

**Ministry of Attorney General  
Justice Services Branch  
Civil and Family Law Policy Office**

**Family Relations Act Review**

**Chapter 8**

**Children's Participation**

**Discussion Paper**

**Prepared by the Civil and Family Law Policy  
Office**

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This paper is one of several discussion papers developed for the review of the *Family Relations Act*. The paper does not reflect a position or decision of government and is intended to generate discussion and feedback. The discussion paper is not intended to constitute legal advice. Any description of the *Family Relations Act* or other laws is provided solely for the purposes of the discussion paper and should not be relied on as legal advice or a statement of the law for any other purpose. Individuals with questions regarding the legal effect of provisions of the *Family Relations Act* or other laws should seek legal advice from a lawyer.

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**SETTING THE SCENE****The *Family Relations Act* Review &  
The 2005 Report of the Family Justice Reform Working Group**

This discussion paper has been prepared as part of the Province's review of the *Family Relations Act*<sup>1</sup>. While it is recognized that legislation is only one piece of the puzzle when it comes to helping families navigate separation or divorce, the focus of this paper, and the others in this series, is law reform.

When parents separate, decisions have to be made that will have significant impacts on their children: this paper is a search for ways to involve children and young people in those decisions. This is sometimes called "voice of the child" although this paper calls it "children's participation". Both expressions simply mean giving children a say.

This paper also takes into account other recent work in the area of family justice, such as the 2005 report of the Family Justice Reform Working Group to the B.C. Justice Review Task Force. By way of background, that Task Force was established by the Law Society of B.C. in March 2002 to examine possible reforms to B.C.'s justice system that could make it more responsive, accessible and cost-effective. The Task Force appointed four working groups, one of which—the Family Justice Reform Working Group—suggested reforms to the Province's family justice system. The final report of the Family Justice Reform Working Group is entitled "A New Justice System for Families and Children" and is available online at: [http://www.bcjusticereview.org/working\\_groups/family\\_justice/final\\_05\\_05.pdf](http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf)

The chief recommendation of the Working Group's report was to replace the family justice system's adversarial, litigation-based framework with a comprehensive system of dispute resolution.<sup>2</sup> In terms of the voice of the child, the Working Group suggested that: "all participants in the family justice system find better ways to discover children's best interests and to make them a meaningful part of family justice processes."<sup>3</sup>

This paper also takes into account a project called Meaningful Child Participation in BC Family Court Processes, an initiative of the University of Victoria's International Institute for Child Rights and Development (IICRD). In August 2006, the Institute released a report entitled: *Through the Eyes of Young People: Meaningful Court Participation in BC Family Court Processes*, available online at: <http://www.iicrd.org/familycourt/>. This project has resulted in the development and trial of an interview process to be used with children in court cases about custody and access arrangements. The IICRD started to pilot its interview model in October, 2005 in Kelowna. An evaluation of that pilot project is planned.

This paper is divided into five sections. The first four sections discuss the voice of the child in relation to: general reforms of the *Family Relations Act*; consensual dispute resolution; family litigation; and parenting disputes after an order has been made. The final section of the paper provides an opportunity for you to highlight what you feel are the most pressing issues and identify any issues that are not covered in the paper that you think should be considered. Once you have read the paper, use the feedback form to send us your responses. The feedback form includes all of the questions posed in this paper.

A separate background paper contains more detailed information on the voice of the child. See [background paper](#). If you wish to see any of the laws in this paper please refer to the following link to [Legislation](#).

## The Evolving Legal Framework

Over time, the law has developed different approaches to children. Traditionally, it has viewed them as objects of concern. Since the late 1600s, its focus has been protecting children and safeguarding their best interests.<sup>4</sup> Some academics, including Australian Nicola Ross, whose research interests at the University of Newcastle include children's participation in the legal process, have commented that such an approach is adult-oriented. "Best interests," she writes, "is fundamentally about expert, adult interpretations of what is best for children."<sup>5</sup> Others say the best interests' discourse historically paints children "as lacking capacity to participate on the grounds of immaturity, irrationality, and incompetence and as participating in the legal system only as part of a wider family identity."<sup>6</sup>

More recently, the law has taken a rights-based approach to children, considering the voice of the child as a human rights issue.<sup>7</sup> In human rights law, voice itself is seen as a human rights issue:<sup>8</sup> a denial of a voice in decisions that affect one's life is seen as a denial of the opportunity for meaningful participation and, ultimately, a denial of one's personhood.

The challenge is to integrate these two strands of the law that have developed at different times. There may be a tension at times between the two, but they are not mutually exclusive.

Indeed, the United Nations *Convention on the Rights of the Child*<sup>9</sup> embodies both. Article 3 requires states to act in the best interests of children:

*1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

However, as its name suggests, the convention clearly entrenches a rights-based approach as well. In particular, Article 12 (set out below under Discussion Point (2)) guarantees children the right to have a voice in relation to decisions that affect them.

Canada ratified the *Convention on the Rights of the Child* in 1991.<sup>10</sup> However, ratification does not mean that the Convention became part of Canadian law directly. To have full effect, it must be implemented, or woven into, the relevant federal, provincial and territorial laws and policies.

British Columbia's *Family Relations Act* contains two relevant provisions. The first is s. 24, which makes the views of the child an explicit factor in the best interests test governing custody, access and guardianship applications:

*Part 2 – Child Custody, Access and Guardianship*

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*24(1) When making, varying or rescinding an order under this Part, a court must give paramount consideration to the best interests of the child and, in assessing those interests, must consider the following factors and give emphasis to each factor according to the child's needs and circumstances:*

\*\*\*

*(b) if appropriate, the views of the child;*

Second, s. 30 requires the written consent of a child older than 12 before a court can appoint a guardian for that child. (The court may override the need for the child's consent if it is in the best interests of the child to do so.) Section 30 says:

*30 (1) Subject to this Act, a court may, on application,*

*(a) appoint a guardian . . .*

*(2) If a child is over 12 years of age, a court must not make or give effect under subsection (1) to an appointment unless*

*(a) the child consents in writing to the appointment, or*

*(b) if the child withholds consent to the appointment, the court is satisfied that the appointment is necessary in the best interests of the child . . .*

### **The Evolving Social Science Research**

Traditionally, it was assumed that children's views and interests were adequately represented by their parents. A related belief was that if children could be insulated from post-separation decision-making, they could be protected from the turmoil of their parents' relationship breakdown.<sup>11</sup>

Social science research is beginning to cast doubt on these assumptions. It shows that in the midst of the pain of separation and divorce, parents may not be well placed to adequately represent the views and interests of their children. Parenting capacity dips in the face of the parents' own process of post-separation adaptation.<sup>12</sup> Some parents, particularly those locked in bitter conflict, may lack the ability to separate their children's interests from their own.<sup>13</sup> Other parents may simply be ignorant of their children's feelings, or at least the true extent of them.<sup>14</sup>

Research also reveals that not listening to children may cause more harm than not. There is a link between positive mental health and perceived control over decisions.<sup>15</sup> Further, being kept in the dark may increase children's stress levels.<sup>16</sup> In the absence of information, they may fill the gaps in their understanding<sup>17</sup> with erroneous interpretations of the changes in their family: they may imagine, for example, that the parent who left no longer loves them<sup>18</sup> or that they themselves caused the break up.<sup>19</sup>

### **Ongoing Debate**

The debate about children's roles in post-separation decision-making has shifted from whether children ought to have a voice to how this goal ought to be achieved. On this, there is a wide range of views. For example, some judges support the use of judicial interviews in appropriate circumstances, particularly with respect to older children.<sup>20</sup> Other judges view these as problematic and potentially in conflict with the judge's role as an impartial trier of fact.<sup>21</sup> Some in the family justice system believe that inquiring too directly as to a child's views may cause loyalty conflicts and anxiety.<sup>22</sup> In contrast, psychologist Joan Kelly, with over 35 years of expertise in interviewing children, writes: "The caution against not asking children to choose has led to a systematic failure to consult children about any aspects of divorce decisions that markedly change their lives and have long-term consequences."<sup>23</sup>

Legal representation for children is approached in different ways in different parts of the world. Publicly funded legal representation is routinely available to children in contested cases in New Zealand, whereas in England appointment of lawyers for children is seen as an extraordinary step, appropriate for only the most difficult cases.<sup>24</sup> Nor is there agreement as to what role children's lawyers should play.

