes to ensure that children are given the right to have their voices heard in family law proceedings. At the same time, recommendations will be made to ensure that protective mechanisms exist so that the voices of children, whose parents are in the process of separating and divorcing, can be heard in safe and protected environments. It is the thesis of this paper that children in family law matters should be empowered in protective settings so that they can have an impact on decisions that will have a significant impact on their lives.

⁵⁵ Ibid., at 9.

⁵⁶ See also European Convention on the Exercise of Children’s Rights in Germany *The Rights of the Child: A European Perspective* (German Council of European Publishing, 1996).

⁵⁷ R.S.C. 1985, c. Y-1.

⁵⁸ Wald, op.cit., note 43, at 16.

⁵⁹ Freeman, op.cit., note 31, at 324.

1.3 Article 12 of the United Nations Convention on the Rights of the Child: The Right of Children to Have Their Views Heard

The United Nations Convention on the Rights of the Child,⁶⁰ completed in 1989, is considered a “landmark in the history of childhood.”⁶¹ As Professor Toope states in “The Convention on the Rights of the Child: Implications for Canada,” “for generations, a powerful myth shaped attitudes in many cultures; the myth contained a vision of the family as a purely ‘private’ sphere which was, and should be, shielded from public scrutiny.”⁶² The U.N. Convention articulates the rights of children in economic, social, cultural and political spheres. It is stated in the Preamble to the Convention that “the child should be fully prepared to live an individual life in society.”⁶³

The U.N. Convention on The Rights of the Child has been ratified by over 200 countries.⁶⁴ States that have ratified the Convention must ensure that the rights enunciated in this international document are reflected in their internal laws and practices.⁶⁵ Canada became a signatory in 1990.

Article 12, which asserts the right of children to participate in decisions that affect them, is considered the “linchpin” of the U.N. document.⁶⁶ This provision says:

- 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.

- (2) For this purpose, the child shall in particular 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, in a manner consistent with the procedural rules of national law.

This document is the first Convention to state that children have a right to express their views in processes that affect their lives.⁶⁷ As stated by one commentator, Article 12 is “significant because it recognizes the child as a full human being with integrity and personality and with the

⁶⁰ Op.cit., at note 52.

⁶¹ M. Freeman, “Introduction: Children as Persons” in *Children’s Rights: A Comparative Perspective*, ed. M. Freeman (England: Dartmouth Publishing Company Limited, 1996) at 1.

⁶² S. Toope, “The Convention on the Rights of the Child: Implications for Canada” in *Children’s Rights: A Comparative Perspective*, ed. M. Freeman (England: Dartmouth Publishing Company Limited, 1996), at 47.

⁶³ Op.cit., at note 52.

⁶⁴ Nelken, op.cit., note 51, at 315.

⁶⁵ Barton and Douglas, op.cit., note 32, at 39.

⁶⁶ Freeman, op.cit., note 31, at 319.

⁶⁷ Ibid., at 318.

ability to participate fully in society.”⁶⁸ It acknowledges that children are individuals with interests distinct from their parents or family members.⁶⁹

In Article 12, the Convention mandates the hearing of a child “who is capable of forming his or her views” and giving “due weight” to the views in accordance with the age and maturity of the child. It recognizes that a young child may be mature beyond his or her years and that appropriate weight should be accorded by decision-makers to these views.⁷⁰ The child’s opinions must be sought so that he or she can become an active participant in the determination of his or her well-being.⁷¹ As one author states, the Convention perceives the child as an autonomous, though not independent human being, rather than a passive object of care.⁷²

The rights specified in Article 12 extend to “all matters affecting the child” with the result that there is no longer a traditional area of exclusive parental or family decision-making.⁷³ As stated by Van Bueren, “children have rights which transcend those of the family of which they are part.”⁷⁴ Signatories to the Convention no longer have the unfettered discretion to determine when to consider, and when to ignore, the views of children.⁷⁵

Article 12 of the U.N. Convention places a duty on state parties to involve children who wish to participate in matters that may have an impact on their lives. However, it does not seek to compel states to pressure children to express their views. As Van Bueren writes, Article 12 is not to be confused with self-determination, a term which implies not only the right to participate in decisions, but to have the decisions followed.⁷⁶ Rather it obliges signatories to ensure that children who wish to, have the right to convey their views. The Convention also compels countries to adopt decision-making processes that are accessible to children.⁷⁷

It has been argued by some that Article 12 should be read in conjunction with Article 13 of the Convention:

The child shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers,

⁶⁸ Ibid., at 319.

⁶⁹ Barton and Douglas, *op.cit.*, note 32, at 42.

⁷⁰ G. Van Bueren, “The Right of the Child to Freedom of Expression” in *The International Law on the Rights of the Child* (The Netherlands: Martinus Nijhoff Publishers, 1995) 131 at 136.

⁷¹ Y. Ronen, “Protection for Whom and for What? Protection Proceedings and the Voice of the Child at Risk” in *Children’s Rights and Traditional Values*, ed. G. Douglas and L. Sebba (Vermont: Ashgate Publishing Company, 1998) at 250.

⁷² Ibid., at 249.

⁷³ G. Van Bueren, “The Right of the Child to Freedom of Expression” in *The International Law on the Rights of the Child* (The Netherlands: Martinus Nijhoff Publishers, 1995) 131 at 136.

⁷⁴ Ibid., at 138.

⁷⁵ Ibid., at 137.

⁷⁶ Ibid., at 138.

⁷⁷ Ibid., at 137. See also Australian Law Reform Commission, *Speaking for Ourselves: Children and the Legal Process* (Commonwealth of Australia, 1996).

either orally, in writing or in print, in the form of art, or through any other media of the child's choice.⁷⁸

These provisions consider children as capable as adults of articulating rational views.⁷⁹ It has been asserted that the child's right in Article 12 to participate in matters that affect him is a prerequisite to the achievement of many other rights specified in the U.N. Convention.⁸⁰

The empowerment of children, provided for in Article 12, entails the establishment of mechanisms to ensure the participation of young persons. Barn and Franklin take the position that to fulfill the objectives of Article 12, countries must:

- (1) amend appropriate statutes to ensure that Article 12 is reproduced in domestic legislation;
- (2) provide children with the support necessary to enable them to understand their rights and to allow them to express themselves either directly or through an advocate; and
- (3) alter the status of the child to ensure that the child's opinion is listened to and considered.

Age and culturally-appropriate tools must be available to children to enable them to communicate their views.⁸¹ Note that Article 12(2) states that children have the right to be heard directly or through representatives, such as legal counsel.⁸²

In *For the Sake of the Children*, the Special Joint Committee on Child Custody and Access made reference to Article 12 of the U.N. Convention on the Rights of the Children.⁸³ The Committee stated that Canada must ensure that children in this country participate in a meaningful way in decisions that will affect their lives.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ G. Barn and A. Franklin, "Issues in Developing Children's Participation Rights: The Experience of Save the Children in the U.K." in *Monitoring Children's Rights*, ed. E. Verhellen (The Hague, The Netherlands: Kluwer Law International, 1996) 305, at 306.

⁸¹ Ronen, *op.cit.*, note 71, at 257.

⁸² H. Davidson, "The Child's Right To Be Heard and Represented" in *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law*, ed. C. Price Cohen and H. Davidson (U.S.A.: America Bar Association Center on Children and the Law, 1990) at 151.

⁸³ (Ottawa: Public Works and Government Services Canada, 1998) at 21-22.

2.0 LEGAL REPRESENTATION FOR CHILDREN IN DIVORCE, CUSTODY AND ACCESS PROCEEDINGS

2.1 Uncertainty Regarding the Appointment of Counsel for Children in Divorce, Custody and Access Proceedings

Legal representation for children in family law proceedings is a relatively new concept. As children began to be perceived as persons with independent rights and interests in the 1970s and 1980s, the notion that young persons should be afforded legal representation to assert those rights and interests became a subject of debate. In the past few decades, only a small number of children in Canada have had the opportunity to be represented by counsel in custody and access cases.⁸⁴

Statements from the courts, law reform commission reports, documents from law societies and articles in academic journals are responsible for altering the view that children do not require legal counsel to articulate their wishes in divorce and custody proceedings. For example in the U.S. decision *Wendland v. Wendland*,⁸⁵ the court stated that the children “are not to be buffeted around as mere chattels in a divorce controversy, but rather to be treated as interested and affected parties...” Similarly, the Supreme Court of Canada held in *Racine and Racine v. Woods*⁸⁶ that “a child is not a chattel in which its parents have a proprietary interest...”

In 1974, the Law Reform Commission of Canada released a paper that stated that where the interests of a child will be directly or indirectly affected by a court proceeding, consideration should be given to the appointment of independent legal counsel to represent the child.⁸⁷ Particular emphasis was placed on contested custody cases as legal proceedings in which “the interests of the child may require separate legal representation.”⁸⁸ The Law Reform Commission took the position that neither the judge, the child’s parents, nor counsel for the child’s parents should act as an advocate for the child in these matters. It proposed that independent legal representation be provided to the child and that child’s counsel be accorded the same rights and privileges as lawyers representing the adult parties in the family law proceedings. Similar recommendations have been made by law reform bodies to the governments of British Columbia, Quebec and Alberta.⁸⁹

⁸⁴ C. Bernard, R. Ward, and B. Knoppers, “Best Interests of the Child Exposed: A Portrait of Quebec Custody and Protection Law” (1992-93), 11, *Can. J. Fam. L.* 58 at 136. See also J. Begley, “The Representation of Children in Custody and Access Proceedings” (1994), 10 *Solicitors’ Journal* 1 at 15, A.P. Nasmith “The Inchoate Voice” (1991-92), 8 *Can. Fam. L.Q.* 43, and G. Thomson “Eliminating Role Confusion in the Child’s Lawyer: The Ontario Experience” (1983), 4 *Can. J. Fam. L.* 125 at 133.

⁸⁵ 138 N.W. (2d) 185 (Wisconsin Sup. Ct. 1965) at 191.

⁸⁶ [1983] 2 S.C.R. 173 at 185.

⁸⁷ Law Reform Commission of Canada, *The Family Court*, Working Paper No. 1 (Ottawa, 1974).

⁸⁸ *Ibid.*

⁸⁹ See discussion in *Reid v. Reid* (1975), 25 R.F.L. 209 (Ont. Div. Ct.).

Despite reports released on the virtues of legal representation of children in family law proceedings, the appropriate role of a child's lawyer in custody and access disputes remains controversial.⁹⁰ Issues that remain unresolved include the following:⁹¹

1. Should legal proceedings involve counsel other than those representing the adults/parents in cases of custody and access?
2. If counsel for the child is to be appointed, should it be available only in exceptional circumstances, or should all children of divorcing or separating parents have access to legal representation?
3. Should private counsel for the child be appointed or should a government lawyer represent the child?
4. What is the precise role of the child's lawyer—to advocate the child's preferences and wishes, to put forth the child's best interests, or to assist the court in collecting evidence pertaining to the issues of custody and access?

The judiciary in this country has offered little guidance on the subject of child representation in family law cases. The decisions rendered on this issue have been conflicting and, as a result, have exacerbated the confusion surrounding the circumstances in which a lawyer should be appointed for the child, as well as the precise function of child's counsel. As one observer writes:⁹²

There have been fractional divides in Canada with respect to the proper role of counsel who represent a child in custody and access proceedings. Moreover, wavering judicial interpretations for the role of counsel has provided ambiguous and inconsistent precedence.

Another lawyer states:⁹³

Compounding the difficulty is the environment in which decisions are made: one that combines broad discretion with vague criteria, as well as a hybrid of the adversarial and inquisitorial processes.

Some courts have taken the position that separate legal representation for a child in a custody dispute is inappropriate as a general practice. The Manitoba Court of Appeal stated in

⁹⁰ His Honour Judge A. P. Nasmith, "The Inchoate Voice" (1991-92), 8 *Can. Fam. L.Q.* 43 at 44; R. Boll, "Who Speaks For The Child? The Right to Independent Legal Representation" (1993-94), *Law Now* 8 at 9; and G. Thomson, "Eliminating Role Confusion In The Child's Lawyer: The Ontario Experience" (1983-84), 4 *Can. J. Fam. L.* 125 at 126.

⁹¹ See C. Davies, *Family Law in Canada* (Toronto: Carswell Legal Publications, 1984) at 539-540.

⁹² A. Mamo "Child Representation" in J. McLeod, *Child Custody Law and Practice* (Toronto: Thomson Canada Limited, 1998 updates) at 13-18.

⁹³ Thomson, op.cit., note 90, at 126.

Lavitch v. Lavitch,⁹⁴ the general rule is that there should not be separate representation of children in custody cases. Mr. Justice Reid in *Rowe v. Rowe*⁹⁵ wrote the following in a divorce case before the Ontario Supreme Court:

Based on my experience in this case, I doubt the desirability of having children represented by counsel or advised by “their own” solicitor as a practice. There may well be cases wherein the circumstances a trial judge considers it desirable for the children to have separate representation at trial. If that is so, the office of the official guardian would appear to be available and can be called upon at that point. Earlier involvement of solicitors for children can, I think, cause more harm than good.

The court in *Laszlo v. Laszlo*⁹⁶ refused to appoint counsel for the children on the grounds that the lawyers for the adult parties were capable of placing before the court the necessary evidence for an informed custody determination.

In other decisions, courts have been prepared to appoint counsel for children in exceptional circumstances. As stated in *Bonenfant v. Bonenfant*:⁹⁷

Unless and until the appropriate legislature enacts otherwise, the court should not as a routine matter impose upon the parties in a custody proceeding the compilation, expense, and enlargement of trial proceedings which must almost inevitably result from the appointment of additional counsel. Such a step should not be taken unless it is made to appear that justice is otherwise unlikely to be achieved and that there is substantial risk that the court will be unable to carry out its duty to make a decision in the best interests of the children if the appointment is not made.

In some family proceedings, children have been permitted to have legal representation if it can be established that the children possess different interests than their parents. In both *Lavitch v. Lavitch*⁹⁸ and *Morris and Morris v. Mitchell*,⁹⁹ the courts held that separate legal representation was not appropriate unless it could be demonstrated that either the interests of the child and the parent were not congruent, or that the child had special interests.

Other courts have denounced this approach. In *Novic v. Novic*,¹⁰⁰ for example, the Ontario Court of Appeal stated that it was not necessary for the child to possess interests separate from either or both parties in order to secure legal representation. A legitimate ground for appointment of counsel is to ensure that the views and preferences of the child are adequately conveyed to

⁹⁴ [1986] 2 W.W.R. 577 (Man. C.A.).

⁹⁵ (1976), 26 R.F.L. 91 at 96 (Ont. Sup. Ct.).

⁹⁶ (1984), 39 R.F.L. (2d) 383 (Man. Q.B.).

⁹⁷ (1981), 21 R.F.L. (2d) 173 at 178 (Ont. H.C.).

⁹⁸ *Lavitch*, op.cit., note 94. The issue before the Manitoba Court of Appeal was whether the courts in Manitoba or California had jurisdiction to decide the custody matter.

⁹⁹ (1984), 44 R.F.L. (2d) 187 (Ont. H.C.).

¹⁰⁰ (1984), 37 R.F.L. (2d) 333, leave to appeal to the Supreme Court of Canada refused (1984), 3 O.A.C. 319 (S.C.C.).

judicial decision-makers.¹⁰¹ Similarly, in the 1997 decision *Kerton v. Kerton*,¹⁰² a lawyer was appointed for a child in a supervised access dispute. The court stated that the function of counsel was to convey the views of the child and to prevent the parties from interpreting the child's wishes and from attempting to remove her from the conflict.

Some judges have stated that separate legal representation should be provided to the child if it is the court's opinion that such appointment would assist it in ascertaining the best interests of the child. Such an approach was taken in *Reid v. Reid*¹⁰³ and *Ross v. Britton*.¹⁰⁴

In this section, the jurisdiction to appoint lawyers for children in divorce, custody and access proceedings will be described. A discussion will be provided of the three traditional models of legal representation as well as the advantages and disadvantages of each of these approaches. The capacity of children to instruct counsel will also be explored. In addition, the question of whether the rules which govern solicitor/client privilege for adults should be applied with the same rigour for children represented by counsel will be canvassed. The selection, professional training and sources of remuneration for children's counsel will be discussed, as well as the prospect of developing a code of ethics for lawyers who represent children.

2.2 Functions of the Child's Lawyer in Family Law Cases

The important functions performed by counsel for children deserve discussion. A fundamental role of a legal representative is to ensure that the child's views and wishes are placed before the court.¹⁰⁵ As an observer notes:¹⁰⁶

It is false to assume that the evidence adduced by the parents and the points of view presented by them are exhaustive and accurate. Very often the child's perspective is far different from that of either of his/her parents and far more realistic as to their strengths and weaknesses. It must follow that counsel for the child is neither an extraneous role in the proceedings nor a mere subordinate to counsel for the parties.

It is also asserted that parents, disappointed or angry at their failed marriage, may not be able to adequately take into account their children's needs and interests.

The presence of independent counsel for children in custody disputes can be a "powerful catalyst" for settling cases and avoiding trials.¹⁰⁷ A settlement generally results in less trauma for both the children and the parents than a highly contested court case.¹⁰⁸ Counsel for the child may be perceived by the parents as a neutral party which may have the effect of reducing the

¹⁰¹ Ibid.

¹⁰² [1997] W.D.F.L. 718 (Ont. Ct. Gen. Div).

¹⁰³ (1975), 25 R.F.L. 209 at 216 (Ont. Div. Ct.)

¹⁰⁴ [1996] W.D.F.L. 823 (Ont. Gen. Div).

¹⁰⁵ Mamo, op.cit., note 92, at 13-27 to 13-29.

¹⁰⁶ Ibid., at 13-27. See also S. Wilber, "Independent Counsel for Children" (1993), 27 *Fam. L.Q.* 349 at 351.

¹⁰⁷ T. Maczko, "Some Problems With Acting For Children," (1979), 2 *Can. J. Fam. L.* 267 at 279.

¹⁰⁸ Ibid.

“win/lose” mentality of the litigants.¹⁰⁹ The parents may also be less inclined “to use their children as weapons in their personal conflict” and may be more willing to fully consider their children’s needs, views and interests.¹¹⁰

Another important function of counsel is to protect the child during the course of the legal proceedings. Counsel can ensure that the necessary measures are taken to expedite the proceedings and to accommodate children in the court process. The reassurance of counsel on a child in the midst of a family breakdown cannot be overestimated.¹¹¹ The child can freely express his or her concerns, anxieties and views to an impartial and unbiased person. As a result, the child is protected as well as given a sense of empowerment, particularly if the child believes that his or her counsel may have an influence on the outcome of the dispute.

2.3 Jurisdiction to Appoint Independent Counsel for Children

2.3.1 *Parens Patriae Jurisdiction of Superior Courts*

The genesis of independent representation for children is the *parens patriae* jurisdiction of the courts.¹¹² *Parens patriae* refers to the role of the state as guardian of persons under a legal disability. As stated by Galligan J. in *Reid v. Reid*,¹¹³ a court of equity has inherent power representing the Sovereign in its capacity as *parens patriae* to protect the rights of infants. Courts have appointed counsel for children in custody proceedings under the *parens patriae* jurisdiction.

It is important to note, however, that only judges of Superior Courts have the *parens patriae* power to appoint counsel for children in custody and other legal proceedings. As Judge Bean commented in *Catholic Children’s Aid Society of Metropolitan Toronto v. C.M. and D.L.*,¹¹⁴ there is no inherent jurisdiction in the Ontario Court Provincial Division to appoint counsel to represent the rights of children. The Provincial Court is not a court of equity and does not have *parens patriae* jurisdiction. The provincial courts have the authority to provide such representation only in circumstances in which the power to appoint counsel for children is specified in legislation.¹¹⁵

2.3.2 *Statutory Power to Appoint Counsel for Children in Family Law Proceedings*

Although many provinces have enacted legislation which permits counsel to be appointed for children in family law proceedings, the precise role of the lawyer is not delineated. Moreover, the appointment of counsel is within the discretion of the court or government official.

¹⁰⁹ Nasmith, op.cit., note 90, at 60.

¹¹⁰ Maczko, op.cit., note 107, at 283.

¹¹¹ Mamo, op.cit., note 92, at 13-6.

¹¹² Ibid., at 13-9.

¹¹³ (1975), 25 R.F.L. 209 at 216 (Ont. Div. Ct.). See *Re Eve*, [1986] 2 S.C.R. 388 at 425-426.

¹¹⁴ (1991), 35 R.F.L. (3d) 1 at 13 (Ont. Ct. Prov. Div.), appealed to (1991), 35 R.F.L. (3d) 297 (Ont. Gen. Div.)

¹¹⁵ Ibid.

For example, section 2 of the *Family Relations Act* of British Columbia¹¹⁶ states that a family advocate may be appointed by the Attorney General to act as counsel “for the interests and welfare of the child” in proceedings involving the custody of, maintenance for, or access to the child. Section 24 of the Act states that the judge must consider the views of the child “if appropriate” on issues of custody, access and guardianship.¹¹⁷ The *Manitoba Family Maintenance Act*¹¹⁸ states the following:

When the court is satisfied that a child is able to understand the nature of the proceedings and the court considers that it would not be harmful to the child, the court *may* consider the views and preferences of the child (emphasis added).

According to the *Children’s Law Reform Act* in Ontario¹¹⁹

24 (2) In determining the best interests of a child for the purposes of an application under this Part in respect of custody of or access to a child, a court shall consider all the needs and circumstances of the child including,

...

(b) the views and preferences of the child, where such views and preferences can reasonably be ascertained.

In Ontario, the Office of the Children’s Lawyer has the authority to represent children in family law proceedings. The Children’s Lawyer is an independent Crown Law Office appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General to represent children within the administration of justice.¹²⁰ Pursuant to section 89(3) of the *Courts of Justice Act*,¹²¹ the court can request that the Children’s Lawyer represent the interests of the child in a custody and access dispute. Section 112(1) of the *Courts of Justice Act* states:¹²²

In a proceeding under the *Divorce Act* (Canada) or the *Children’s Law Reform Act* in which a question concerning custody of or access to a child is before the court, the Children’s Lawyer may cause an investigation to be made and may report and make recommendations to the court on all matters concerning custody of or access to the child and the child’s support and education.

¹¹⁶ R.S.B.C. 1996, c. 128.

¹¹⁷ Ibid.

¹¹⁸ 1987, c.F20, S. 2(2). See also section 394.1 *Quebec Code of Civil Procedure*.

¹¹⁹ R.S.O. 1990, C.12.

¹²⁰ Office of the Children’s Lawyer Policy Statement: Role of Child’s Counsel, 1995.

¹²¹ R.S.O. 1990, c.C. 43.

¹²² Ibid.

The Office of the Children's Lawyer will accept judicial referrals in custody and access disputes where the representation of the child will provide a meaningful contribution to the resolution of the matter and protect the child's interests in the proceedings.¹²³

This brief review of Canadian legislation demonstrates that the child in divorce, custody and access proceedings, unlike criminal cases, does not have an automatic right to independent counsel. It is the court or government officials who have the discretion to decide if the child will be afforded legal representation in a custody or access dispute. Moreover, the precise role of counsel in such proceedings is ambiguous. Mamo states that the confusion surrounding the function of counsel is the reason that "independent counsel has not succeeded in procuring its intended purpose of affording a child input into a proceeding that will affect the balance of the life of the child."¹²⁴ He further states:¹²⁵

... the institutionalization of independent counsel for children has not emancipated children from traditional paternalism, hidden in the legal process, which tends to muffle or veto the preferences of the child. Children remain hapless concomitants to the unfettered discretion of both counsel and the courts.

An examination will now be undertaken of the different models of legal representation for children.

2.4 The Three Models of Legal Representation for Children

Three models of legal representation for children have traditionally been relied upon by Canadian courts and practising lawyers. They are the advocate, the litigation guardian and the *amicus curiae*. In this section, a description of each of these models will be provided as well as a discussion of the advantages and disadvantages of the three approaches to child representation.

¹²³ Office of The Children's Lawyer Policy Statement, op.cit., note 120; and Office of the Children's Lawyer, Annual Review, 1997/1998.

¹²⁴ Mamo, op.cit., note 92, at 13-1.

¹²⁵ Ibid.

2.4.1 *Amicus Curiae*

The traditional interpretation of *amicus curiae* or “friend of the court” is a lawyer appointed by the court of equity to assist the court in an impartial exposition of the facts, the state of the law, and the interests of non-participants in court proceedings.¹²⁶ The *amicus curiae* assumes a neutral position with respect to the outcome of the litigation. The function of counsel is inquisitive; the allegiance of the *amicus curiae* is to the court and not to the litigants.¹²⁷ Counsel is discharged with the responsibility of providing assistance to the court in the administration of justice. The role of the *amicus curiae* is defined by the court in the particular proceedings.¹²⁸

In the context of custody and access matters, the *amicus curiae* collects relevant evidence that might not otherwise be submitted to the court by the parent litigants to assist the judge in making a determination that is in the best interests of the child.¹²⁹ Counsel has the responsibility to ensure that the court has before it a comprehensive account of the facts, including expert evidence, to counterbalance the potential “distorting” positions of the parents.¹³⁰ Although the *amicus curiae* generally places the views of the child before the court as part of the evidence, counsel does not argue in favour of the child’s position. The *amicus curiae* usually expresses his or her assessment of the outcome of the matter based on the supporting evidence.¹³¹

Some judges, academics and lawyers take the position that the role of *amicus curiae* is not appropriate in custody and access cases, particularly when a child has the capacity to instruct counsel. It is argued that the *amicus curiae* “does not institutionalize the importance of the child’s voice in the process,” but rather the “child is silenced.”¹³² The child is precluded from directly expressing his or her preferences to the court and does not have the opportunity to challenge the recommendations of the *amicus curiae*. As stated by the Alberta Institute of Law Research and Reform in *Protection of Children’s Interests in Custody Disputes*,¹³³ “we do not think that the *amicus curiae* can properly be said to represent either the child’s interests in any sense in which counsel usually represents a client or a client’s interest.” Granger J. in the

¹²⁶ H. T. G. Andrews and P. Gelsomino, “The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View” in *Family Law: Dimensions of Justice* (edited by R. Abella and C. L’Heureux-Dubé) (Toronto: Butterworths, 1983) at 251, and J. Begley, “The Representation of Children in Custody and Access Proceedings” (1994), 10 *Solicitors’ Journal* 1 at 18. See also *D.B. and P.B. v. Director of Child Welfare for Newfoundland* (1982), 30 R.F.L. (2d) 438 (S.C.C.).

¹²⁷ Boll, op.cit., note 90, at 9; C. Huddart and J. Ensminger, “Hearing the Voice of Children” (1991-92) 8 *Can. Fam. L.Q.* 95 at 104; and “The Legal Representation of Children: A Consultation Paper prepared by The Quebec Bar Committee” (1996), 13 *Can. J. Fam. L.* 49 at 78.

¹²⁸ “The Legal Representation Of Children” *ibid.*, and Andrews and Gelsomino, op.cit., note 126, at 251.

¹²⁹ Nasmith, op.cit., note 90, at 45.

¹³⁰ Andrews and Gelsomino, op.cit., note 126, at 252.

¹³¹ Huddart and Ensminger, op.cit., note 127, at 105.

¹³² Mamo, op.cit., note 92, at 13-19 to 13-21. See also Andrews and Gelsomino, op.cit., note 126, at 252.

¹³³ Report No. 43 (Edmonton, Alberta: October 1984).

Ontario Court General Division decision of *Strobridge v. Strobridge*¹³⁴ is critical of the role of *amicus curiae* in the context of custody proceedings:

The role of the *amicus curiae* in custody cases in an adversarial system is not consistent with representation of a child. The *amicus curiae* has no obligation to ascertain the wishes of the child nor to present these wishes to the court. The *amicus curiae* in effect is a court appointed expert, appointed to assist the court in the determination of the best interests of the child. In a true adversarial system, the *amicus curiae* is an aid to the court rather than the representative of the child.

Some judges such as Abella J. and L'Heureux-Dubé J. assert that the role of *amicus curiae* is appropriate only in circumstances in which children do not have the capacity to instruct counsel or do not possess particular views on the issues that are the subject of the court proceedings.¹³⁵ Judge Nasmith delineates the possible functions of the *amicus curiae* in such a situation:¹³⁶

1. to assist the child in comprehending the legal process;
2. to ease the child's distress in the divorce, custody or access proceedings;
3. to seek various government and private resources for the parties such as mediation, conciliation, counselling or therapy with the objective of encouraging the parties to settle out of court;
4. to encourage the parents to focus on the best interests of the child; and
5. to protect the child from over-assessment.

2.4.2 Guardian Ad Litem

A guardian *ad litem*, or litigation guardian, has the responsibility of taking the necessary measures to ascertain the best interests of the child and to present these findings to the court.¹³⁷ This may take the form of soliciting expert testimony, submitting reports, and examining and cross-examining witnesses.¹³⁸ The guardian *ad litem* is obliged to put forth evidence to ensure that the best interests of the child are protected.¹³⁹

It is fundamental to note that it is the lawyer's views and not necessarily the child's preferences that are conveyed to the court, even in cases in which the child is capable of articulating a

¹³⁴ (1992), 10 O.R. (3d) 540 at 548, appealed to the Ontario Court of Appeal (1994), 18 O.R. (3d) 753.

¹³⁵ See discussion in Huddart and Ensminger, *op.cit.*, note 127, at 105-106. See also Nasmith, *op.cit.*, note 90, at 47 and 58.

¹³⁶ Nasmith, *ibid.*, at 49.

¹³⁷ Begley, *op.cit.*, note 126, at 12; and M. Bernstein, "Towards a New Approach to Child Representation: How Less is More in Child Welfare Proceedings" (1993-94), 10 *Can. Fam. L.Q.* 187 at 190.