Until recently, discussions centred mainly on court proceedings. The larger question is how to integrate children's voices into all aspects of the family justice system.

### **A Snapshot—Voice of the Child & Post-separation Decision-making in B.C.**

Although most post-separation decisions are made outside of court, little is known about how or whether children are involved at the front end of the family justice system in B.C.; that is, at the stages of obtaining information, informal discussions or negotiations within the family, or early

consensual dispute resolution. There have been no comprehensive studies on this point. Nor is there a specific legal duty on parents under the *Family Relations Act* to consider their children's views when making decisions that will affect them.

General information about separation and divorce is available to young people in B.C. through two online guidebooks: *A Kids' Guide to Separation and Divorce* and *A Teen Guide to Parental Separation and Divorce*. (See <http://www.familieschange.ca>.)

Traditionally, young people have not involved in publicly funded family (separation and divorce) mediations in B.C. Starting in mid- to late- May 2007, Family Justice Services Division of the Ministry of Attorney General, the department that oversees public sector family justice programs and services, plans to pilot child-inclusive mediation in several Family Justice Centres across B.C.

If a family dispute goes to court, young people's voices are most often heard indirectly through written reports authorized under s. 15 of the *Family Relations Act*. These may take the form of full custody and access assessments, or more focussed "views-of-the-child" reports. As well, some B.C. judges and masters (other court-based decision-makers) interview children as a means of obtaining their views.

Further information about family justice programs and services is available in a separate paper on that topic. See [Chapter 5](#).

### **Possible Voice-of-the-Child Mechanisms**

The [background research](#) conducted for this discussion paper revealed an array of voice-of-the-child mechanisms, including:

1. the provision of child-friendly information about the family justice system generally, and about the specific case involving the child;
2. linked parent education and children's programs that contain a voice-of-the-child element (for example, the children write a group letter to the parents, setting out their experiences);
3. child-inclusive mediation, which could involve:
  - a youth's direct participation in the mediation session;
  - a youth's direct participation in the mediation session, with the help of a support person;  
or
  - a child's or youth's views being sought and fed back into the mediation session.
4. children's participation in collaborative law practice, including the use of child specialists to interview children and feed back their views into the collaborative sessions.
5. written reports and assessments, such as views-of-the-child reports or custody and access assessments;
6. legal representation for children;
7. opportunities for children's direct evidence, which may take the form of:
  - oral testimony in court;
  - oral testimony provided via closed circuit television;
  - a judicial interview, outside the courtroom;
  - a videotaped statement; or
  - a written statement, that may include:
    - ◆ a letter to a judge;
    - ◆ a fill-in-the-blank court form;

- ◆ a verbatim statement of the child's responses to interview questions; or
  - ◆ an affidavit.
8. the adoption of a special (less adversarial) hearing format for family cases involving children; and
  9. the use of parenting co-ordinators to resolve disputes that arise after an agreement or court order has been made, with authority to speak directly with children in fulfillment of their duties.

## DISCUSSION

### PART A – GENERAL AMENDMENTS TO THE FAMILY RELATIONS ACT

#### ***Discussion Point (1) – Persons Making a Major Decision Affecting a Child***

Section 24 of the *Family Relations Act* speaks to the court's duty to consider the views of the child, if appropriate, when making decisions about custody, access, or guardianship, but it does not place a similar duty on parents.

In contrast, s. 6 of Scotland's *Children (Scotland) Act 1995* places a legal duty on anyone making a major decision about a parental right or responsibility to "have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child's age and maturity . . ." The Scottish law does not distinguish between decisions made inside or outside court.

#### **QUESTION**

1. Should the *Family Relations Act* be amended to require any person making a major decision involving a child to consider the child's views, provided the child is capable of forming views and wants to share them?

#### ***Discussion Point (2) – Children's Rights***

Article 12 of the U.N. *Convention on the Rights of the Child* heralds a rights-based approach to children's participation in matters that affect them. It reads as follows:

1. *States 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.*

There are two different kinds of family cases within the family justice system: private and public. Private family cases deal with questions that arise due to separation and divorce (e.g. custody and access arrangements). In public family cases, the Province has intervened in a family to ensure that children are kept safe, such as in situations of child neglect or abuse. Both respond to issues that directly affect children's lives, such as where the children will live, and who will care for them.

Even though B.C.'s child protection statute, the *Child, Family and Community Service Act* (CFCSA), has developed in a very different context from the *Family Relations Act*, it has express opportunities for children and youth to have a voice in decisions that will affect them. For example, the CFCSA refers explicitly to the children's rights, including the right "to be consulted and to express their views, according to their abilities, about significant decisions affecting them"

and "to be informed of their rights, and the procedures available for enforcing their rights."<sup>25</sup> In addition, the CFCSA guarantees children over 12 years of age certain procedural rights, such as notice of various hearings.<sup>26</sup>

Article 34 of Québec's *Civil Code* also gives children a right to be heard in family cases:

*Art. 34. The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.*<sup>27</sup>

As a result of article 34, young people in Québec are more likely to testify in family law proceedings than elsewhere, albeit with the benefit of modified procedures:

- The judge screens the questions the parents plan to ask the child.
- At the hearing, the questions are asked by either the judge or the children's lawyer rather than by a parent's lawyer (or a parent).
- Parents may be excluded from the courtroom during a child's testimony.<sup>28</sup>

The *Family Relations Act* takes a different approach to the issue of children's voices. Section 24, which sets out the best interest factors judges must consider when making decisions about custody, access or guardianship, requires that children's views be considered "if appropriate." In other words, it is not automatic for children's views to be included. A judge must first decide it is appropriate to do so.

Regardless of the legislative wording, it should be noted that providing children and youth with a voice under family legislation does not mean asking what they want and then granting their wishes. As child participation expert, Joan Kelly, writes:

*It should be stressed that children's participation in divorce and custody processes is generally viewed as an opportunity for relevant input from children, but not actual decision-making, which may create stress and compromise parent-child relationships. Children not only understand the difference between expressing their thoughts and making final decisions, but most state that they do not want to make autonomous choices.*<sup>29</sup>

### **QUESTIONS**

2. Does s. 24 of the *Family Relations Act* adequately reflect article 12 of the U.N. *Convention on the Rights of the Child*?
3. If not, what is needed?

### **Discussion Point (3) – Views of Mature Children**

The wishes of older children are often highly influential in custody and access applications, in part, because of the ability of these young people to vote with their feet. That said, the *Family Relations Act* does not set a threshold age at which a child's views must be given greater weight or become determinative. For example, although s. 30 refers to the written consent of children over 12 years in applications to appoint guardians other than the child's parents, the consent requirement may be overridden if "the court is satisfied that the appointment is necessary in the best interests of the child."<sup>30</sup>

Other Canadian family statutes also refer to the consent of children 12 and older. For example, under Alberta's *Family Law Act*, a guardianship order requires the consent of children 12 years or older,<sup>31</sup> although as in B.C., the judge can dispense with the consent requirement if "satisfied that there are good and sufficient reasons for doing so."<sup>32</sup> Saskatchewan's *Children's Law Act, 1997* requires the consent of a child 12 years or older for an order appointing a guardian of the child's property.<sup>33</sup> The Northwest Territories' and Nunavut's family laws require the consent of a

child 12 years and older for an order approving the disposition or encumbrance of the child's property.<sup>34</sup>

Special provision for decisions involving older children can also be found in the family statutes in other countries. For example, s. 50 of New Zealand's *Care of Children Act 2004* says that custody orders must not be made for children 16 or older, unless there are special circumstances.<sup>35</sup>

#### QUESTIONS

4. Should the views of mature children ever be determinative of custody, access or guardianship decisions under the *Family Relations Act*? If so, under what circumstances?

### PART B – CONSENSUAL DISPUTE RESOLUTION

#### *Discussion Point (4) – Children & Mediation*

Traditionally children and young people have not been included in *Family Relations Act* mediations conducted by Family Justice Counsellors. However, in the spring of 2007, Family Justice Services Division plans to pilot child-inclusive mediation in several Family Justice Centres across B.C., including the pilot Family Justice Services Centre (called the Family Justice Information Hub in the Family Justice Reform Working Group report) in Nanaimo. For more information about family justice services in B.C. or about the Nanaimo pilot, please refer to [Chapter 5](#).

In its 2005 report, the Family Justice Reform Working Group recommended mandatory dispute resolution for all family cases, including applications for custody, guardianship and access.<sup>36</sup> The Working Group spoke highly of mediation's potential for bringing children's voices to the fore. The report said: "Mediation can offer a forum where parents can more easily hear their children's concerns and take them into account in their agreements. Mediators need to be trained to involve children in the process in appropriate ways."<sup>37</sup>

Child-inclusive practice has developed somewhat differently in child protection mediations than *Family Relations Act* mediations. In the last decade, child protection mediators, who are lawyers and others in private practice under contract with the Province, have explored various practices to facilitate children's voices in child protection mediations, including:

- reading a letter written by the child at the outset of the mediation;
- interviewing the child separately before the mediation, to obtain the child's views; and
- inviting the young person to participate in the mediation session directly, with the help of a support person.<sup>38</sup>

Family policy in other jurisdictions is also increasingly focussed on the development of appropriate ways to involve children and youth in mediation. Australia, in particular, has been active in this field. It began piloting child-inclusive mediation nearly a decade ago.<sup>39</sup> The main innovation of its pilot was the introduction of a children's interview into the process. Subject to a confidentiality policy, information from the children was gathered in the interview and fed back into the mediation. Children's needs were listed on a whiteboard along with those of the two parents. The mediator was then responsible for integrating the third agenda, the children's agenda, into subsequent mediation sessions.<sup>40</sup>

In lower conflict separations, the same person could both interview the child and conduct the mediation. In medium to high conflict families, separate mediators were used.<sup>41</sup>

An early evaluation of the Australian pilot reported favourable outcomes. Over 80% of parents whose children participated in the pilot reported that their children had benefited "a great deal" from the new model of mediation while only 4% said there had been no benefit. In contrast, among the control group, who participated in traditional mediation where children were not

interviewed, 42% said the mediation had been of no benefit to their children, and only 20% said their children had benefited "a great deal."<sup>42</sup>

The use of child-inclusive mediation continues to expand in Australia.<sup>43</sup> A detailed study of comparative outcomes of traditional family mediation and child-inclusive mediation is now underway.<sup>44</sup>

In England, child-inclusive mediation is now available in a handful of cities, including Leeds, Derbyshire, and London.<sup>45</sup> Government officials and mediation providers in England have expressed keen interest in the Australian program and ongoing research.<sup>46</sup> Opportunities for collaboration between Australian and English researchers are being considered.<sup>47</sup>

In Scotland and in California, child-inclusive practice is also a part of family mediation services.<sup>48</sup> Indeed, Drs. Janet Johnston and Joan B. Kelly, from California, provided input into the development of the Australian child-inclusive mediation program.<sup>49</sup>

Child-inclusive mediation practice is also being piloted in Auckland, New Zealand.<sup>50</sup> A recent research report that looked at 17 families with 26 children aged 6 to 18 years of age<sup>51</sup> who participated in the child-inclusive model reported favourable findings, including: an increased opportunity for children to have a voice in post-separation negotiations and planning;<sup>52</sup> high satisfaction levels among children and parents;<sup>53</sup> easier adaptation on the part of children to their parents' separation or divorce;<sup>54</sup> and reduced conflict between parents.<sup>55</sup>

### **QUESTIONS**

5. Have you had experience involving children in family mediations, and if so, how were they involved?
6. If you have had such experience, what worked about the mediation sessions? What did not?

## **PART C – FAMILY LITIGATION**

### ***Discussion Point (5) – Automatic Voice-of-the-Child Mechanisms***

Although children's views are an explicit factor in the best interests' test that governs custody, access and guardianship applications under s. 24 of the *Family Relations Act*, the *Act* does not guarantee young people an opportunity for direct input, should they want it. Stated differently, filing a family law application involving children does not automatically trigger a voice-of-the-child mechanism.

Under Scottish court rules, an application for an order relating to parental responsibilities or rights, guardianship or the administration of a child's property triggers an obligation to provide notice to the affected child.<sup>56</sup> This notice, called an "intimation," is carried out through an F-9 Form (a copy of which is attached as Appendix A to this paper). In addition to notifying the child that a major decision involving him or her is about to be made, it invites the child's views about his or her future.<sup>57</sup>

If the child submits that form, indicating a desire to be heard, the court may not make an order until the child has had the opportunity to express his or her views, and the court must attach due weight to them.<sup>58</sup>

Scottish children are eligible to receive publicly funded legal assistance to help complete the F-9 Form.<sup>59</sup> If a child needs help finding a lawyer, the Scottish Child Law Centre, a non-profit organization based in Edinburgh, offers a referral service.<sup>60</sup>

The pilot project in Kelowna led by the University of Victoria's International Institute of Child Rights and Development is also examining the use of children's statements in family law proceedings. The pilot, which began in October 2005 as part of the Institute's project on Meaningful Child Participation in BC Court Processes, involves recording children's replies to questions posed in an intake interview.

Participation in the Kelowna project is voluntary. If the parents, their lawyers, the child, and the decision-maker agree to participate, an interviewer (a family lawyer or counsellor) is selected from a roster. With an observer present, the interviewer meets with the child and records the child's views word-for-word in response to the intake questionnaire. The resulting verbatim statement is then provided to the decision-maker.<sup>61</sup> The Institute will report its findings once the program concludes.

### **QUESTIONS**

7. Should the filing of an application for custody, access or guardianship under the *Family Relations Act* automatically trigger a child's right to have his or her views considered?
8. If so, what kind of practice would be helpful?
  - fill-in-the-blank court forms for children
  - interviews with children, where their responses are recorded
  - written reports or assessments
  - other: \_\_\_\_\_
9. If so, when should it take place—for example, upon filing? before mediation is attempted? when a trial is scheduled?

### **Discussion Point (6) – Expert Witness Reports**

There are a variety of expert witness reports referenced under s. 15 of the *Family Relations Act*. These reports are both publicly and privately funded. Publicly funded s. 15 reports, prepared by Family Justice Counsellors, include full custody and access reports or more focussed, briefer views-of-the-child reports that addresses one or two issues, such as the child's views on where he or she wishes to live. There are also various kinds of s. 15 reports that parents can retain professionals in private practice to prepare, including reports that contain psychological testing or home studies. Section 15 reports are a common way in B.C. to put children's views before a judge in *Family Relations Act* cases.