¹³⁸ *Ibid.*, and Boll, *op.cit.*, note 90, at 9.

¹³⁹ Begley, *ibid.*

particular point of view. A guardian *ad litem* may disregard a child's instructions if counsel is of the opinion that these instructions are not in accordance with the child's best interests.¹⁴⁰ In other words, the lawyer's opinion may prevail over the child's view.

It is important to consider the Ontario Court of Appeal decision *Strobridge v. Strobridge*.¹⁴¹ Osborne J.A. held that counsel for a child cannot be both an advocate and a witness in custody and access proceedings. Resort must be had to appropriate evidentiary means to put forth the views of the best interests of the child. The lawyer may call expert witnesses to testify, file reports and make submissions on the evidence. This judgment has been followed in several Ontario custody decisions including *Zelinko v. Zelinko*¹⁴² and *Punzo v. Punzo*.¹⁴³

The role of guardian *ad litem* has been criticized by some members of the legal profession. It is argued that it is "unacceptable" for counsel not to advocate the position of a child who has the ability to express his or her views and preferences on a custody or access issue.¹⁴⁴ As Mlyniec states in "The Child Advocate In Private Custody Disputes: A Role In Search Of A Standard," a lawyer is not in a better position than a judge to assess the best interests of the child in a custody or access proceeding.¹⁴⁵ In fact, some judges take the position that counsel who puts forth the best interests of the child is usurping the power of the bench.¹⁴⁶ Commentators have asserted, however, that in cases in which a child is incapable of instructing counsel, it is appropriate for counsel to act in the role of litigation guardian and present evidence to assist the court in formulating the best interests of the child.¹⁴⁷

2.4.3 *The Advocate*

The function of the advocate, the traditional role assumed by lawyers for adults, is to represent the legal rights and interests of his or her client.¹⁴⁸ Lawyers do not judge the positions they are asked by their clients to advocate.¹⁴⁹ Rather, the function of counsel is to present the client with options, to recommend a course of action, and then leave the ultimate decision to the client. As explained in "The Legal Representation of Children: A Consultation Paper prepared by the Quebec Bar Committee," lawyers must fulfill their role as counsel for children as they would for adult clients; they must explain the nature of the legal proceedings in question, the various steps in the process, and the consequences of choices advocated by their child clients.¹⁵⁰

¹⁴⁰ Mamo, op.cit., note 92, at 13-20; and Begley, *ibid*.

¹⁴¹ *Strobridge*, Ontario Court of Appeal, op.cit., note 134.

¹⁴² [1995] O.J. No. 3275 (Ont. Ct. Gen. Div.).

¹⁴³ (1996), 21 R.F.L. (4th) 7 (Ont. C.A.).

¹⁴⁴ Begley, op.cit., note 126, at 12; and Mamo, op.cit., note 92, at 13-20.

¹⁴⁵ (1977-1978), 16 *J. Fam. Law* at 1 at 13.

¹⁴⁶ See Davies, op.cit., note 91, at 540.

¹⁴⁷ Bernstein, op.cit., note 137, at 201.

¹⁴⁸ Andrews and Gelsomino, op.cit., note 126, at 252.

¹⁴⁹ *Ibid.*, and Huddart and Ensminger, op.cit., note 127, at 105.

¹⁵⁰ "The Legal Representation of Children," op.cit., note 127, at 80-81.

Although lawyers may suggest to their child clients that they re-evaluate their position, counsel is under an obligation to put forth the child's preferences and wishes on the principle that clients have the right to have the court hear and take under advisement their views on the particular legal issues.¹⁵¹ The advocate may examine witnesses, present written reports and cross-examine the witnesses of the litigants. It is important to note that in presenting the evidence, the lawyer is prohibited from disclosing to the court his or her personal convictions respecting the disposition of the matters. In other words, "the child's advocate must do everything ethically possible to advance his client's interests and to achieve the end result by that client regardless of the advocate's personal opinion of the merits of the child's wishes."¹⁵²

Judges, academics and some provincial law societies have been vociferous in their views regarding the appropriate functions of counsel for children. In 1981, the Law Society of Upper Canada released the Report of the Subcommittee of the Professional Conduct on the Legal Representation of Children.¹⁵³ The Subcommittee took the position that in the absence of a specific legislative enactment, a traditional solicitor/client relationship should exist between a lawyer and a child. According to the report "the child's voice should not be watered down by someone else's opinion of what is good for him, least of all by counsel appointed to represent him."¹⁵⁴ The Ontario Subcommittee argued that it was inappropriate for a lawyer to disclose to the court information in his or her possession acquired in the course of the solicitor/client relationship that was contrary to the views and preferences of the child/client. The report stated that the lawyer is not the judge of the best interests of the child and is not, in any circumstances, to be excused from a breach of the solicitor/client relationship.¹⁵⁵

Members of the judiciary such as Nasmith J.,¹⁵⁶ L'Heureux-Dubé J. and Abella J.¹⁵⁷ as well as lawyers Alfred Mamo¹⁵⁸ and Judith Begley,¹⁵⁹ have endorsed the role of advocate for counsel who represent children. This is because it gives the child a direct voice in the proceedings: in a solicitor/client relationship the "rights of the child are not subverted" by counsel who put forth their views as to what is best for the child.¹⁶⁰ It enables children to actively participate in proceedings that will profoundly affect them. Moreover, such evidence is invaluable to the court

¹⁵¹ Andrews and Gelsomino, op.cit., note 126, at 253; and Nasmith, op.cit., note 90 at 45.

¹⁵² Begley, op.cit., note 126, at 12.

¹⁵³ *Report of the Law Society of Upper Canada Subcommittee on Representation of Children* (Toronto: Law Society of Upper Canada, 1981).

¹⁵⁴ *Ibid.*, at 4.

¹⁵⁵ *Ibid.*

¹⁵⁶ Nasmith, op.cit., note 90, at 58.

¹⁵⁷ R. S. Abella, C. L'Heureux-Dubé, and M. L. Rothman, "Code of Recommended Procedures in the Resolution of Family Disputes" in *Family Law: Dimensions of Justice*, ed. R. Abella and C. L'Heureux-Dubé (Toronto: Butterworths, 1983) at 327-328.

¹⁵⁸ Mamo, op.cit., note 92, at 13-29.

¹⁵⁹ Begley, op.cit., note 126, at 12. See also E. Kruzick and D. Zemans "In The Best Interest Of The Child: Mandatory Legal Representation" (1992), 69 *Denver Univ. Law Rev.* 605 at 613.

¹⁶⁰ Mamo, op.cit., note 92, at 13-18.

which may otherwise be deprived of information that reflects the wishes of the children of the dissolved marriage. Abella J. in *Re W.*¹⁶¹ stated:

The child's advocate is the legal architect who constructs a case based on the child's views.

In its present form, that means that the child's lawyer should present and implement a client's instructions to the best of his or her ability. And this, in turn, involves indicating to the court the child's concerns, wishes and opinions. It involves, further, presenting to the court accurate and complete evidence which is consistent with the child's position. And too, there is an obligation to ensure, in so far as this is possible given the age and circumstances of the child, that the opinions and wishes expressed by the child are freely given and without duress from any other party or person.

Judge Abella stated that although counsel must represent the wishes of the child, counsel may explore "with the child the merits or realities of the case, evaluating the technicalities of the child's position and even offering, where appropriate, suggestions about possible reasonable resolutions to the case."¹⁶²

It is essential to note that the child's views alone do not determine the outcome of the decision, but rather form an important component of the evidence considered by the court. As Begley writes:¹⁶³

... the child's wishes are only one piece of evidence to be weighed by the judge in making the final determination, but it is extremely important that they be presented to the court as forcefully as possible in order that the child's voice be distinctly heard.

It is recommended that the child's advocate be appointed as early as possible in the proceedings. Once appointed, counsel should have the same right to participate fully in any aspect of the proceedings as counsel for any other party. This includes the right to attend the pre-trial, mediation sessions, to have discovery, to bring motions, to call and cross-examine witnesses, to make submissions and to appeal.¹⁶⁴

An important question that arises regarding the solicitor/client relationship is whether a child has the capacity to articulate his or her preferences and wishes, and to instruct counsel.

¹⁶¹ (1980), 27 O.R. (2d) 314 (Ont. Prov. Ct.) at 316-317.

¹⁶² *Ibid.*, at 318.

¹⁶³ Begley, *op.cit.*, note 126, at 13.

¹⁶⁴ Abella, L'Heureux-Dubé and Rothman *op.cit.*, note 157, at 327-328.

2.5 Capacity of the Child to Instruct Counsel

It has been argued that the legal profession has taken a narrow approach to the capacity of children to instruct counsel. As Thomson explains, if one takes the position that all children are not *sui juris* and if a difficult test of capacity is established, very few children will be afforded independent legal representation on a solicitor/client model.¹⁶⁵ However, if (a) the legal system considers children as *sui generis*, (b) the same test of presumption of capacity used for adults is applied to children, and (c) a simple test of capacity is endorsed, more children in family law proceedings will be provided with lawyers who advocate the views and preferences of these young persons.¹⁶⁶

A belief that has been gaining acceptance in recent years is the notion that more harm is caused to children by excluding their views in family law matters than by including them in the decision-making process.¹⁶⁷ This position is reflected in “The Inchoate Voice” by Judge Nasmith, who argues that the legal system must:¹⁶⁸

...err on the side of inclusion rather than exclusion of the children’s views and preferences. I wonder what is gained by arbitrarily defining areas for excluding children’s preferences. We may be falling back into some of the historical traps set for children. What harm can it do to bring preferences forward even if their weight turns out to be relatively slight? What is the fear? The evidence is going to be weighed in the end along with other factors. The child’s preference is not necessarily determinative. It is part of the evidence.

Several tests have been put forward as methods of assessing the capacity of the child to instruct counsel. For example, Leon,¹⁶⁹ Bernstein¹⁷⁰ and Ramsey¹⁷¹ argue that an age limit is an appropriate way to ascertain the capacity of a child. Leon formulates a scheme consisting of rebuttable presumptions based upon the child’s age in order to determine the type of legal representation the child receives.¹⁷² Bernstein asserts that a child who has reached the age of 12 should be deemed capable of instructing counsel.¹⁷³ Ramsey, in her discussion of whether a child has the mental and emotional abilities required to make a decision which has a “rationale

¹⁶⁵ Thomson, *op.cit.*, note 90, at 137.

¹⁶⁶ *Ibid.*, at 138.

¹⁶⁷ *Ibid.*, and Mamo, *op.cit.*, note 92, at 13-39.

¹⁶⁸ Nasmith, *op.cit.*, note 90, at 54.

¹⁶⁹ “Recent Developments in Legal Representation of Children: A Growing Concern With the Concept of Capacity” (1978), 1 *Can. J. Fam. L.* 375.

¹⁷⁰ Bernstein, *op.cit.*, note 137, at 207.

¹⁷¹ “Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity” (1983), 17 *Fam. L.Q.* 287 at 312-314.

¹⁷² Leon, *op.cit.*, note 169, at 432-433.

¹⁷³ Bernstein, *op.cit.*, note 137, at 207.

possibility of accuracy,” states that a child who has attained the age of seven should be presumed capable of instructing a lawyer.¹⁷⁴

Others argue that age is not a legitimate predictor of the maturity of the child or the ability of the child to instruct counsel. As one author states, “the court should not be entitled to suppress the basic right of a child to be heard based upon an ambiguous age-based test for the competence of a child.”¹⁷⁵ Age is considered an unreliable gauge of capacity because children develop at different rates. It is asserted that it is the capacity to understand and articulate one’s thoughts, rather than the age of the children, which is relevant.¹⁷⁶

The “rationality” of the child is another criterion relied upon to determine the ability of the child to instruct counsel. According to David Day, who acted as *amicus curiae* to a five year old child in a custody case before the Supreme Court of Canada,¹⁷⁷ the following requirements must be met for counsel to act as an advocate for a child:¹⁷⁸

- (1) the ability to communicate voluntarily to counsel, instructions which are rationale and reasonable;
- (2) the ability to clearly and fully understand counsel’s advice; and
- (3) an appreciation of the nature and legal significance of the judicial proceeding.

The Law Society of Upper Canada stated the following in its 1981 report:¹⁷⁹

A child may be deemed to have capacity where the child is mature and responsible enough to accept the consequences of his or her acts and decisions and can express a preference as to its resolution... One of the factors in making this decision would be the ability of the child to accept *rationaly* the advice he or she is receiving. If the child stubbornly, without reason refuses to accept the advice of counsel, it may be that the child lacks the maturity to properly instruct counsel.

Critics of these approaches argue that an assessment by a lawyer of the “rationality” of the child’s instructions, is a “purely subjective and value-laden” endeavour.¹⁸⁰ It is stated that the

¹⁷⁴ Ramsey, *op.cit.*, note 171, at 312-313.

¹⁷⁵ Mamo. *op.cit.*, note 92, at 13-35. See also Nasmith, *op.cit.*, note 90, at 52.

¹⁷⁶ Begley, *op.cit.*, note 126, at 13.

¹⁷⁷ *D.P. and P.B. v. Director of Child Welfare for Newfoundland* (1982), 30 R.F.L. (2d) 438 (S.C.C.).

¹⁷⁸ “Counsel For Christopher: Representing An Infants Best Interests In The Supreme Court of Canada” (1983), 33 R.F.L. (2d) 16 at 23.

¹⁷⁹ Report of The Law Society of Upper Canada Subcommittee, *op.cit.*, note 153.

¹⁸⁰ Mamo, *op.cit.*, note 92, at 13-32.

requirement that a child be able to formulate a “rational custodial preference” in order to be permitted to instruct counsel constitutes a “paternalistic” orientation to legal representation.¹⁸¹

An approach that recognizes and promotes children’s rights in custody and access proceedings directs that children who have the ability to communicate their preferences, views or wishes, be granted the right to have a lawyer advocate those preferences.¹⁸² This is the sole yardstick for assessing a child’s capacity to instruct counsel, according to proponents of such view. As stated in the report of the Quebec Bar, even very young children have these capabilities.¹⁸³ It is argued that children as young as four years old can communicate their views to a lawyer.¹⁸⁴ According to Judge Nasmith, instructions from a four or five year old child “should not be sabotaged by a rationalization that they are not really instructions” unless the child is developmentally behind.¹⁸⁵ He takes the position that departure from the “normal mouthpiece function of a legal advocate” is only appropriate when the child is unable or unwilling to state his or her views on issues of custody and access.¹⁸⁶

Controversy remains as to the appropriate role of a lawyer whose client does not have the ability to instruct counsel. Some take the approach that the lawyer should act as an *amicus curiae* to ensure that all relevant information is submitted to the court. As one author writes, the directive of counsel who represents an incapable child is to ensure that the court reaches an informed decision.¹⁸⁷ Others subscribe to the view that the appropriate function of the lawyer is that of a litigation guardian: the duty of counsel is to present evidence to the court respecting the best interests of the child involved in a custody or access dispute.¹⁸⁸

2.6 Solicitor/Client Privilege: Confidential Communications Between the Child and Counsel

An issue that continues to be a subject of debate is whether it is appropriate for a lawyer to disclose to the court or third parties confidential information transmitted by the child/client. The essential question to be addressed is should the rules which govern solicitor/client privilege for adults be applied with the same rigour to the child/lawyer relationship.