Currently, 10% of Family Justice Counsellor resources go towards preparing s. 15 reports and 90% to dispute resolution services. Demand for publicly funded s. 15 reports consistently outstrips resources, and delays result. Because of the delay, some families pay for private-sector s. 15 reports even though these are costly.

In Ontario, staff at the Office of the Children's Lawyer in the Ministry of the Attorney General prepare publicly funded assessments and reports in disputed custody and access cases. Staff have a greater role in deciding which publicly funded service will be provided to a particular family than do their B.C. counterparts. Under the Ontario model, the court requests the assistance of the Office of the Children's Lawyer, but that office must consent, and will decide what professional service will be offered to the family.<sup>62</sup> Thus, for example, staff at the Office of the Children's Lawyer may decline to complete a full custody and access report if the family has not first tried mediation.

In contrast, in B.C., it is the judge who decides whether a s. 15 report is necessary and also the judge who may specify which kind of s. 15 report –full custody and access assessment, for instance– is to be prepared. With respect to publicly funded s. 15 reports, Family Justice

Counsellors are not able to prioritize the s. 15 report orders or suggest what would be the most appropriate service. Family Justice Counsellors must complete the report in the fashion outlined in the order and cannot recommend another kind of report (for example, a views-of-the-child report rather than a full custody and access report) or even a different kind of service such as mediation.

### **QUESTIONS**

10. Are s. 15 reports a valuable way of putting children's views before a judge?
11. If you are a professional with experience using s. 15 reports, do you find them more useful in certain kinds of cases than in others? Please explain your answer.
12. Regarding publicly funded s. 15 reports, should the *Family Relations Act* be amended to leave it up to those providing the family justice services to determine which kind of report is most appropriate for a particular family or should this remain a decision for the judge?

### **Discussion Point (7) – Legal Representation**

Legal representation is another way to ensure that children's views come before the court. There are at least three different roles for a lawyer in children's cases:

- *amicus curae*, or "friend of the court," who acts for the court to ensure that the judge has the benefit of the most complete information upon which to make a decision;<sup>63</sup>
- best interests' lawyer, who advocates the position that he or she believes is in the best interests of the child, although the child may not necessarily agree;<sup>64</sup> or
- the traditional advocate's role, with the child instructing the lawyer, and the lawyer advocating on the basis of those instructions.<sup>65</sup>

British Columbia's system of legal representation of children is premised on a best interests' model. Section 2 of the *Family Relations Act* contemplates the appointment of a Family Advocate to represent "the interests and welfare of the child." However, that program is no longer funded.

Of the international jurisdictions canvassed for this paper, New Zealand offers the most extensive legal representation for children in family disputes. Section 7 of its *Care of Children Act 2004*, requires the appointment of counsel in custody and access cases unless "the appointment would serve no useful purpose." Consequently, children's lawyers are the most common voice-of-the-child mechanism in New Zealand.<sup>66</sup>

New Zealand uses two types of legal representatives for children: children's lawyers, and counsel to assist the court. Children's lawyers bring the views and wishes of the child before the court and are under a further duty to inform the court of "other factors that impact on the child's welfare".<sup>67</sup> A 2001 Practice Note instructs them to try to resolve any conflict between the child's views and his or her best interests. If this cannot be done, the children's lawyer may advocate the child's wishes, but invite the court to appoint a second lawyer (counsel to assist the court) to argue the best interests issue.<sup>68</sup> So, for example, if a child's wish is to remain in a situation that is clearly unsafe, the children's lawyer will talk this over with her and point out that this living arrangement is likely not in her best interests. If the conflict cannot be resolved, then the children's lawyer would invite the court to appoint a second lawyer who would argue that the arrangement preferred by the child would not be in that child's best interests.

Theoretically, the costs of children's legal representation, which are paid by the New Zealand Family Court, may be recovered from the parties.<sup>69</sup> Nevertheless, considerable public resources are invested in the program.<sup>70</sup>

Australia's system is the mirror opposite of New Zealand's. It, too, contemplates publicly appointed legal counsel for children and has potentially two different kinds of children's lawyers: child representatives and direct representatives. However, the starting point under ss. 68L and 68LA of the *Family Law Act, 1975* is best interests' advocacy. The appointment of a direct representative for the child is possible only in limited circumstances. The Family Court of Australia's 2003 Guidelines for the Child Representative state:

*...where a child of sufficient maturity wishes to have a direct representative who will act on the child's instructions, the Child's Representative should inform the child of the possibility of applying to become a party to the proceedings and of giving instructions to a legal representative through a next friend to be appointed by the Court. . . .*

Although children's representatives are not appointed in every contested family case in Australia, appointments have been on the rise since the High Court's 1994 decision in the case called *Re K*. That decision sets out a list of some of the circumstances that would justify the appointment of a children's representative, including: cases of alleged abuse; intractable conflict between the parents; or alienation of the child from one or both parents. By 2002-03, children's representatives accounted for 10.6% of the total family legal aid budget.<sup>71</sup>

As in New Zealand, the costs of children's legal representation in Australia do not necessarily fall entirely to the public purse. In 2003, Parliament amended the *Family Law Act, 1975* to permit orders for contribution from the parents "in such proportion as the court considers just." The *Act* specifies that such an order cannot be made against a legally aided party or against a person who would otherwise suffer financial hardship.<sup>72</sup>

In England, separate representation for children is possible under Rules 9.2 and 9.5 of the *Family Proceedings Rules 1991*. According to a recent consultation paper prepared by the Department for Constitutional Affairs, "Rule 9.2A allows competent children of sufficient age and understanding to participate in proceedings without a guardian, and Rule 9.5 provides for separate representation where a child has been made a party to the proceedings."<sup>73</sup> A young person's access to Rule 9.2A depends, however, on either the court granting leave, or the lawyer's assessment "that the minor is able, having regard to his understanding, to give instructions in relation to the proceedings."<sup>74</sup>

Appointments of *guardians ad litem* (litigation guardians)<sup>75</sup> under the English Rule 9.5 are on the rise. Because there was concern about the "excessive use"<sup>76</sup> of the rule in some areas, the President of the Family Division issued a practice direction in 2004 to limit appointments to cases involving issues of "significant difficulty," including cases in which serious abuse is alleged; where there are mental health issues; or where there is an intractable dispute over residence or contact.<sup>77</sup> The primary focus of a *guardian ad litem* is to advocate for the welfare of the child.<sup>78</sup>

As noted above, England is currently reviewing its court rules relating to legal representation of children. Its consultation process ended on December 8, 2006.<sup>79</sup>

Scotland, too, offers children and youth Legal Aid to obtain lawyers in connection with family cases.<sup>80</sup> Normally, it is children 12 years and older who are eligible for publicly funded legal representation.<sup>81</sup> However, when Scotland introduced the *Children (Scotland) Act 1995*, it also amended the *Age of Legal Capacity (Scotland) Act 1991*, to recognize a child's capacity to instruct a lawyer so long as the child "has a general understanding of what it means to do so."<sup>82</sup> Thus, children under 12 years are not precluded from seeking publicly funded legal assistance.

Ontario's Office of the Children's Lawyer employs both social workers and lawyers who work together closely. In custody and access cases, that Office either provides a lawyer for the child or prepares a report by a social worker, or, in exceptional circumstances, both.

## QUESTIONS

13. Is separate legal representation an effective way to ensure children's voices are heard in decisions that will affect them?
14. If so, what role should these lawyers play?
- friend of the court
  - best interests' advocate,
  - traditional advocate, or
  - other.
15. Should the *Family Relations Act* be amended to permit courts to allocate the costs of children's legal representation between the parties, or to recover those costs from the parties?
16. What is your opinion on Ontario's multidisciplinary approach to disputed custody and access cases (i.e. social workers and lawyers working together)?