In Canada, relevant evidence is excluded from the courtroom as a result of the rules of privilege.¹⁸⁹ As Professor Rollie Thompson explains “privilege rules serve to exclude highly

¹⁸¹ Ibid.

¹⁸² Ibid., at 13-38.

¹⁸³ “The Legal Representation of Children,” *op.cit.*, note 127, at 85.

¹⁸⁴ Nasmith, *op.cit.*, note 90, at 54.

¹⁸⁵ Ibid., at 55.

¹⁸⁶ Ibid., at 54.

¹⁸⁷ Mamo, *op.cit.*, note 92 at 13-40 to 13-41; and Nasmith, *op.cit.*, note 90, at 47.

¹⁸⁸ “The Legal Representation of Children: A Consultation Paper prepared by the Quebec Bar, *op.cit.*, note 127, at 108.

¹⁸⁹ D.A. Rollie Thompson, “Rules of Evidence and Preparing for Court,” in *Canadian Child Welfare Law: Children, Families and the State*, (edited by N. Bala, J. Hornick, and R. Vogl) (Toronto: Thompson Educational Publishing, Inc., 1991) at 300.

reliable evidence on the basis that other social values, outside the judicial process are more important than truth-finding inside a courtroom.”¹⁹⁰ A question that arises in the context of custody and access cases is the legal or ethical obligation of a lawyer to reveal information from the child/client that she is, or has been, abused by a parent. What are the responsibilities of counsel in circumstances in which the child/client instructs the lawyer that he or she wishes to reside with his or her mother despite the fact that she is being physically or sexual abused by the mother’s boyfriend?¹⁹¹ As Himel observes, “if the lawyer divulges information against the child’s instructions, the solicitor-client relationship may be damaged forever.”¹⁹²

It is important to note that provinces throughout Canada have enacted child abuse reporting laws in their respective jurisdictions. Pursuant to many of these statutes, professionals such as physicians, social workers, teachers and priests, have an obligation to report abusive acts to state authorities if they have reasonable grounds to suspect that the child is suffering or may have suffered abuse.¹⁹³

According to the Rules of Professional Conduct in such provinces as Ontario, counsel are permitted, but not obliged, to disclose confidential information for the purpose of preventing the commission of a future crime.¹⁹⁴ In other words, if a child/client instructs the lawyer that she wishes to reside with her father despite the fact that he sexually abuses the child, the lawyer may breach the child’s confidence but is not ethically obliged to do so.¹⁹⁵ The dilemma that arises is that although disclosure of the abuse will protect the child, divulging the confidential information may have serious adverse repercussions on the solicitor/client relationship.

It has been argued that even in situations in which a child may be in peril, the solicitor/client privilege must be respected. Maczko states that if the privileged communication is not respected, children will be selective in the information they impart to their lawyers. It is necessary to have a fully informed lawyer in order to act on the child’s behalf.¹⁹⁶ Maczko takes the position that the child’s right to privileged communications with counsel should be established in legislation.¹⁹⁷

Similarly, the Quebec Bar Committee in its report “The Legal Representation of Children” stated that a lawyer must respect communications made in confidence by the child, regardless of the child’s age.¹⁹⁸ The Committee argued that the relationship between the lawyer and the client

¹⁹⁰ Ibid.

¹⁹¹ Nasmith, op.cit., note 90, at 55.

¹⁹² S. Himel, “Representing Children,” in *Canadian Welfare Law: Children Families, and The State*, ed. N. Bala, J. Hornick, and R. Vogl (Toronto: Thompson Educational Publishing Inc., 1991) at 201.

¹⁹³ See, for example, *Child and Family Services Act*, R.S.O. 1990, c.C-11, Section 72.

¹⁹⁴ Law Society of Upper Canada Rules of Professional Conduct, (Toronto: Law Society of Upper Canada) Rule 4, Commentary 11.

¹⁹⁵ Himel, op.cit., note 192, at 202.

¹⁹⁶ F. Maczko, “Some Problems With Acting For Children” (1979), 2 *Can. J. Fam. L.* 267.

¹⁹⁷ Ibid., at 291 and 297. Note that in the *Child and Family Services Act* in Ontario, op.cit., note 193, a solicitor/client privilege exists with respect to the duty to report abuse.

¹⁹⁸ Op.cit., note 127, at 113-114.

will be undermined if the child cannot confide in counsel. It took the position that it is in the child's interest that counsel be as fully informed as possible to provide proper representation to the client.¹⁹⁹ Judge Andrews of the Ontario (Provincial) Court subscribes to the same view. He argues that the privilege belongs to the child client; it is a breach of a lawyer's ethical responsibilities to violate the privilege without his client's full consent. According to Judge Andrews, disclosure to third parties, of information imparted by the child to the lawyer could:²⁰⁰

...seriously undermine the child's view of the judicial system. The child may come to feel that adults are imposing a decision and his or her point of view is not only unrepresented, but it is being subverted... Thus, the child's stable development as a responsible citizen in a free society could be hampered by a sense of distrust toward society's institutions and professions.

Some practising members of the bar advise that the best approach to this dilemma is to encourage the child to disclose the abuse to third parties, such as a teacher, social worker or physician. In this way, the child is protected and the solicitor/client privilege is not breached.²⁰¹

2.7 Ensuring Quality Legal Representation for Children: Selection, Professional Training and Sources of Remuneration

In order to ensure quality legal representation, each province should develop criteria regarding the selection, training and remuneration of counsel for children.²⁰² Some of the skills that must be acquired in the legal representation of a child are the ability to communicate with young people, comprehension of child psychology, possession of skills in interviewing children and knowledge of community resources.²⁰³ Lawyers must understand the stages of development of the child, be able to comprehend information conveyed by the child and possess the ability to communicate information to the child in simple and comprehensible language.²⁰⁴ It has been advocated, by some, that only lawyers with five or ten years experience should be permitted to act for children in family law proceedings.²⁰⁵

To ensure that the child is independently represented without the influence of adult parties, governments should absorb the legal expenses of counsel for the child.²⁰⁶ Children in custody and access cases, like young persons accused of crimes, should have access to legal aid.²⁰⁷ Private counsel retained by the parents does not satisfy the objective that child's counsel will act

¹⁹⁹ Ibid.

²⁰⁰ Andrews and Gelsomino, *op.cit.*, note 126, at 254.

²⁰¹ Himel, *op.cit.*, note 192, at 202.

²⁰² "The Legal Representation of Children: A Consultation Paper," *op.cit.*, note 127, at 109-110.

²⁰³ Maczko, *op.cit.*, note 196, at 297.

²⁰⁴ "The Legal Representation of Children: A Consultation Paper," *op.cit.*, note 127, at 121-122; and Thomson, *op.cit.*, note 90, at 145.

²⁰⁵ Begley, *op.cit.*, note 126, at 15.

²⁰⁶ Bernard, Ward, and Knoppers, *op.cit.*, note 84, at 147.

²⁰⁷ "The Legal Representation of Children: A Consultation Paper," *op.cit.*, note 127, at 118.

as a “mouthpiece” for his or her client. As one author notes, “private counsel cannot effectuate a true representation of the child because counsel has an ultimate loyalty to his or her client.”²⁰⁸

It has been recommended that an ombudsman for children,²⁰⁹ or alternatively provincial Child Advocacy Offices, be responsible for informing children of their right to a lawyer, as well as assuming the important role of training lawyers to represent young persons.

2.8 Code of Ethics for Lawyers

The establishment of a code of ethics for lawyers representing children merits serious consideration. Some provisions that have been suggested include the following:²¹⁰

- (1) The duties of trust, increased availability, continuity, and prohibition from withdrawing from the case in the absence of valid grounds.
- (2) The duty to act with celerity: it is incumbent on the lawyer to ensure that the case is not necessarily delayed.
- (3) The duty of communication: the lawyer must acquire special skills to understand and to convey information to the child. The legal process must be explained in terms appropriate to the child’s level of comprehension. Familial and sociocultural context must be taken into account.
- (4) The duty of confidentiality.

²⁰⁸ Mamo, *op.cit.*, note 92, at 13-8.

²⁰⁹ “The Legal Representation of Children: A Consultation Paper,” *op.cit.*, note 127, at 117-118.

²¹⁰ *Ibid.*, at 111-115.

3.0 HEARING THE VOICE OF THE CHILD

3.1 Arguments in Support of Allowing Children to Participate in Family Law Disputes

Members of the judiciary have been reluctant to allow children to testify as witnesses in custody and access disputes.²¹¹ There is concern that children will be irrevocably harmed by such an experience. It is argued that the pressure to choose between parents, fear of hurting a loved adult on whom one is dependent, and the potential for vengeful retribution from a parent can be damaging to children.²¹² Concerns have also been expressed regarding the adversarial process that characterizes legal proceedings in Canada. The imposing atmosphere of the courtroom, repetition of details of an event to strangers in public, cross-examination, and physical separation from a parent or relative are some of the features of providing evidence that are feared will adversely affect children.²¹³

In the past few years, the importance of including the child in divorce, custody and access proceedings has been recognized. There is also growing realization that many of the concerns articulated above by members of the judiciary and other professionals can be addressed by introducing amendments to provincial and federal legislation and through other non-statutory mechanisms.

Several reasons have been put forth for allowing a child to participate in custody and access proceedings. First, it ensures that the decision-making process is child-centered. It gives children the opportunity to convey their physical, emotional and social needs to a judge which ensures that the decision-making process is not focused exclusively on their parents' views and preferences. Children will know that their views are being stated as clearly as they can formulate them, in language they choose, without the danger of being mis-stated by a well-meaning adult.²¹⁴ Second, as Madame Justice McLachlin states, for a judge to ascertain the best interests of a child in a custody dispute, "it seems logical to find out what the child thinks."²¹⁵ The child's statement of his or her views directly is important evidence to be weighed by the court.²¹⁶ In the article "Hearing the Voice of Children," the following statement is made by a British Columbia judge:²¹⁷

²¹¹ C. Huddart and J. Ensminger, "Hearing the Voice of Children" (1991-92), *Can. Fam. L.Q.* 95 at 101; J. McLeod, "Factors Governing the Award of Custody" in *Child Custody Law and Practice*, ed. J. McLeod (Ontario: Thomson Canada Ltd., 1992) at 4-36. See also *Wakaluk v. Wakaluk* (1976), 25 R.F.L. 192 (Sask. C.A.).

²¹² Note that Huddart and Ensminger, *ibid.*, at 101, assert that "there are no systematic studies underpinning those conclusions."

²¹³ See discussion by R. Bessner on Child Witnesses in *Wilson on Children and the Law* (Toronto: Butterworths, 1996 updates) at 6.65.

²¹⁴ Huddart and Ensminger, *op.cit.*, note 211, at 100.

²¹⁵ "Children and the Legal Process: Changing The Rules of Evidence" (1992), 50 *The Advocate* 727.

²¹⁶ Huddart and Ensminger, *op.cit.*, note 211, at 96.

²¹⁷ *Ibid.*, at 96.

To determine guardianship, custody, or access without seeing or hearing from the child is to fix the future pattern of her life without which may be the most useful evidence.

The judge can observe the child and assess the child's understanding of the situation without the intervention of a third party. It is asserted that "[at] a time when the parents' capacity to parent is diminished, when parents have difficulty separating their child's needs from their own needs, the child's views about her needs are particularly helpful."²¹⁸

A third reason for allowing children to directly convey their wishes and needs to the court is that excluding them may be more damaging to children than permitting young persons to participate in a process that has life-long ramifications for them. The comments of two judges merit serious consideration:

Children whose divorcing parents cannot communicate rationally will usually have seen much more damaging fights than those in a courtroom. But most judges prefer to protect the child from the presumed harm.²¹⁹

...

The stress which testimony in custody proceedings must place on a child who is both a witness and a party affected is difficult to calculate. But the damage which may be done by leaving the child out of the process may be even greater.²²⁰

A further argument in support of child participation in custody and access disputes is that the parents of the child will be obliged to listen and consider the wishes and concerns of their children.²²¹ In some circumstances, they may incorporate these views in their representations to the court.

3.2 Accommodation of Children

Over the past 15 to 20 years, lawyers, psychologists and social workers have recommended that measures be taken by legislators and members of the judiciary to accommodate children in the legal process. It is argued that the system of justice is adult-oriented and is not designed to handle cases in which children are involved.²²² Law reform bodies such as the Ontario Law Reform Commission have asserted that "children must be protected in the court process in order to effectively tell their story."²²³ Extreme anxiety on the part of the child may not only have

²¹⁸ Ibid., at 97.

²¹⁹ Ibid., at 101.

²²⁰ The Honourable Madame Justice Beverly McLachlin, *op.cit.*, note 215, at 728.

²²¹ Huddart and Ensminger, *op.cit.*, note 211, at 100.

²²² J. Y. Parker, "The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?" (1982), 17 *New Eng. L. Rev.* 643, at 696. See also Ontario Medical Association's Committee on Child Welfare, "The Child in Court: Some Changes Needed (1987), *Ont. Med. Rev.* 93, at 94.

²²³ R. Bessner, *Report on Child Witnesses*, Ontario Law Reform Commission, (Toronto, 1991) at 72.

psychological repercussions, it may result in testimony that is incomplete, at times incoherent, and with little probative value.²²⁴

The Supreme Court of Canada in decisions rendered in the 1990s has supported the notion that children should be accommodated in the justice system. It was stated in *R. v. B.(G.)*²²⁵ and *R. v. W.(R.)*²²⁶ that children may require different treatment than adults when providing evidence in legal proceedings. Madame L'Heureux-Dubé stated in *R. v. Levogiannis*,²²⁷ a case that dealt with the constitutionality of screens for children in criminal trials, that:

The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.

It is argued that the rules of evidence applicable to adults should be altered for children. The Supreme Court of Canada stated in *R. v. L. (D.O.)*, a case in which the constitutionality of a *Criminal Code* provision on videotaped interviews of children was upheld, that the “rules of evidence, as much as the law itself, are not cast in stone and will evolve with time.”²²⁸ A similar sentiment was echoed in *R. v. Levogiannis* where the court stated that legislature “is free to enact or amend legislation in order to reflect its policies and priorities, taking account societal values which it considers important at a given time.”²²⁹ Madame Justice McLachlin in “Children and the Legal Process: Changing the Rules of Evidence” wrote that because children are “important players” in our legal system, the laws of evidence, civil and criminal, should be reassessed and amended, if necessary.²³⁰

It is the position of this author that legislation should be introduced which accommodates children who wish to tender evidence in civil proceedings in which custody and access is being adjudicated. The purpose of these amendments should be:

1. to facilitate the participation of children in family law disputes to ensure that the process is child-centered and that their voices are heard;
2. to minimize the anxiety on the child; and
3. to promote the tendering of reliable evidence.

In this chapter, different methods by which the views of children may be elicited will be examined. In the author’s opinion, federal and provincial legislators should seek to introduce

²²⁴ Ibid.

²²⁵ [1990] 2 S.C.R. 30.

²²⁶ (1992), 13 C.R. (4th) 257 (S.C.C.).

²²⁷ (1993), 25 C.R. (4th) 325 at 331 (S.C.C.).

²²⁸ (1993), 25 C.R. (4th) 285 at 311 (S.C.C.).

²²⁹ (1993), 25 C.R. (4th) 325 at 334 (S.C.C.).

²³⁰ The Honourable Madame Justice Beverly McLachlin; op.cit., note 215, at 737.

changes in divorce, custody and access proceedings to achieve two fundamental objectives: to empower the child and to protect the child. The suggestions that follow will seek to fulfill these twin goals.

3.3 Hearing the Voice of the Child

3.3.1 Reform of the Competency Rules

Prior to the enactment of provincial and federal legislation on the competency of child witnesses, the common law governed the reception of children's evidence in civil and criminal proceedings.²³¹ A presumption existed under the common law that children under the age of 14 were incompetent witnesses. Moreover, only children who could demonstrate that they understood the oath were permitted to give testimony in legal proceedings.²³² Children who could not convince a judge that they had the requisite religious knowledge and beliefs were precluded from tendering evidence in civil and criminal trials.

The federal and provincial legislatures introduced statutory provisions on the competency of children in their respective Evidence Acts. The *Canada Evidence Act*,²³³ the *Ontario Evidence Act*²³⁴ as well as statutes in other provinces contained provisions similar to the one reproduced below:

- (1) In any legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.
- (2) No case shall be decided upon such evidence unless it is corroborated by some other material evidence.

Pursuant to these provisions, children who did not understand the concept of an oath and could not give sworn testimony were permitted by statute to give unsworn evidence in legal proceedings. Children who could demonstrate that they understood the "duty of speaking with truth" and who possessed "sufficient intelligence to justify the reception of evidence" were allowed to testify. However, an important restriction was imposed. The child's statement required corroboration. According to the statutory provisions, no case was to be "decided upon such evidence unless it is corroborated by some other material evidence."²³⁵ It is also noteworthy that, unlike adults, children who had no religious upbringing or no religious faith

²³¹ *The King v. Brasier* (1779), 168 E.R. 202.

²³² *R. v. Antobus* (1946), 3 C.R. 357 (B.C.C.A.).

²³³ See R.S.C. 1970, c.E-10.

²³⁴ *An Act to Amend The Evidence Act*, R.S.O. 1959, C.31, s.1; *Ontario Evidence Act*, R.S.O. 1980, c.145, s.18.

²³⁵ *Ontario Evidence Act*, R.S.O. 1980, *ibid.*, s.18(2).

were prohibited from giving a solemn affirmation in lieu of swearing an oath. These provisions continue to govern the reception of children's evidence in some provinces.

In the late 1970s, it was argued by some child psychiatrists, child psychologists as well as lawyers that the legal rules did not reflect the testimonial abilities of children.²³⁶ It was asserted that the competency rules were based on the following erroneous principles: children have poor memories, children cannot discern fact from fantasy, and children have the propensity to lie more than adults.²³⁷ Studies from Canada, the United States, Australia, England, Scotland and Ireland demonstrated that children had been greatly undervalued in the legal system.²³⁸ Empirical research conducted in the 1980s showed that the memory of a person is not directly correlated to the age of that person.²³⁹ Children from the age of three or four are capable of providing reliable information. It was also established that children are no more likely than adults to fabricate evidence.²⁴⁰ Psychological and medical studies also revealed that although children engage in imaginative play, they are capable of discerning fact from fantasy in the context of witnessed events.²⁴¹

²³⁶ See R. Bessner, "The Competency of the Child Witness: A Critical Analysis of Bill C-15," (1989), 31 *Crim. L.Q.* 481.

²³⁷ See Chapter 1, "Psychological Studies On The Reliability of Children's Testimony" in The Ontario Law Reform Commission *Report on Child Witnesses*, op.cit., note 223, at 7-18.

²³⁸ Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Edinburgh, Scotland: 1989); Law Reform Commission of Ireland, *Report on Child Sexual Abuse* (September 1990). J.C. Yuille, M. A. King and D. MacDougall, *Child Victims and Witness: The Social Science and Legal Literatures* (Ottawa: Department of Justice Canada, 1988), and J.R. Christiansen and "The Testimony of Child Witnesses: Fact, Fantasy and The Influence of Pre-trial Interview (1987), 62 *Wash. L. Rev.* 705, at 707.

²³⁹ S. Rozell, "Are Children Competent Witnesses?: A Psychological Perspective" (1985), 63 *Wash. U.L.Q.* 815 at 820; C. Hedderman, *Children's Evidence: The Need for Corroboration* (Research and Planning Unit Paper 41. (London England: Home Office, 1987); G.B. Melton, "Children's Competency to Testify" (1981), 5 *Law and Human Behavior* 73, at 82; D.C. Raskin and J.C. Yuille, "Problems in Evaluating Interviews of Children in Sexual Abuse Cases" in S.J. Ceci, D.F. Ross, and M.P. Toglia eds., *Perspectives on Children's Testimony* (New York: Springer Verlay, 1989) 184, at 190; and A. Yates, "Should Young Children Testify in Cases of Sexual Abuse?" (1987), 144. *Am. J. Psychiatry* 476, at 478.

²⁴⁰ B. Nurcombe, "The Child as Witness: Competency and Credibility" (1986), 25 *J. Am. Acad. Child Psychiatry* 473, at 475; J. R. Spencer and R. Flin, *The Evidence of Children: The Law and the Psychology* (London England: Blackstone Press, 1990) at 270; and D.J. Foté, "Child Witnesses in Sexual Abuse Criminal Proceedings: The Capabilities, Special Problems, and Proposals for Reform." (1985), 13 *Pepperdine L. R.* 157 at 158.

²⁴¹ Spencer and Flin, *ibid.*, at 259; and M. K. Johnson and M. A. Foley, "Differentiating Fact from Fantasy: The Reliability of Children's Memory" (1984), 40 *J. of Social Issues* 33, at 45.

In 1988, *An Act to Amend the Criminal Code and the Evidence Act*²⁴² was proclaimed into force. Section 16 of the *Canada Evidence Act*,²⁴³ which governs the reception of children's evidence in federal proceedings reads:

- 16 (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine:
 - (a) whether the person understands the nature of an oath or a solemn affirmation; and
 - (b) whether the person is able to communicate the evidence.
- (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
- (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation, but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
- (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
- (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Section 16 of the *Canada Evidence Act* constitutes a liberalization of the former competency rules. It permits children to affirm in place of swearing an oath. Like adults, children need no longer convince a judge that they hold a belief in God or a Supreme Being in order to give testimony. The federal legislation overcomes obstacles posed by such cases as the Ontario Court of Appeal in *R. v. Budin*²⁴⁴ which prohibited children who had little or no religious background from tendering sworn evidence. Prior to the 1988 amendments, such evidence was only receivable as unsworn testimony for which corroborative evidence was statutorily required.²⁴⁵

A further result of the federal legislation is that corroboration is no longer required for the unsworn evidence of a child. The statements of young persons are not to be considered as less

²⁴² S.C. 1987, c.24.

²⁴³ R.S.C. 1970, c.E-10.

²⁴⁴ (1981), 32 O.R. (2d) (Ont. C.A.).

²⁴⁵ *Canada Evidence Act* R.S.C. 1970, c.E-10, section 16(2).

reliable than the evidence of adults. The weight to be attached to the testimony of a child, as it is with other witnesses, is to be assessed by the trier of fact.

Although the 1988 legislation constitutes an improvement over the former federal competency rules for children, the provisions contain deficiencies.²⁴⁶ First, a presumption continues to exist that children under the age of fourteen are not competent. Every child under that age must be subjected to an inquiry by the judge, to ascertain if the section 16 requirements are met. By contrast, adults are not compelled to undergo such scrutiny prior to giving evidence in legal proceedings.

Second, the distinction between an oath, a solemn affirmation, and a promise to tell the truth in section 16 *Canada Evidence Act* requires clarification. For example, courts have adopted the *Bannerman*²⁴⁷ interpretation of the oath. According to Dickson J. (as he then was), the oath is a moral obligation to speak the truth without the necessity of a belief in God. One must ask how an oath is distinguishable from a solemn affirmation. Furthermore, section 16(3) of the *Canada Evidence Act* states that a child “who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.” Again, one must question the difference between promising to tell the truth and a solemn affirmation.

Third, the Supreme Court’s recent interpretation of “communicates the evidence” in section 16 of the *Canada Evidence Act* has been perceived as a step backwards in the march towards ensuring that children’s voices are heard in judicial proceedings. As Madam Justice L’Heureux-Dubé states in her dissenting opinion in *R. v. Marquard*,²⁴⁸ the meaning attributed to “communicate the evidence” in section 16 may “subvert the purpose of legislative reform in this area.”

The controversy emanates from the majority opinion in *Marquard*.²⁴⁹ The court held that “communicate the evidence in section 16,” means more than verbal ability. McLachlin J., writing for the majority, stated that it is the duty of the trial judge “to explore in a general way whether the child is capable of perceiving events, remembering events and communicating events to the court.”²⁵⁰ This must be satisfied in order for the child to give evidence in federal proceedings.

L’Heureux-Dubé J. argued that such an interpretation is “counter to the clear words wording of s.16 of the Act, as well as the trend to do away with presumptions of unreliability and to expand the admissibility of children’s evidence.”²⁵¹ One of the primary objectives of the 1988 amendments to the *Canada Evidence Act* was to simplify the competency requirements and to

²⁴⁶ See R. Bessner op.cit., note 236.

²⁴⁷ *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), affirmed without reasons by the Supreme Court of Canada, [1966] S.C.R. v, 50 C.R. 76 n.

²⁴⁸ (1993), 25 C.R. (4th) 1 S.C.C., at 24.

²⁴⁹ Ibid.

²⁵⁰ Ibid., at 10.

²⁵¹ Ibid., at 24.

facilitate the admissibility of children's evidence. Moreover, as L'Heureux-Dubé J. states, psychological studies in recent years have demonstrated that the conventional assumptions regarding the unreliability of children's evidence lack empirical support.²⁵² The federal 1984 Badgley Report²⁵³ proposed that no special rules of testimonial competence should exist for children; rather, the evidence of children should be heard and weighed in the same manner as their adult counterparts. The Badgley Committee made the following recommendation:²⁵⁴

Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, and not a matter of admissibility. A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.

It is worth noting that several jurisdictions such as the United States, France, Germany and Scotland have liberalized their respective rules on the competency of children.²⁵⁵

L'Heureux-Dubé J. in *Marquard* makes reference to rule 601 of the United States Federal Rules of Evidence "which abolished all specific grounds of testimonial competence including those involving children. Everything now goes to weight."²⁵⁶

In an article entitled "High Time for One Secular Oath,"²⁵⁷ an Ontario judge criticizes the federal government for not "taking the unifying step for all witnesses" but rather creating a "new hierarchy of choices for witnesses under fourteen":

It seems that we now have three choices: an oath, a solemn affirmation, and the third choice for a person who understands neither the nature of an oath nor a solemn affirmation but who can communicate. Such people may simply promise to tell the truth. Now that there are no longer any requirements for corroboration of unsworn evidence, is there nonetheless to be a different weight attached to the evidence of people depending on which of these alternatives is used? Will that not be very confusing? We know that a solemn affirmation is equated with an oath. What then is the quality of evidence given with a simple promise? Is it something less? If not, why not use a simple promise for everyone? If there is a difference, what is the difference exactly? What is the consequence if the simple promise is taken in the first instance without an exploration of the other alternatives?

He further states that because Canadian society has become secular and because there is a proliferation of different religions in this country, the oath should be abolished as a test of competency.²⁵⁸

²⁵² Ibid., at 24-25.

²⁵³ *The Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa, 1984).

²⁵⁴ Ibid., volume 1, at 373-374.

²⁵⁵ See discussion in *R. v. Marquard*, op.cit., note 248, at 26.

²⁵⁶ Ibid., at 25-26.

²⁵⁷ Judge Peter Nasmith, (1990), 24 *L. Soc. Gaz.* 230, at 237-238.

In my opinion, our courts should be entirely secular. We live in an increasingly multi-culture (multi-religion) society. Religious beliefs are diverse. Those people linked to the Judeo-Christian mainstream would find the traditional Anglican ceremony more or less familiar. Many others would not. We took this country from aboriginals who had other beliefs. We have invited and welcomed to the country very significant numbers of Muslims, Hindus, Buddhists, etc. to add to a list of agnostics, atheists, pantheists, and myriad others who have not been indoctrinated with Christian beliefs. The rights of these minorities (who, together, possibly constitute the majority) to be free from discrimination based on religion, are firmly entrenched in section 15 of our *Charter of Rights*. I think this means that our democratic society is sufficiently liberalized to free individuals from any tendency of the state to use its power to impose religious dogma on them.

...

There is probably some merit in having witnesses confirm their obligation to tell the truth. Whatever the ceremony it should mean that the witness is being held accountable. The traditional oath, with its tenuous probe into the religious realm, does not have this effect. For those who are not believers, the religious factor is meaningless. For some with religious conviction, this pedestrian ceremony is trivializing and insulting, perhaps even blasphemous. For many, the ceremony is just foreign to their religious beliefs. A responsible person will speak the truth without a religious oath and for the others it means nothing anyway.

This was also the recommendation of the Ontario Law Reform Commission in 1991 in its *Report on Child Witnesses*:²⁵⁹

The Commission recommends that the oath be abolished for child witnesses in civil proceedings. A review of the case law demonstrates that the oath has become an unworkable test of competency for children and has impeded many young witnesses from offering crucial evidence at trials. Moreover, studies indicate there is no correlation between understanding the meaning of the oath and speaking the truth in court. Furthermore, the transformation of Ontario, like other jurisdictions, from a religious to a largely secular society has accentuated the inappropriateness of the oath as a test of competency. The Commission therefore recommends that the oath be abolished as a test of competency for child witnesses. In our view, a simple promise to tell the truth should be the competency requirement for child witnesses in Ontario civil proceedings.

Some provinces have passed legislation in recent years addressed to the competency of children in legal proceedings. British Columbia²⁶⁰ and Saskatchewan²⁶¹ have modelled their statutory

²⁵⁸ Ibid., at 231-232.

²⁵⁹ The Ontario Law Reform Commission, op.cit., note 223, at 37.

²⁶⁰ *Evidence Act* R.S.B.C. 1996, c.124, s.5.