### Discussion Point (8) – Less Adversarial Hearings: The Children's Cases Model

Much of the concern about children's direct involvement in family proceedings relates to the adversarial nature of litigation. There is widespread concern that involvement in adversarial proceedings can be disturbing for children and can adversely affect their relationships with one or both parents.<sup>83</sup>

Australia has recently introduced a different, less adversarial, format for family law cases involving children. What began as the Children's Cases Pilot Project in the Family Court registries of Sydney and Parramatta in 2004 has now been included in Australia's *Family Law Act, 1975*.<sup>84</sup>

The new format has a much more active role for judges in the hearings. The judge, rather than the parties, determines:

- the issue(s) in dispute;
- the evidence to be called; and
- the manner in which the evidence is to be received.<sup>85</sup>

There are other departures from the traditional hearing format as well:

- The focus is on the future rather than the past.<sup>86</sup>
- The atmosphere is informal—for example, counsel do not wear robes,<sup>87</sup> nor are there formal requirements as to where lawyers should sit in the courtroom relative to parties.<sup>88</sup>
- There may be direct discussions between the judge, the parties, and the parties' lawyers – as opposed to the usual pattern of direct examination by one lawyer followed by cross examination by the other lawyer.<sup>89</sup>
- The judge has authority to dispense with the traditional rules of evidence, including those governing hearsay or opinion evidence.<sup>90</sup>
- The judge may decide individual issues at any point during the hearing rather than giving a comprehensive judgment at the end.<sup>91</sup>
- A family consultant (a mediator) is present to assist the parties.<sup>92</sup>

On November 1, 2006, New Zealand began to pilot its own version of a children's cases hearing format.<sup>93</sup> It has many of the same elements as the Australian program, but it differs in that it does not involve a court-based mediator (the family consultant in the Australian model).<sup>94</sup>

The 2005 report of the Family Justice Reform Working Group recommended that a similar model be tested in B.C.<sup>95</sup>

### **QUESTIONS**

17. Would a less adversarial trial format for children's cases help to ensure that children's voices are heard in family disputes?
18. Would such a fundamental change in the format of a family law trial suggest a different approach to how children's voices ought to be heard, such as more direct participation?
19. Would you support the introduction of the Australian Children's Cases model in B.C.?
20. What are the most useful aspects of the Australian model?
21. What are the least useful aspects of the Australian model?

### **Discussion Point (9) – Judicial Interviews**

An interview with the judge is another method of ensuring children's participation in *Family Relations Act* decisions. Some say that the judicial interview is far from the ideal way of ascertaining a child's wishes because:

1. *it is conducted in an environment which is intimidating;*
2. *it is conducted by one who is not skilled in asking questions of children and interpreting their answers;*
3. *the short time of the interview makes it unlikely that the perceptions of the child explaining or representing her wishes can be considered with sufficient depth; and*
4. *the interview may be seen as a violation of the judge's function as an impartial trier of fact, in part because the judge need assume an inquisitor role when questioning children.*<sup>96</sup>

Some judges, however, support judicial interviews of children. For example, the former Chief Justice of Australia's Family Court stated that judges should consider interviewing older children more often.<sup>97</sup>

Under German law, children are entitled "to make their personal relationships to both parents . . . known to the court."<sup>98</sup> Judicial interviews are widely used. An appellate judge from Frankfurt who participated in the 4<sup>th</sup> World Congress on Family Law and Children's Rights in March 2005, stated that a sensitively handled judicial interview "can boost the child's self-esteem" because the process recognizes the child as a person in his own right and allows the child to know his views are being taken seriously.<sup>99</sup> The conversation between the judge and the child may also serve to reassure the child that the final decision is in the hands of the judge and relieve the child's misplaced sense of guilt over the separation.<sup>100</sup>

In B.C., judicial interviews are not commonplace, but they do occur more frequently than in other Canadian jurisdictions.<sup>101</sup> The judge who decided the B.C. Supreme Court's case of *L.E.G. v. A.G.* held that parental consent was not a pre-requisite to a judicial interview. She found the court's jurisdiction to interview children was grounded in its inherent *parens patriae*<sup>102</sup> powers and in its statutory duty to act in the best interests of children.<sup>103</sup>

As observed in *L.E.G. v. A.G.* decision, a number of Canadian family statutes specifically grant judges a discretion to interview children. The family legislation of Newfoundland and Labrador, P.E.I., Ontario, the Northwest Territories, and Nunavut take this approach.<sup>104</sup>

### **QUESTION**

22. Should the *Family Relations Act* be amended to set out a discretionary power on the part of judges to interview children to determine their views?

**PART D – PARENTING DECISIONS AFTER A COURT ORDER**

***Discussion Point (10) – Children & Post-Order Decision-Making***

In some families, disputes over parenting arrangements do not end with the making of a court order. Some American jurisdictions have enacted legislation that permits the use of parenting co-ordinators as a means to resolve disputes in higher conflict families. Parenting co-ordinators are usually social workers, psychologists, psychiatrists, marriage counsellors, family lawyers or mediators.<sup>105</sup> Often the disputes they seek to resolve centre on child-related issues such as holiday scheduling, transportation of the children to and from access visits, bedtime routines, the participation of other people in scheduled access visits, such as a new partner, or child care arrangements.<sup>106</sup>

In fulfillment of their mediation or arbitration duties, parenting co-ordinators are empowered to speak directly with the children (as well as with other family members).<sup>107</sup> In addition, they may be authorized by law to request relevant information from third parties, such as the child's doctor, therapist, school or caregivers. They may recommend that the children (or the parents) participate in other services such as physical or psychological assessments or counselling.<sup>108</sup>

The Family Justice Reform Working Group recommended the use of parenting co-ordination as a way to address the needs of higher conflict families.<sup>109</sup> The B.C. Ministry of Attorney General is considering the option of parenting co-ordinators as part of its response to the Working Group's report. For further information about programs and services for families in B.C., please refer to [Chapter 5](#).

**QUESTION**

23. If the *Family Relations Act* were amended to address the appointment of parenting co-ordinators, what legislative guidance, if any, should be given about how these professionals should interact with the young people at the centre of a family dispute? For example, should parenting co-ordinators be authorized to interview young people? Should it be necessary for the parenting co-ordinator to obtain the young person's consent before accessing medical or school records?

**PART E – GENERAL FEEDBACK**

**QUESTIONS**

24. There are a number of options to ensure that children's voices are heard in decisions that will affect them following their parents' separation or divorce. Which **three** do you view as the most important? Please prioritize the following, with 1 being the most important and 3 being the least important.

| OPTION  | RANKING |
|---|---------|
| <input type="radio"/> amending the <i>Family Relations Act</i> to place a duty on anyone making a major decision affecting a child to consider that child's views |         |
| <input type="radio"/> amending the <i>Family Relations Act</i> to reflect more closely Art. 12 of the United Nations <i>Convention on the Rights of the Child</i> |         |

|   |  |
|---|--|
| ○ making special provision in the <i>Family Relations Act</i> for the views of mature children (for example, make them determinative in certain situations)   |  |
| ○ developing child-inclusive mediation  |  |
| ○ amending the <i>Family Relations Act</i> to provide an automatic voice-of-the-child mechanism such as an interview with the child, a fill-in-the-blanks court form for children to complete, etc. |  |
| ○ having separate legal representation  |  |
| ○ adopting a less adversarial hearing format  |  |
| ○ encouraging judicial interviews   |  |
| ○ adopting parenting co-ordination  |  |
| ○ other   |  |

25. Are there issues related to voice of the child not covered in this paper that you would like to raise?

Please provide your [feedback](#).

**APPENDIX A - Scotland's F-9 Form**

Form F9                      Form of intimation in an action which includes a crave for a section 11 order

Rule 33.7(1)(h)              Court Ref. No.

**PART A**

**This part must be completed by the Pursuer's solicitor in language a child is capable of understanding**

To (1)

The Sheriff (the person who has to decide about your future) has been asked by (2) to decide:-

(a) (3) and (4)

(b) (5)

(c) (6)

If you want to tell the Sheriff what you think about the things your (2) has asked the Sheriff to decide about your future you should complete Part B of this form and send it to the Sheriff Clerk at (7) by (8). An envelope which does not need a postage stamp is enclosed for you to use to return the form.

**IF YOU DO NOT UNDERSTAND THIS FORM OR IF YOU WANT HELP TO COMPLETE IT you may get free help from a SOLICITOR or contact the SCOTTISH CHILD LAW CENTRE ON the FREE ADVICE TELEPHONE LINE ON 0800 328 8970.**

If you return the form it will be given to the Sheriff. The Sheriff may wish to speak with you and may ask you to come and see him or her.

**NOTES FOR COMPLETION**

- |  |  |
|--|--|
| <p>(1) Insert name and address of child.</p> <p>(3) Insert appropriate wording for residence order sought.</p> <p>(5) Insert appropriate wording for contact order sought.</p> | <p>(2) Insert relationship to the child of party making the application to court.</p> <p>(4) Insert address.</p> <p>(6) Insert appropriate wording for any other order sought.</p> |
|--|--|

(7) Insert address of sheriff clerk.

(8) Insert the date occurring 21 days after the date on which intimation is given. N.B. Rule 5.3(2) relating to intimation and service.

(9) Insert court reference number.

(10) Insert name and address of parties to the action.

**PART B**

**IF YOU WISH THE SHERIFF TO KNOW YOUR VIEWS ABOUT YOUR FUTURE YOU SHOULD COMPLETE THIS PART OF THE FORM**

To the Sheriff Clerk, (7)

Court Ref. No. (9)

(10).....

**QUESTION (1): DO YOU WISH THE SHERIFF TO KNOW WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?  
(PLEASE TICK BOX)**

|     |                          |
|-----|--------------------------|
| YES | <input type="checkbox"/> |
| NO  | <input type="checkbox"/> |

If you have ticked YES please also answer Question (2) or (3)

**QUESTION (2): WOULD YOU LIKE A FRIEND, RELATIVE OR OTHER PERSON TO TELL THE SHERIFF YOUR VIEWS ABOUT YOUR FUTURE?  
(PLEASE TICK BOX)**

|     |                          |
|-----|--------------------------|
| YES | <input type="checkbox"/> |
| NO  | <input type="checkbox"/> |

If you have ticked YES please write the name and address of the person you wish to tell the Sheriff your views in Box (A) below. You should also tell that person what your views are about your future.

**BOX A:**

|                 |
|-----------------|
| (NAME) .....    |
| (ADDRESS) ..... |
| .....           |

|                  |            |                          |             |                          |
|------------------|------------|--------------------------|-------------|--------------------------|
| Is this person - | A friend?  | <input type="checkbox"/> | A relative? | <input type="checkbox"/> |
|                  | A teacher? | <input type="checkbox"/> | Other?      | <input type="checkbox"/> |

OR

**QUESTION (3): WOULD YOU LIKE TO WRITE TO THE SHERIFF AND TELL HIM WHAT YOUR VIEWS ARE ABOUT YOUR FUTURE?  
(PLEASE TICK BOX)**

**YES**

**NO**

If you decide that you wish to write to the Sheriff you can write what your views are about your future in Box (B) below or on a separate piece of paper. If you decide to write your views on a separate piece of paper you should send it along with this form to the Sheriff Clerk in the envelope provided.

**BOX B:**

**WHAT I HAVE TO SAY ABOUT MY FUTURE:-**

**NAME:** .....

**ADDRESS:** .....

**DATE:** .....

## ENDNOTES

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<sup>1</sup> *Family Relations Act*, R.S.B.C. 1996, c.128.

<sup>2</sup> Family Justice Reform Working Group, "A New Justice System for Families and Children," presented to the B.C. Justice Review Task Force (May 2005) at 13, available online at: [http://www.bcjusticereview.org/working\\_groups/family\\_justice/final\\_05\\_05.pdf](http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf) (last accessed: November 3, 2006).

<sup>3</sup> *Ibid.* at 69.

<sup>4</sup> Anne Graham and Robyn Fitzgerald, "Taking Account of the 'To and Fro' of Children's Experiences in Family Law," presented at the Childs 2005 Conference, Oslo, Norway (June 2005) at 4. See also Nicola Ross, "Agency, Article 12 and Models for Legal Representation of Children in Australia," presented at the 4th World Congress on Family Law and Children's Rights, Cape Town, South Africa, (March 2005) at 4.

<sup>5</sup> Nicola Ross, *ibid.* at 4-5.

<sup>6</sup> Anne Graham and Robyn Fitzgerald, *supra* note 4 at 4, citing Smith, 1997 & Prout & James, 1997.

<sup>7</sup> Nicholas Bala, "The Role of Advocacy & The Children's Lawyer in Ontario's Justice System," (Draft, November 10, 2002) at 2-4 & Alan Campbell, "The Voice of the Child in Family Law: Whose Right? Who's Right?" Ph.D. thesis, submitted to the School of Social Work and Social Policy, Division of Education, Arts and Social Sciences, University of South Australia (2004) at 55.

<sup>8</sup> Carol Smart, "From Children's Shoes to Children's Voices," *Family Court Review*, Vol. 40, No. 3 (July 2002) 307-319 at 307.

<sup>9</sup> *Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2 1990).

<sup>10</sup> Department of Justice Canada, "Meeting Our Obligations under the United Nations *Convention on the Rights of the Child*," online at: [http://www.justice.gc.ca/en/news/nr/2003/doc\\_30988.html](http://www.justice.gc.ca/en/news/nr/2003/doc_30988.html) (last accessed: November 3, 2006).

<sup>11</sup> Carol Smart, *supra* note 8 at 307-308.

<sup>12</sup> See discussion in Pauline O'Connor, "Voice and Support: Programs for Children Experiencing Parental Separation and Divorce," presented to the Family, Children and Youth Section of the Department of Justice Canada (2004) at 12-14 & 34.

<sup>13</sup> Helena Barwick, Alison Gray and Roger Macky, "Characteristics Associated with the Early Identification of Complex Family Court Custody Cases," prepared for the New Zealand Department for Courts (September 2003) at 12.

<sup>14</sup> Ann O'Quigley, "Listening to Children's Views: The Findings and Recommendations of Recent Research," Joseph Roundtree Foundation (2000) at 10.

<sup>15</sup> Joan B. Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice," (2002) *Va. J. Soc. Pol'y & L.*, Vol. 10(1) 129 at 149.

<sup>16</sup> *Ibid.* at 150.

<sup>17</sup> See discussion in Suzanne Williams, International Institute of Child Rights and Development, "Through the Eyes of Young People: Meaningful Child Participation in Family Court Processes," (August 2006) at 25.

<sup>18</sup> Ernest A. Sanchez & Sherrie Kibler-Sanchez, "Empowering Children in Mediation: An Intervention Model," *Family Court Review*, Vol. 42, No. 3 (July 2004) 554 at 558, citing Dunn, Davies and O'Connor (2001).

<sup>19</sup> Ann O'Quigley, *supra* note 14 at 2.