²⁶¹ The *Saskatchewan Evidence Amendment Act*, S.S. 1989-90, c.57, s.4, enacting ss. 42-42.3 of the *Saskatchewan Evidence Act*, R.S.S. 1978, c.S-16.

provisions on section 16 of the *Canada Evidence Act*. However, Newfoundland²⁶² and Ontario²⁶³ have broadened even further the ability of children to give evidence in civil matters. The relevant provision of the *Newfoundland Evidence Act* is reproduced:²⁶⁴

- 18(1) A child's evidence is admissible if,
 - (a) he or she promises to tell the truth; and
 - (b) the court is of the opinion that the child understands what it means to tell the truth and is able to communicate the evidence.
- (2) When it is necessary to establish whether a child is competent to give evidence, the court may conduct an inquiry to determine whether, in its opinion, the child understands what it means to tell the truth and is able to communicate the evidence.
- (3) If the child does not promise to tell the truth, or if the court is of the opinion that the child does not understand what it means to tell the truth, his or her evidence may still be admitted if the court is of the opinion that it is sufficiently reliable.

- 18.1(1) Evidence given by a child need not be corroborated.
 - (2) The judge shall not instruct the jury that it is unsafe to rely on the uncorroborated evidence of a child.
 - (3) Subsection (2) does not affect the judge's discretion to comment on the evidence.

Note that a promise to tell the truth, and not an oath or solemn affirmation, is a test of competency. Moreover, even children who do not comprehend the meaning of a promise to speak the truth may have their evidence admitted if the court considers it to be "sufficiently reliable."

The Ontario provision reads:²⁶⁵

- 18(1) A person of any age is presumed to be competent to give evidence.
 - (2) When a person's competence is challenged, the judge, justice or other presiding officer shall examine the person.

²⁶² *Newfoundland Evidence Act*, R.S.N. 1980, c.E-16, as amended by S.N. 1995, c.34, s.1.

²⁶³ *Ontario Evidence Act*, R.S.O. 1990, c.E-23, as amended by S.O. 1995, c.6, s.6(1).

²⁶⁴ Op.cit., note 262.

²⁶⁵ Op.cit., note 263.

- (3) However, if the judge, justice or other presiding officer is of the opinion that the person's ability to give evidence might be adversely affected if he or she examined the person, the person may be examined by counsel instead.
- 18.1(1) When the competence of a proposed witness who is a person under the age of 14 is challenged, the court may admit the person's evidence if the person is able to communicate the evidence, understands the nature of an oath or solemn affirmation and testifies under oath or solemn affirmation.
 - (2) The court may admit the person's evidence, if the person is able to communicate the evidence, even though the person does not understand the nature of an oath or solemn affirmation, if the person understands what it means to tell the truth and promises to tell the truth.
 - (3) If the court is of the opinion that the person's evidence is sufficiently reliable, the court has discretion to admit it, if the person is able to communicate the evidence, even if the person understands neither the nature of an oath or solemn affirmation nor what it means to tell the truth.
 - 18.2(1) Evidence given by a person under the age of 14 need not be corroborated.
 - (2) It is not necessary to instruct the trier of fact that it is unsafe to rely on the uncorroborated evidence of a person under the age of 14.

Children are presumed to be competent witnesses in Ontario. The legislation states that children can tender evidence by swearing an oath, giving a solemn affirmation or promising to tell the truth. As in Newfoundland, if a court considers the child's evidence to be sufficiently reliable the judge can admit the evidence even if the child has not demonstrated that he understands the meaning of the promise to tell the truth.

It is recommended that federal and provincial legislators amend their respective Evidence Acts to remove obstacles to the admissibility of children's evidence. In this way, the judge has the opportunity to consider the child's views and can assess the weight to be accorded to such evidence in the particular case. The new provision could include the following:

- (1) a presumption that children are competent to provide evidence in federal and provincial proceedings;
- (2) a repeal of the statutory requirement of corroboration;
- (3) the test for the admissibility of the evidence should simply be the verbal ability to communicate and an understanding of a promise to tell the truth; and
- (4) in cases in which a child does not understand the promise to tell the truth, the evidence of the child will be admissible if in the court's discretion, the evidence is sufficiently reliable.

3.3.2 *The Use of Screens in the Courtroom*

Provision of screens to children in custody and access disputes serves two important functions. The erection of a screen, which prevents the child from seeing the parties to the proceeding, has the effect of reducing the anxiety of the child and of fostering an atmosphere in which the child can give accurate and comprehensive testimony.²⁶⁶ A one-way screen allows the parties and lawyers to observe the child while he or she is tendering evidence. Several jurisdictions, including England, Wales, and some U.S. States, have passed legislation that permits screens to be erected for children involved in the legal process.²⁶⁷

In 1988, the Parliament of Canada introduced a provision into the *Criminal Code* which permits the use of screens in circumscribed situations.²⁶⁸ It is submitted that legislators should not blindly import section 486(2.1) of the *Criminal Code* into civil divorce, custody and access proceedings. It is noteworthy that the 1988 provision allowed only children who had allegedly been subjected to acts of sexual abuse to rely on this protective device. It was not available to children who had been victims of other crimes. In the 1997 amendments to the *Code*, the section was broadened to include acts of physical abuse, such as assault.²⁶⁹ Also, until recently, section 486(2.1) was restricted to victims of abuse and not to children who may have witnessed these crimes. The test that must be satisfied to avail the child of a screen is onerous. It must be established, to the satisfaction of a judge, that the “screen is necessary to obtain a full and candid account of the acts complained of from the complainant or witness.” In other words, children who are capable of tendering evidence without a screen are denied this protective device.²⁷⁰ It is clear from the Ontario Court of Appeal decision *R. v. Paul M.* that prevention of trauma is not an objective of the legislation.²⁷¹

The London Child Witness Project in Ontario has criticized the restrictiveness of the screen provision in the *Criminal Code*. In a report, it stated that “the formality of the application procedure and the difficulty in obtaining screens for young witnesses is unnecessary and not in keeping with the spirit of the legislation to make child witnesses feel more comfortable in a courtroom setting.”²⁷²

²⁶⁶ London Child Witness Project (London, Ontario, Nov. 1990), at 22; and Spencer and Flin, *op.cit.*, note 240, at 83.

²⁶⁷ See discussion in Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Perth, Australia, April 1990), at 60; Law Reform Commission of Ireland, *op.cit.*, note 238, at 70; Scottish Law Reform Commission, *op.cit.*, note 238, at 19; and D. Whitcomb, “When the Victim is a Child: Past Hope, Current Reality, and Future Promise of Legal Reform in the United States” in J. R. Spencer, G. Nicholson, R. Flin, and R. Bull (eds), *Children’s Evidence in Legal Proceedings: An International Perspective* (Cambridge Lectures, England, June 1989).

²⁶⁸ R.S.C. 1985, c.C-46, s.486(2.1) as enacted by R.S.C. 1985, c.-19 (3rd Supp.), s.14.

²⁶⁹ 1997, c.16, s.6.

²⁷⁰ See for example *R. v. Paul M.* (1990), 1 O.R. (3d) 341 (Ont.C.A.).

²⁷¹ *Ibid.*

²⁷² London Child Witness Project, *op.cit.*, note 266, at 108.

In 1989, the Saskatchewan Legislature followed the lead of the federal government and amended The *Saskatchewan Evidence Act*²⁷³ to provide screens for children in civil proceedings. Section 42.1(1) states that where:

- (a) a witness is under 18 years of age; and
- (b) in the opinion of the presiding judge, the exclusion of the witness would assist in obtaining a full and candid account from the witness the presiding judge may order that the witness testify outside the courtroom or behind a screen or other device that would allow the witness not to see the parties.

Like its federal counterpart, Saskatchewan has adopted the “full and candid test” of section 486(2.1) of the *Criminal Code*. Thus, the psychological health of a child is not a relevant consideration for judges in their determination of whether a screen should be provided to a child in civil proceedings. Note, however, that the provision is not restricted to disputes in which abuse is alleged. Screens are available to children in all civil proceedings.

British Columbia introduced an amendment to its *Evidence Act* in 1988²⁷⁴ that enables children under the age of 19 to testify behind a one-way screen. However, this protective device is restricted to victims of sexual or physical abuse. Children who provide evidence in other types of legal proceedings cannot testify behind a screen. Nor can children who have merely witnessed events that are the subject of litigation. A further limitation is that the “full and candid” test must be satisfied. The judge, justice, or a presiding officer must come to the conclusion “that the order is necessary to obtain a full and candid account of the alleged abuse from the person alleged to have been abused.”

In 1995, legislators introduced amendments to the *Ontario Evidence Act*²⁷⁵ to allow screens for children in civil proceedings. Any child under 18 years old, not merely victims of abuse, may rely on this protective device. Moreover, the provision is broader than the federal legislation or the analogous statutory provisions in British Columbia or Saskatchewan. A screen is available if either it helps the child give complete and accurate testimony, or if it is in “the best interests of the child.” The section reads:²⁷⁶

- 18.4(1) A witness under the age of 18 may testify behind a screen or similar device that allows the witness not to see an adverse party, if the court is of the opinion that this is likely to help the witness give complete and accurate testimony or that it has in the best interests of the witness, and if the condition set out in subsection (4) is satisfied.

...

²⁷³ Op.cit., note 261.

²⁷⁴ Op.cit., note 260.

²⁷⁵ Op.cit., note 263.

²⁷⁶ Ibid.

- (4) When a screen or similar device or closed-circuit television is used, the judge and jury and the parties to the proceeding and their lawyers shall be able to see and hear the witness testify.

3.3.3 *Closed-Circuit Television*

Live television link enables the child to be examined and cross-examined from outside the court in the congenial atmosphere of a witness room. Television cameras and screens are placed in the courtroom to enable the judge, the parties, and members of the public, to see and hear the child testify.²⁷⁷

The availability of closed-circuit television for children is considered to have several advantages. First, it protects the child from the anxiety-inducing courtroom “full of strangers and rituals.”²⁷⁸ Second, it shields the child from physical confrontation with the parties to the proceedings. Third, “it renders the child better able to tell his or her story, remember, and answer questions clearly and accurately.”²⁷⁹ In other words, it enables the trier of fact to obtain a more detailed and accurate account from the child. Fourth, closed-circuit television has been credited with providing the benefits of a child courtroom at substantially less expense.²⁸⁰ Australia, England, and over 33 U.S. States allow children to provide evidence by closed-circuit television.²⁸¹

The Canadian government introduced a provision into the *Criminal Code* which allows children in criminal cases to rely on closed-circuit television in limited circumstances. Section 486(2.1) of the Code, amended in 1997, provides:²⁸²

Notwithstanding section 640, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 16(2) or (3), or section 163.1, 170, 171, 172, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272 or 273 and the complainant or any witness, at the time of the trial or preliminary inquiry, is under the age of eighteen years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, the presiding judge or justice, as the case may be, may order that the complainant or witness testify outside the court room or behind a screen or other device that would allow the complainant or witness not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant or witness.

²⁷⁷ See Scottish Law Commission, *op.cit.*, note 238, at 21; and Law Reform Commission of Western Australia, *op.cit.*, note 267, at 45.

²⁷⁸ Law Reform Commission of Western Australia, *ibid.*, at 45.

²⁷⁹ *Ibid.*, at 49.

²⁸⁰ D. F. Foté, “Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposal for Reform” (1985), 13 *Pepperdine L. R.* 157, at 180.

²⁸¹ Spencer and Flin, *op.cit.*, note 240, at 84-90; and J. C. Robbard and L. J. Kordyban, “The Child Witness: Reconciling the Irreconcilable” (1989), 27 *Alta. L. Rev.* 327, at 351.

²⁸² 1997, c.16, s.6.

As is the case with screens in criminal proceedings, closed-circuit television is only available in cases in which sexual or physical abuse of the child is alleged. Moreover, the “full and candid” test must be satisfied. Therefore, minimizing the stress or anxiety of the child is not an objective of the legislation.

Some provinces have introduced similar provisions. Saskatchewan, for example, permits all children, not only those who have allegedly been abused, to tender evidence by closed-circuit television.²⁸³ British Columbia has restricted the availability of this protective device to children who have been physically or sexually abused by a party to the proceedings.²⁸⁴ Like the federal provision, it must be demonstrated that reliance on closed-circuit television is necessary for the child to provide a complete and accurate account of his or her testimony.

The Ontario legislation is broader than the closed-circuit television provisions of British Columbia, Saskatchewan or section 486(2.1) of the *Criminal Code*. Either of the following two criteria must be satisfied under section 18.4(2) of the *Evidence Act*:²⁸⁵

- (1) it is in the best interest of the child to testify by closed-circuit television; or
- (2) a screen or similar device is insufficient to enable the child to tender complete and accurate evidence.

It is submitted that legislation should be introduced to allow all young persons to provide evidence in divorce, custody, or access disputes by closed-circuit television.

3.3.4 The Use of Videotapes

Videotaping the statements of a child is another method by which courts can hear directly the wishes and interests of a young person. Videotaping has been heralded as one of the most innovative responses to eliciting the views and observations of children.²⁸⁶ As stated by the Law Reform Commission of Australia:²⁸⁷

It is clear that the traditional manner of taking evidence is undergoing a searching re-examination in the light of modern technological developments and that video-recording is being seen as a way of using that technology to treat child witnesses more humanely.

Two methods of eliciting the child’s views by videotape will be considered: (a) videotaped testimony and (b) videotaped interviews.

²⁸³ The *Saskatchewan Evidence Act*, op.cit., note 261 at s.42.1.

²⁸⁴ British Columbia *Evidence Act*, op.cit., note 260 at s.72.

²⁸⁵ Ontario *Evidence Act*, op.cit., note 263.

²⁸⁶ Foté, op.cit., note 280, at 175.

²⁸⁷ Law Reform Commission of Western Australia, op.cit., note 267, at 45.

(a) Videotaped Testimony

Some jurisdictions permit children to give evidence by videotaped testimony. The child is examined and cross-examined before a judge in a small, congenial room rather than a courtroom. The proceedings are informal. Legal garb is not worn and the judge, counsel, and the child sit together at a table. The parties to the litigation are not present in the room; they view the proceedings through a one-way screen or through the medium of closed-circuit television. They communicate with their lawyers through a microphone and an earpiece.²⁸⁸

The video recording of the child's evidence is presented at the trial some months later. Some of the advantages of videotaped testimony are:²⁸⁹

- (1) the child is not required to appear at the trial;
- (2) the child can express her views in an informal setting; and
- (3) the child need not endure the anxiety associated with waiting months for the trial to take place.

Evidence by videotaped testimony, also referred to as videotaped depositions, is offered to children in continental legal systems as well as common law jurisdictions. New South Wales, Scandinavian countries, and some U.S. States permit this mode of tendering evidence for young persons.²⁹⁰ Ontario introduced in the *Evidence Act*²⁹¹ a provision on videotaped testimony. Children are permitted to rely on section 18.3 if either (1) it is in the best interests of the child, or (2) it is likely to help the child give complete and accurate testimony. Lawyers for the parties must be present when the evidence is tendered and must be given the opportunity to examine the child "in the same way as if he or she was testifying in the courtroom."²⁹²

(b) Videotaped Interviews

Several jurisdictions permit videotaped interviews of the child, which take place months before the trial, to be entered as evidence in legal proceedings. The virtues of such a technique are that the interviews take place in a relaxed setting which minimizes the anxiety of the child. Also, the trier of fact receives more comprehensive evidence than testimony given months later in a more threatening environment. The videotape captures the child terminology, facial expressions, and

²⁸⁸ Spencer and Flin, op.cit., note 240, at 42; Scottish Law Commission, op.cit., note 238, at 18-19; Law Reform Commission of Ireland, op.cit., note 238, at 72-73; and Law Reform Commission of Tasmania, *Child Witness* (1989) at 1.