<sup>20</sup> Alastair Nicholson, Former Chief Justice, Family Court of Australia, "Children and Children's Rights in the Context of Family Law," address given at the Law Asia Conference, Children and the Law: Issues in the Asia Pacific Region, Brisbane, Australia (21 June 2003) at 6-7 & "Children and Young People – The Law and Human Rights," address to the Law Society of the Australian Capital Territory, Canberra, Australia (14 May 2002) at 18.

<sup>21</sup> See discussion in Carol Mahood Huddart and Jeanne Charlotte Ensminger, "Hearing the Voice of Children," (1991-92) 8 *C.F.L.Q.* 95 at 103.

<sup>22</sup> Joan B. Kelly, *supra* note 15 at 148.

<sup>23</sup> *Ibid.*

<sup>24</sup> New Zealand Ministry of Justice, "Lawyer for the Child," (brochure) & President's Direction on Representation of Children in Family Proceedings (UK) (5 April 2004).

<sup>25</sup> *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46, ss. 70(c) & (o).

<sup>26</sup> *Ibid.*, ss. 38(1)(a) & 49(2)(a).

<sup>27</sup> *Civil Code of Quebec*, L.Q. 1991, c. 64, Art. 34.

<sup>28</sup> Nicholas Bala, Victoria Talwar & Joanna Harris, "The Voice of Children in Canadian Family Law Cases," (2005) Vol. 24, No. 3, 221-280 at 252-253.

<sup>29</sup> Joan B. Kelly, *supra* note 15 at 150-151, citing Smart & Neal, "'It's My Life Too' – Children's Perspectives on Post-Divorce Parenting," 30 *Fam. L.* 163 at 166; Carol Smart *et al.*, "Objects of Concern? – Children and Divorce," 11 *Child. & Fam. L.Q.* 365, 374-76 (1999) & Joan B. Kelly, Mediation Interviews with Children (unpublished work product, on file with author).

<sup>30</sup> *Family Relations Act*, *supra* note 1, s. 30(2)(b).

<sup>31</sup> *Family Law Act*, S.A. 2003, c. F-4.5, s. 24(1).

<sup>32</sup> *Ibid.*, s. 24(2).

<sup>33</sup> *Children's Law Act, 1997*, S.S. 1997, c. C-8.2, s. 31(2).

<sup>34</sup> *Children's Law Act*, R.S.N.W.T. 1997, c. 14, s. 51 [N.W.T.] & *Children's Law Act (Nunavut)*, R.S.N.W.T. 1997, c. 14, s. 51 [Nunavut].

<sup>35</sup> *Care of Children Act 2004*, s. 50(1).

<sup>36</sup> Family Justice Reform Working Group, *supra* note 2 at 45.

<sup>37</sup> *Ibid.* at 51.

<sup>38</sup> Interview with Andrea Clarke, Senior Policy Analyst, Dispute Resolution Office, B.C. Ministry of Attorney General (16 June 2006).

<sup>39</sup> Australian Department of Families, Community Services, and Indigenous Affairs, "Chapter 3: The Project Story," in *Child Inclusive Practice in Family and Child Counselling and Family and Child Mediation*, (Nov. 1998), online: <http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/programs/families-CIPcontents.htm> (last accessed: November 3, 2006).

<sup>40</sup> Jennifer McIntosh, "Child-Inclusive Divorce Mediation: Report on a Qualitative Research Study," 18(1) *Med. Q.* (Fall 2000) 55 at 58-59.

<sup>41</sup> Australian Department of Families, *supra* note 39, "Overview".

<sup>42</sup> Jennifer McIntosh, *supra* note 40 at 61-62.

<sup>43</sup> Child-inclusive mediation was initially piloted in Melbourne and Darwin: Australian Department of Families, Community Services, and Indigenous Affairs, *supra* note 39. Later papers refer to the services in Canberra and Adelaide: Jennifer McIntosh and Caroline Long, "Current Findings in Australian Children in Postseparation Disputes: Outer Conflict, Inner Discord," (April 2005), *J. of Fam. Studies*, Vol. 11, No. 1 99-109 at 101.

<sup>44</sup> *Ibid.* See also [http://www.childreninfocus.org/work\\_researchproject.html](http://www.childreninfocus.org/work_researchproject.html) (last accessed: November 3, 2006).

<sup>45</sup> Clare Dyer, "Family Judges Learn From Australian Approach to Battles Over Children," *The Guardian* (July 31, 2006).

<sup>46</sup> *Ibid.* See also Children in Focus, "Research Project," online [http://www.childreninfocus.org/work\\_researchproject.html](http://www.childreninfocus.org/work_researchproject.html) (last accessed: November 3, 2006).

<sup>47</sup> Children in Focus, *ibid.*

<sup>48</sup> See discussion of Janet Johnston's work at the Center for the Family in Transition in the Australian Department of Families, Community Services, and Indigenous Affairs, *supra* note 39, "Chapter 5.2: What Kind of Support Helps? Research Views". Joan B. Kelly has also spoken in favour of child-inclusive mediation: "Listening to Children's Voices: Helping Separating Parents Tune In," slide show presented to Family Mediation Scotland (June 28, 2004).

<sup>49</sup> Australian Department of Families, Community Services, and Indigenous Affairs, *supra* note 39, "Overview".

<sup>50</sup> Jill Goldson, Centre for Child and Family Policy Research, Auckland University, "Hello, I'm a Voice, Let Me Talk – Child-Inclusive Mediation in Family Separation," Report #1/06 (December 2006), online: <http://www.familiescommission.govt.nz/download/innovativepractice-goldson.pdf> (last accessed: January 16, 2007) at 10.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 11-13 & 16.

<sup>53</sup> *Ibid.* at 4 & 16.

<sup>54</sup> Jill Goldson, *supra* note 50 at 16.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993*, No. 1956 (s. 223), Chapter 33 (Family Actions), Rule 33.7(1)(h), available online at: <http://www.scotcourts.gov.uk/library/rules/ordinarycause/index.asp> (last accessed: November 3, 2006).

<sup>57</sup> Sheriff Court Form F-9, available online at: [http://www.scotcourts.gov.uk/library/rules/ordinarycause/ordinary\\_cause\\_rules/Form%20F09.doc](http://www.scotcourts.gov.uk/library/rules/ordinarycause/ordinary_cause_rules/Form%20F09.doc) (last accessed: November 3, 2006).

<sup>58</sup> *Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993*, *supra* note 56, Rule 33.19.

<sup>59</sup> Scottish Child Law Centre, "Have Your Say in Court," (brochure) at 4 & E. Kay M. Tisdall, *et al.*, "Children's Participation in Family Law Proceedings: A Step Too Far or a Step Too Small," *Journal of Social Welfare and Family Law*, 26(1) 2004: 17-33 at 21.

<sup>60</sup> Scottish Child Law Centre, *ibid.* at 4.

<sup>61</sup> "Further Pilot Information – Meaningful Child Participation in BC Family Court Process," IICRD website: <http://www.iicrd.org/childparticipation/PilotInformationDocument.doc> (last accessed: November 3, 2006).

<sup>62</sup> Office of the Children's Lawyer, Ontario Ministry of the Attorney General, "More About What We Do," available online at: <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/about.asp> (last accessed: January 8, 2007).

<sup>63</sup> Ronda Bessner, "The Voice of the Child in Divorce, Custody and Access Proceedings," presented to the Family, Children and Youth Section of the Department of Justice Canada (2002) at 21-22.

<sup>64</sup> *Ibid.* at 22-23.

<sup>65</sup> *Ibid.* at 23.