²⁸⁹ Spencer and Flin, *ibid.*, at 158; Scottish Law Commission, *ibid.*, at 124; and R. Eatman and J. Bulkley, *Protecting Child Victim/Witnesses* (American Bar Association National Legal Research Center for Child Advocacy and Protection, February 1986), at 21.

²⁹⁰ See discussion in Law Reform Commission of Tasmania, op.cit., note 288, at 12-14; Spencer and Flin, *ibid.*, at 157; and C. L. Marchese, "Child Victims of Sexual Abuse: Balancing A Child's Trauma Against the Defendant's Confrontation Rights – *Coy v. Iowa*" (1990), 6 J. *Contemp. Health Law and Policy* 411, at 419.

²⁹¹ Ontario *Evidence Act*, op.cit., note 263.

²⁹² *Ibid.*, at s.18.3(2).

emotional responses.²⁹³ According to the Supreme Court of Canada, “Scientific study has indicated that, as compared to a courtroom setting, the quality and reliability of children’s testimony is significantly enhanced in a smaller, more intimate, videotape environment.”²⁹⁴ According to Spencer and Flin in *The Evidence of Children: The Law and the Psychology*,²⁹⁵ videotaped interviews:

...enable the court to hear an unquestioningly accurate account of what the child was saying about the incident at the time it first came to light, before time wiped certain details from his or her mind, and prompting or questioning by adults implanted others.

Another virtue of videotaped interviews is that parents may view the tape in advance of trial and consequently, may be more apt to take the needs and wishes of their children into account in their representations to the court.

The provision introduced in the *Criminal Code* by the federal government in 1988, since amended in 1997,²⁹⁶ requires that several conditions be satisfied for a videotaped interview of a child to be admissible. Section 715.1²⁹⁷ is only available for offences involving the abuse of a child. In addition, videotape must be made within a reasonable time after the alleged offence. A further criterion is that the child must appear at the trial and adopt the contents of the videotape. The child is subject to examination and cross-examination by counsel. The Supreme Court of Canada has noted that although the child must appear in court, the introduction of the videotaped interview reduces the time the child is required to remain on the witness stand during the trial.²⁹⁸

The province of Saskatchewan permits videotaped interviews of children to be admitted in civil proceedings. Section 42.2 of the *Saskatchewan Evidence Act*²⁹⁹ provides:

In any proceeding in which a witness was under 18 years of age at the time the events occurred about which he or she is testifying, a videotape:

²⁹³ B. McAllister, “Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom,” (1986), 18 *St. Mary’s L.J.* 279, at 311.

²⁹⁴ *R. v. L. (D.O.)* 25 C.R. (4th) 1285 at 306. See also *R. v. F(C.C.)* (1997), 154 D.L.R. (4th) 13 (S.C.C.).

²⁹⁵ Spencer and Flin, op.cit., note 240, at 161.

²⁹⁶ 1997, c.16, s.7.

²⁹⁷ Section 715.1 of the *Criminal Code* provides: In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 163.1, 170, 171, 172, 173, 210, 211, 212, 213, 266, 267, 268, 271, 272 or 273, in which the complainant or other witness was under the age of eighteen years at the time of the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant or witness describes the acts complained of, is admissible in evidence if the complainant or witness, while testifying, adopts the contents of the videotape.

²⁹⁸ *R. v. L. (D.O.)*, op.cit., note 294, at 307.

²⁹⁹ The *Saskatchewan Evidence Act*, op.cit., note 261.

- (a) that is made when a reasonable time after the events occurred; and
- (b) in which the witness describes the events;

is admissible in evidence if the witness adopts the contents of the videotape while testifying.

The Saskatchewan provision is not restricted to cases of abuse and, therefore, videotaped interviews of children are admissible in all civil proceedings. However, like section 715.1 of the *Criminal Code*, the child must appear at the trial to adopt the contents of the videotape and is subject to examination and cross-examination.

In Ontario, it is necessary to obtain leave of the court for videotaped interviews to be entered into evidence in civil proceedings. Although it is available to all persons under 18 years old, children must also be present at the trial to adopt the contents of the videotape.³⁰⁰

It is important to note that a judge in any legal proceeding has the discretion either to refuse to admit, or to edit, portions of the videotape if the probative value of the videotape is slight.

In *R. v. L. (D.O.)*, a case in which section 715.1 of the *Criminal Code* was constitutionally upheld, the Supreme Court of Canada lists factors that judges can consider when exercising their discretion whether to admit a videotaped interview of a child.³⁰¹ Some of these factors are:

- (a) the form of questions used by any other person appearing in the videotape;
- (b) any interest of anyone participating in the making of the statement;
- (c) the quality of the video and audio reproduction;
- (d) the presence or absence of admissible evidence in the statement; and
- (e) the ability to eliminate inappropriate material by editing the tape.

It is submitted that videotaped interviews of children should be admissible in proceedings in which custody and access is an issue to be addressed by the courts. Providing the videotape is considered to be a reliable by the judge, it should be a component of the evidence to be considered by the court in family law proceedings.

3.3.5 The Presence of a Support Person

The presence of a support person to provide emotional support to children during the course of the legal proceedings has been advocated by law reform bodies, academics, and other members

³⁰⁰ Ontario *Evidence Act*, op.cit., note 263, s.18.3.

³⁰¹ *R. v. L.(D.O.)*, op.cit., note 294, at 316-317.

of the legal profession.³⁰² At the hearings of the Special Joint Committee on Child Custody and Access, children complained that they did not have the support systems that were available to their parents.³⁰³

Support persons can perform valuable functions. They can discuss with the child any anxieties that they are experiencing as a result of their parents' separation or divorce. Support persons can explain the stages of the proceedings to the child, be physically at the child's side while they are giving evidence and be present while the child is waiting in court or in a lawyer's office. In addition, the support person can reassure the children that articulating their views and interests to judicial decision-makers is an important and worthwhile endeavour. As stated by the Scottish Law Reform Commission, the close presence of a trusted adult can, in some cases, "give a young child the reassurance that is required for evidence to be given clearly and confidently."³⁰⁴

In criminal proceedings in Canada, children under 14 years old who have allegedly been abused are permitted to have a support person in close proximity while tendering evidence.³⁰⁵ Section 486(1.2) of the *Criminal Code* states that the choice of the support person rests with the child. A witness in the proceedings may serve as a support person if the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice so requires. Section 486(1.4) of the Code states that the judge can order that the support person and child not communicate with each other while the child is testifying.

Ontario permits a support person to be in close proximity to the child in civil proceedings for all persons under 18 years old.³⁰⁶ The *Evidence Act* provides examples of circumstances in which a support person may not be suitable. They are:³⁰⁷

- (a) if the court is of the opinion that the support person may attempt to influence the testimony of the child;
- (b) if the support person behaves in a disruptive way; or
- (c) if the support person is also a witness in the proceedings.

In such cases, the child will have the opportunity to select an alternative support person.

It is recommended that children in Canada under the age of 18 years be permitted by statute to appoint a support person to provide them with emotional support during divorce, custody, and access proceedings.

³⁰² Huddart and Ensminger, op.cit., note 211, at 102; Ontario Law Reform Commission, *Report on Child Witnesses*, op.cit., note 223, at 92.

³⁰³ *For the Sake of the Children*, Report of The Special Joint Committee on Child Custody and Access (Ottawa: December 1998) at 19.

³⁰⁴ Scottish Law Commission, op.cit., note 238, at 7.

³⁰⁵ Section 486(1.2) *Criminal Code*.

³⁰⁶ Ontario *Evidence Act*, op.cit., note 263, s.18.5. See also article 394.4 of the *Quebec Code of Civil Procedure*.

³⁰⁷ Ibid.

3.3.6 *The Role of the Judge*

Judges have an important role to play in protecting children in family law proceedings.³⁰⁸ Members of the judiciary have inherent jurisdiction to control their own process for the proper administration of justice. It is essential that judges take measures to ensure that children in family law cases are treated “with due regard for the dignity and legitimate privacy of the child and without seeking to intimidate or humiliate them.”³⁰⁹ As an Ontario judge stated, judges have a clear role “to ensure that the advocacy process is not misused.”³¹⁰

Psychologists Gail Goodman and Vickie Helgeson have observed some of the behaviours engaged in by lawyers with children in legal proceedings. Use of complicated vocabulary, double negatives, difficult sentence constructions and intimidating techniques designed to undermine a child’s confidence, are some of the practices resorted to by some members of the legal profession.³¹¹ Judges can ensure that all proceedings are conducted in age-appropriate language and they can control counsel who seek to intimidate the child.³¹² Also, members of the judiciary can protect the child by preventing questions from being asked that require the child to state a preference between parents. In *For the Sake of the Children*, the Special Joint Committee made reference to a judge in Michigan who habitually informs children in custody and access cases that he and not the child is the decision-maker.³¹³ These statements are designed to ensure that children do not take responsibility for the outcome of the case.

Judges can also ensure that the physical surroundings are conducive to eliciting the testimony from children in an environment that reduces anxiety. For example, a child may be comfortable speaking to a judge from a location in court other than the witness stand. It is important that members of the bench receive education in child psychology and be provided with appropriate skills with which to communicate with children.

The Supreme Court of Canada has endorsed the view that judges have a crucial role to play with respect to children who participate in the legal process. L’Heureux-Dubé J. in *R. v. L. (D.O.)*³¹⁴ said the following:

It is my view that, in the case at hand as well as in other cases involving fragile witnesses such as children, the trial judge has a responsibility to ensure that the child understands the questions being asked and that the evidence given by the child is clear and unambiguous. To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to

³⁰⁸ Huddart and Ensminger, op.cit., note 211, at 102; Spencer and Flin, op.cit., note 240, 296-297.

³⁰⁹ See American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (Washington D.C.: May 1985), at 9-10. See also Spencer and Flin, op.cit., note 240, at 297.

³¹⁰ *Re Kathleen R* (unreported) (August 31, 1983, Ont. Prov. Ct.).

³¹¹ G. Goodman and V. Helgeson, “Child Sexual Assault: Children’s Memory and the Law” (1989), 12 *Prov. Judges J.* 17 at 26.

³¹² Huddart and Ensminger, op.cit., note 211, at 102.

³¹³ *For the Sake of the Children*, note 303, at 22.

³¹⁴ Op.cit., note 294, at 323.

clarify the child's responses. In order to ensure the appropriate conduct of the trial, the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm.

3.4 Hearing the Child's Voice Through the Evidence of Third Parties—Hearsay Statements

There may be circumstances in which a child does not wish to express his or her views directly to judicial decision-makers on issues of custody and access. Rather, the child may prefer to discuss his or her anxieties, interests or views with a social worker, teacher, child psychologist, pediatrician or other trusted individual. The transmittal of a child's views to the court through a third party constitutes hearsay evidence and is generally inadmissible unless particular conditions are satisfied.

The hearsay rule, one of the oldest canons in the law of evidence, is defined as follows:³¹⁵

A statement by a person other than one made while testifying as a witness at the proceeding that is offered in evidence to prove the truth of the matter asserted.

The historical reason for the inadmissibility of hearsay statements is that the evidence is inherently unreliable. There is an absence of an opportunity to cross-examine the maker of the statement in order to test perception, memory, narration and sincerity.³¹⁶

The hearsay rule and the plethora of exceptions to the hearsay rule have been the subject of criticism. It has been asserted that the hearsay rule is “needlessly complicated” and “lack(s) any coherent unifying principle.”³¹⁷ As stated by Lord Devlin in the House of Lords in *Official Solicitor to The Supreme Court v. K.* there “are rules of convenience rather than of principle, and the rule against hearsay... is among them.”³¹⁸

Reform of the hearsay rule has been advocated for several reasons. First, the hearsay statements of children often do not satisfy the requirements for the common law exceptions to the hearsay rule as, for example, party admissions, statements of physical, emotional and mental state, or spontaneous declarations. Second, it is argued that the hearsay evidence of a child may be the best evidence of the subject being litigated.³¹⁹ Those involved in the legal system as well as professionals, such as child psychologists and psychiatrists, maintain that the unprompted statement of a child to a third party may be of high probative value. In the words of an Ontario judge:³²⁰

³¹⁵ J. Sopinka and S. N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), at 39-40.

³¹⁶ D.A.R. Thompson, “Children Should Be Heard But Not Seen: Children's Evidence in Protection Proceedings” (National Family Law Programme) (Calgary, July 1990), at H2-9.

³¹⁷ Spencer and Flin, *op.cit.*, note 240, at 135.

³¹⁸ [1965] A.C. 201, at 238, [1963] 3 All E.R. 191, at 208 (H.L.).

³¹⁹ Law Reform Commission of Western Australia, *op.cit.*, note 267, at 13.

³²⁰ *Re Kathleen R.*, *op.cit.*, note 305.

[When] proceedings concern the best interests, safety, and in some cases, the life of the child [g]iven the enormous importance of such issues, the rules of evidence should stand aside when they would prevent the court from hearing all the available evidence which might assist in determining the appropriate result.

Similarly, Madame Justice Wilson in the Supreme Court of Canada decision in *R. v. B.(G.)* stated that it is important that the courts adopt “a much more benign attitude to children’s evidence.”³²¹

A further reason members of the legal profession have supported the liberalization of the hearsay rule for children is the desire to spare children the experience of testifying in court.³²² A child may refuse or be unable to recount his or her views to the court. If a child’s statements to a third party are held to be inadmissible as violating the hearsay rule, potentially valuable evidence may not be considered by the court in its deliberations.

The 1991 judgment of the Supreme Court of Canada in *R. v. Khan*³²³ constitutes an important decision regarding the hearsay statements of children. In this criminal case involving the sexual assault of a three and a half year old child by her physician, McLachlin J. stated that the hearsay rule has often been an obstacle to the reception of children’s evidence.³²⁴

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.

The Supreme Court of Canada adopted the criteria of necessity and reliability as conditions for the admissibility of the hearsay statements of children. It must be demonstrated that the child’s statement to a third party is “reasonably necessary.”³²⁵ For example, evidence based on psychological assessments that state that providing testimony to the court will be traumatic or cause psychological harm to the child, may suffice. Failure of the child to meet the provincial or federal competency requirements will also likely meet the “necessity” condition. The court in *Khan* stressed that these were just some of the circumstances that could satisfy this criterion of the test.³²⁶

³²¹ [1990] S.C.R. 30, 77 C.R. (3d) 347 (S.C.C.).

³²² A. P. Nasmith, “The Inchoate Voice” (1991-92), 8 *Can. Fam. L.Q.* 43 at 39.

³²³ (1991), 79 C.R. (3d) 1 (S.C.C.).

³²⁴ *Ibid.*, at 9.

³²⁵ *Ibid.*, at 13.

³²⁶ *Ibid.*

The second criterion for the admissibility of hearsay statements of children is “reliability.” As stated by McLachlin J.³²⁷

Many considerations, such as timing, demeanour, and personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement, may be relevant on the issue of reliability.

The court stressed that it did not wish to delineate a strict list of factors that must be present to satisfy the “reliability” prong of the test; rather, “the matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge.”³²⁸ The Supreme Court of Canada in *R. v. D.R.*³²⁹ and *R. v. Smith*³³⁰ further elaborated upon the reliability criterion. It was stated that only a circumstantial guarantee of trustworthiness must be established for the statements to be admitted into evidence; it need not be demonstrated that the hearsay statements are absolutely reliable. The principles in *R. v. Khan* were applied in the civil professional misconduct case involving Dr. Khan.³³¹

There is a continuing controversy as to whether the rules required for the admissibility of hearsay statements, as articulated in *R. v. Khan*, should be applied to civil cases and, in particular, child custody and child protection cases. An examination of civil law decisions reveals that uncertainty persists as to the appropriate test for the reception of out-of-court-statements of children. As stated by the Alberta Court of Appeal in *Re J.M.*:³³²

A review of the child custody and guardianship cases reveals a significant disparity in the application of the generally accepted rules regarding the admissibility of hearsay. The tendency to relax these rules in cases dealing with custody and guardianship of children is often apparent.

Some civil courts, in their adjudication of issues of custody and access have applied the principles in *R. v. Khan*. This was the case in both *New Brunswick Minister and Community Services v. E.J.L.*³³³ and *C.(C.) v. B.(L.)*³³⁴ in Newfoundland. In the disciplinary proceedings instituted against Dr. Khan, the Ontario Court of Appeal stated that the principles of “necessity” and “reliability” are applicable to civil proceedings involving the hearsay statements of children. However, Mr. Justice Doherty suggests that the two principles articulated in *R. v. Khan* may not be applied with the same rigour as civil cases:³³⁵

³²⁷ Ibid., at 14.

³²⁸ Ibid.

³²⁹ [1996] S.C.J. no. 8.

³³⁰ [1992] 2 S.C.R. 915.

³³¹ (1992), 9 O.R. (3d) 641 (Ont. C.A.).

³³² [1995] A.J. No. 170.

³³³ (1993), 132 N.B.R. (2d) 331 (Q.B.).

³³⁴ *C. (C.) v. B. (L.)* (unreported), December 12, 1995 (Nfld. U.F.C.), Docket No. 92/0665.

³³⁵ Op.cit., note 325, at 653.

Although *Khan* was a criminal case, I agree with the majority of the Divisional Court that the principles set down in *Khan* govern the admissibility of Tanya's out-of-court statements in the discipline hearings. The Civil Rules of Evidence are made applicable to those proceedings by s. 12(6) of the *Health Disciplines Act*. As there is no statutory civil rule governing the admissibility of the statement, the common law rules apply. The reliance in *Khan* on *Ares v. Venner*, a civil case, indicates that the necessity and reliability criteria identified in *Khan* have equal applicability whether the child's out-of-court statement is tendered in a civil or criminal proceeding. That is not to say that the determination of whether those criteria have been met will be the same regardless of the nature of the proceedings but only that both factors will have to be addressed in both types of cases. I also need not consider the admissibility of such statements in cases which are neither criminal nor civil, or which may be subject to specific statutory provisions, e.g., *Child and Family Services Act*.

It has been argued that hearsay statements should be restricted to an issue of weight rather than admissibility. Several jurisdictions, including France and Scandinavia have abolished the hearsay rule in both civil and criminal proceedings.

It is recommended that the legislatures in this country consider introducing a statutory provision for the hearsay statements of children in divorce, custody and access cases. Providing the statements are considered to be "reliable" by a court, the evidence should be admitted. In other words, only the reliability prong of the *Khan* test should be retained. This will ensure that the statements of children are considered by judges in their deliberations. Once the evidence is received, the judge will assess the weight to be accorded to such statements.

3.5 Judicial Interviews

The practice of a judge privately interviewing a child as a means of ascertaining a child's wishes is a subject of controversy. Proponents of such a practice argue that children may not feel comfortable expressing their views in open court or in the presence of their parents.³³⁶ A judicial interview, it is stated, allows children to express their views in a free and relaxed manner.

A judicial interview generally takes place in judges chambers although some judges have accompanied children to a "park for a chat."³³⁷ Advocates of such a practice argue that this minimizes any adverse psychological harm that may accrue to the child from participation in the legal process. It is also credited with providing a more accurate account of the child's views "free from the adversarial system and from the prompting of others."³³⁸

Opposition to judicial interviews, however, have been vociferous. Jurists such as Abella J., L'Heureux-Dubé J., Rothman J., Huddart J., and Nasmith J., assert that the practice of

³³⁶ A. Shipley, "Custody Law Reform in Ontario: The Children's Law Reform Act" in *Children's Rights In The Practice of Family Law* (edited by B. Landau) (Toronto: Carswell, 1986) at 173-174.

³³⁷ McLachlin, op.cit., note 215, at 727.

³³⁸ See Huddart and Ensminger, op.cit., note 211, at 102-103 for a discussion of the advantages and disadvantages of the judicial interview.

interviewing children in chambers is not a good method of ascertaining the wishes of the child.³³⁹

Several reasons have been put forth for this position. Judicial interviews, it is argued, are conducted in an intimidating environment by a person who is not skilled in asking questions of children or in interpreting their answers. It is stated that the short time of the interview makes it unlikely that the perceptions of the child explaining his or her wishes can be considered in sufficient depth.³⁴⁰ In addition, in an adversarial system, the judicial interview is considered by some to be a violation of the judge's role as an impartial trier of fact.³⁴¹ This is because the judge assumes an inquisitorial role when questioning a child in an interview. There is also concern that the parents' procedural rights are infringed as they are not present at the interview and, therefore, are not in a position to rebut statements made by the child. The Saskatchewan Court of Appeal in *Hamilton v. Hamilton*³⁴² held that an interview should not be used to obtain vital evidence that would be shielded from challenge by the litigants. Judge Nasmith in "The Inchoate Voice" summarizes reasons for his disapproval of judicial interviews as a means of eliciting the views of the child:³⁴³

1. it does not constitute evidence;
2. the content of the interview cannot be reviewed on appeal;
3. there is a denial of the rights of the parties;
4. the child is not protected from the right to state a preference; and
5. justice is not seen to be done.

In *Jandrisch v. Jandrisch*,³⁴⁴ Huband J. A. of the Manitoba Court of Appeal stated that a trial judge has discretion to interview children in private without counsel. However, it is important that a record exist of what was said in the interview in the event that the rights of the parties are subject to appeal. If it is not possible to have a verbatim transcript, a statement from the judge as to what was said must be available. In *Demeter v. Demeter*,³⁴⁵ two children, eight and thirteen years old, were individually interviewed by a judge in chambers. A court reporter was present. The parties were advised that the wishes of the children would be conveyed to the litigants but

³³⁹ Huddart and Ensminger, *ibid.*, at 96 who state that a judicial interview is "not only difficult but fraught with peril"; Nasmith, *op.cit.*, note 323, at 64; and Judge R. S. Abella, Justice C. L'Heureux-Dubé and Justice M. Rothman, "A Code of Recommended Procedures in the Resolution of Family Disputes" in *Family Law: Dimensions of Justice*" (edited by R. S. Abella and C. L'Heureux-Dubé) (Toronto: Butterworths, 1983) at 329.

³⁴⁰ Abella, L'Heureux-Dubé, Rothman, *ibid.*

³⁴¹ *Ibid.*

³⁴² (1989), 23 R.F.L. (3d) 154.

³⁴³ Nasmith, *op.cit.*, note 323, at 64.

³⁴⁴ (1980), 16 R.F.L. (2d) 239.

³⁴⁵ (1996), 21 R.F.L. (4th) 54 (Ont. Ct. Gen. Div.).

only in general terms. This was because disclosure of the full contents of the interview might embarrass the children or damage their future relationships with each parent.

It is maintained that the practice of judicial interviews should only be resorted to when other means of obtaining the child's views are unavailable.³⁴⁶ Certain criteria must be fulfilled: a court reporter must be present to transcribe the interview, the child should be told in advance that what he communicates to the judge will be repeated to the parties, and counsel for the child should be present.³⁴⁷

According to Article 394.4 of the *Quebec Code of Civil Procedure*, a judge may hear the child alone outside the presence of the parties. The parties must be advised of the judicial interview and a transcript of the stenographer's notes, or a copy of the recording of the hearing, must be available. Similarly, Subsection 64(3) of the *Children's Law Reform Act*³⁴⁸ stipulates that judicial interviews are to be recorded.

3.6 Child-Friendly Courtrooms and Court Preparation for Children

The physical design of courtrooms in Canada may exacerbate the anxiety of a child who wishes to participate in divorce, custody, or access proceedings. The size of the court, the elevated position of the judge, and the public gallery are intimidating. Children who have testified in legal proceedings report that the isolation of the witness box made them feel as if they were on trial. Bad acoustics and lack of amplification systems unnerve children who are constantly interrupted during the course of their testimony and told to speak louder.³⁴⁹

The design of courtrooms for children in family cases is worthy of consideration by federal and provincial government officials. A smaller, more informal room may reduce the stress of a child and may result in more comprehensive testimony. Booster seats, better audibility and amplification systems are some measures that can be introduced with minimal expense. It is noteworthy that a child-friendly courtroom has been established in Toronto for criminal child sexual abuse cases. The court is located in a remote section of the courthouse. There is a

³⁴⁶ Abella, L'Heureux-Dubé, Rothman, op.cit., note 340, at 329.

³⁴⁷ Ibid.

³⁴⁸ R.S.O. 1990 c.C.12.

³⁴⁹ Spencer and Flin, op.cit., note 240.

separate entrance to the court for the child, sound systems have been installed, and booster seats are available.³⁵⁰

³⁵⁰ *Court Design Issues Affecting Children and Other Vulnerable Witnesses* (B.C. Ministry of the Attorney General Community Justice Branch, Victim Services Division Child Abuse Committee, 1996).

4.0 CONCLUSION AND RECOMMENDATIONS

In Canada, children have had little opportunity to directly participate in divorce, custody, and access proceedings. The child's voice, if it is heard at all, is usually transmitted by third parties such as the parents, litigants or professionals such as social workers or psychologists.³⁵¹

Children in this country generally do not have access to independent legal representation in divorce, custody and access cases and are not given the opportunity to express their wishes, views, or preferences directly to judicial decision-makers.

In the past few years, the position of the child in divorce, custody and access proceedings has been undergoing re-evaluation. There is gradual acknowledgement that a child is an independent human being, separate from his or her parents, with potentially different views and preferences. The importance of the transmittal of the child's views to members of judiciary, who make decisions that will have a significant impact on the child's life, is being understood. The Special Joint Committee on Child Custody and Access emphasized the importance of hearing the child's voice in its 1998 report *For the Sake of the Children*. Canada also has the responsibility to fulfill its international obligations as a signatory to the United Nations Convention on the Rights of the Child.

It is recommended that federal and provincial officials implement these statutory and non-statutory proposals to ensure that the child's voice is heard in a meaningful way in divorce, custody and access proceedings:

1. Article 12 of the United National Convention on the Rights of the Child should be expressly incorporated in provincial and federal legislation pertaining to divorce, custody, and access. Children who are capable of forming views on these issues must be provided with an opportunity to have these views heard by judicial decision-makers.
2. Federal and provincial legislation on divorce, custody and access should be amended to include a provision that states that children have the right to independent legal representation.
3. A presumption should exist that a child five years or older has the ability to communicate his or her views to a lawyer.

³⁵¹ For example, an assessment for a child may be ordered pursuant to provincial legislation. The child's statements concerning their wishes "may" be conveyed to the court. See section 30 of the *Children's Law Reform Act* R.S.O. 1990, c.C-12. See also N. Bala, "Assessing the Assessor: Legal Issues" (1990), 6 *Can. Fam. L.Q.* 179.

4. Providing the child can communicate his or her views to a lawyer, the relationship between the lawyer and the child should be solicitor/client. Counsel, as advocate for the child, is obliged to put forth the child's wishes and preferences on the principle that children have the right to have the court hear and take under advisement their views on issues before the court.
5. A solicitor/client privilege should exist between the child and the solicitor.
6. For children who are unable to communicate their views or do not wish to have independent legal representation, a lawyer should be appointed to act as *amicus curiae*. The function of the lawyer is to collect evidence that may not be submitted to the court by the litigants. The *amicus curiae* must ensure that the court has before it a comprehensive account of the facts.
7. A child advocacy office must be established in each province where such office does not currently exist. The responsibility of the child advocacy office is to inform children of their right to independent legal representation, to appoint and train lawyers for children, and to ensure quality representation. The child advocacy offices in each province must be provided with appropriate funding to support these activities.
8. Lawyers must acquire the requisite skills to represent children in custody, access and divorce cases. These include appropriate interview skills, the ability to communicate information in simple and comprehensible language, an understanding of child psychology, and knowledge of community resources for children.
9. Lawyers representing children should be remunerated through the Legal Aid Plan in each province.
10. The Law Society in each province should develop a Code of Ethics for lawyers representing children.
11. The statutory competency rules for children in federal and provincial proceedings should:
 - (i) contain a presumption of competency for children;
 - (ii) repeal corroboration requirements for the evidence of children;
 - (iii) state that children who can communicate their views and who understand the promise to tell the truth are permitted to give evidence; and
 - (iv) contain a provision to the effect that the evidence of a child who does not understand the promise to tell the truth is admissible if, in the court's discretion, the evidence is reliable.
12. Federal and provincial legislation should be amended to include a provision that all children have a right to give evidence behind a screen in divorce, custody and access proceedings.

13. Children should have the right, by virtue of a statutory provision, to give evidence by closed-circuit television in divorce, custody, and access cases.
14. Children should have a statutory right to give videotaped testimony in divorce, custody and access proceedings.
15. Federal and provincial legislation should contain provisions allowing for videotaped interviews if such evidence is reliable. The child should not be required to attend the trial to adopt the contents of the interview nor must the child be available for cross-examination.
16. Federal and provincial legislation should be amended to include a provision that states that the child has the right to a support person from the inception of the legal dispute.
17. Judges should take measures to ensure that children are protected in legal proceedings involving divorce, custody and access. For example, proceedings should be conducted in age-appropriate language and counsel should be restrained from intimidating children. The physical surroundings should be conducive to eliciting the views of the child.
18. The child should have the right to an interpreter where language or a disability is a barrier to communication in divorce, custody and access proceedings.
19. Federal and provincial legislation should be amended to include a provision that states that the hearsay evidence of children is admissible if, in the court's opinion, it is "reliable." The "necessity prong" in the criminal decision *R. v. Khan* should not be required for custody, access and divorce proceedings that involve children.
20. Child-friendly courtrooms should be available to children in divorce, custody and access cases who wish to express their views to judicial decision-makers.

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