<sup>66</sup> Judge Peter Boshier, Family Court of New Zealand "Making Our Children Count: The New *Care of Children Act 2004* – Is Section 59 of the *Crimes Act 1961* Good Law?" speech presented to Save the Children New Zealand (Kilbirnie, Wellington, 17 June 2005) at 4, available online at: <http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=save-the-children-nz-wellington-17-june-05.asp> (last accessed: November 3, 2006).

<sup>67</sup> Family Court of New Zealand, "Practice Note – Counsel for Child: Code of Practice" (effective 1 February 2001), online: <http://www.justice.govt.nz/family/practice/notes/default.asp?inline=child-counsel.asp> (last accessed: November 3, 2006).

<sup>68</sup> *Ibid.* See also Family Law Council, "Pathways for Children: A Review of Children's Representation in Family Law," (August 2004) at 20-21.

<sup>69</sup> Family Law Council, *ibid.* at 21. See also New Zealand Ministry of Justice, "Lawyer for the Child," (brochure) at 5.

<sup>70</sup> Family Law Council, *ibid.*

<sup>71</sup> *Ibid.* at 28.

<sup>72</sup> *Family Law Act, 1975* (Cth), s. 117(4).

<sup>73</sup> Department for Constitutional Affairs, "Separate Representation of Children," (2006) at 7, available online at: [http://www.dca.gov.uk/consult/separate\\_representation/cp2006.htm](http://www.dca.gov.uk/consult/separate_representation/cp2006.htm) (last accessed: Nov. 3, 2006).

<sup>74</sup> England, *Family Proceedings Rules 1991*, R. 9.2A(1).

<sup>75</sup> A *guardian ad litem* is "a special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation, and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs." *Bowen v. Sonnenburg*, Ind.App., 411 N.E.2d 390, 396. *Black's Law Dictionary*, 6<sup>th</sup> ed., s.v. "Guardian."

<sup>76</sup> There was a 108% increase from 549 appointments in 2003-2004 to 1,141 in 2004-2005: Gillian Douglas, Mervyn Murch, Claire Miles and Lesley Scanlan, "Research into the Operation of Rule 9.5 of the Family Proceedings Rules 1991: Final Report to the Department for Constitutional Affairs," (2006) at para. 2.47.

<sup>77</sup> Dame Elizabeth Butler-Sloss, President of the Family Division, "President's Direction on Representation of Children in Family Proceedings," (5 April 2004).

<sup>78</sup> Gillian Douglas *et al.*, *supra* note 76 at 29 & 39.

<sup>79</sup> Department for Constitutional Affairs, *supra* note 73.

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- <sup>80</sup> Scottish Child Law Centre, *supra* note 59 at 6 & Scottish Executive, "Meeting in the Middle: A Study of Solicitors' and Mediators' Divorce Practice," (2000) at 86, available online at: (2000), available online at: <http://www.scotland.gov.uk/cru/kd01/blue/meet01.pdf> (last accessed: November 3, 2006).
- <sup>81</sup> Scottish Child Law Centre, *ibid.*
- <sup>82</sup> *Age of Legal Capacity (Scotland) Act 1991*, s. 4A.
- <sup>83</sup> Nicholas Bala *et al.*, *supra* note 28 at 251.
- <sup>84</sup> Family Court of Australia, "Less Adversarial Trials," online at: [http://www.familycourt.gov.au/presence/connect/www/home/about/less\\_adversarial\\_trials/](http://www.familycourt.gov.au/presence/connect/www/home/about/less_adversarial_trials/) (last accessed: November 3, 2006) ["Less Adversarial Trials"].
- <sup>85</sup> Family Court of Australia, "Practice Direction No. 2 of 2006 – Child-related Proceedings (Division 12A)," (7 July 2006) at para. 2.2, available online at [http://www.familycourt.gov.au/presence/connect/www/home/directions/practice\\_directions/2006+practice+directions/practice\\_direction\\_no\\_2\\_of\\_2006](http://www.familycourt.gov.au/presence/connect/www/home/directions/practice_directions/2006+practice+directions/practice_direction_no_2_of_2006) (last accessed: November 3, 2006) ["Practice Direction No. 2 of 2006"].
- <sup>86</sup> *Ibid.* at para.2.3.
- <sup>87</sup> The Honourable Diana Bryant, "The Future of the Family Court," The Third Annual Austin Asche Oration (23 November 2004) at 14, available online at: [http://www.familycourt.gov.au/presence/connect/www/home/publications/papers\\_and\\_reports/new\\_papers/papers\\_Third\\_Annual\\_Austin\\_Asche\\_Oration](http://www.familycourt.gov.au/presence/connect/www/home/publications/papers_and_reports/new_papers/papers_Third_Annual_Austin_Asche_Oration) (last accessed: November 3, 2006).
- <sup>88</sup> "Practice Direction No. 2 of 2006," *supra* note 85 at para. 5.2.
- <sup>89</sup> The Honourable Diana Bryant, *supra* note 87 at 15, 16 & 19; "Less Adversarial Trials," *supra* note 83; "Practice Direction No. 2 of 2006," *supra* note 85 at paras. 6.19-6.20.
- <sup>90</sup> The Honourable Diana Bryant, *ibid.* at 19.
- <sup>91</sup> "Practice Direction No. 2 of 2006," *supra* note 85 at paras. 6.12 & 6.13.
- <sup>92</sup> "Less Adversarial Trials," *supra* note 84.
- <sup>93</sup> Judge Peter Boshier, Principal Family Court Judge, "Parenting Hearing Programme: Less Adversarial Children's Hearings," speech to the Auckland Family Courts' Assn., Novotel, Ellerslie, and Auckland (14 September, 2006), online at: <http://www.justice.govt.nz/family/publications/speeches-papers/default.asp?inline=auckland-family-courts-association-september-2006.asp> (last accessed: January 16, 2007) at 2.
- <sup>94</sup> Jill Goldson, *supra* note 50 at 17.
- <sup>95</sup> Family Justice Reform Working Group, *supra* note 2 at 68.
- <sup>96</sup> Carol Mahood Huddart and Jeanne Charlotte Ensminger, *supra* note 21 at 103.
- <sup>97</sup> The Honourable Alastair Nicholson, Former Chief Justice of the Family Court of Australia, "Children and Children's Rights in the Context of Family Law," address at the Law Asia Conference on Children and the Law: Issues in the Asia Pacific Region (21 June 2003) at 7 & the Honourable Alistair Nicholson, Former Chief Justice of the Family Court of Australia, "Children and Young People – The Law and Human Rights," presented to the Law Society of the Australian Capital Territory, Sir Richard Blackburn Lecture, Canberra (14 May 2002) at 18.

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<sup>98</sup> Eberhard Carl, Judge at the Court of Appeal of Frankfurt am Main, seconded to the German Federal Ministry of Justice, "Giving Children Their Own Voice in Family Court Proceedings: A German Perspective" at 2, presented at the 4<sup>th</sup> World Congress on Family Law and Children's Rights (Capetown, South Africa, 20-23 March 2005), available online at: <http://www.childjustice.org/html/2005.htm> (last accessed: November 3, 2006).

<sup>99</sup> *Ibid.* at 5.

<sup>100</sup> *Ibid.* at 6-7.

<sup>101</sup> Nicholas Bala *et al.*, *supra* note 28 at 247.

<sup>102</sup> *Parens patriae*... "refers traditionally to the role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane..." *Black's Law Dictionary*, 6<sup>th</sup> ed., s.v., "*Parens patriae*".

<sup>103</sup> *L.E.G. v. A.G.*, 2002 BCSC 1455 at para. 4.

<sup>104</sup> *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 71(2); *Custody Jurisdiction and Enforcement Act*, R.S.P.E.I. 1988, c. C-33, s. 8(2); *Children's Law Reform Act*, R.S.O. 1990, c. C-12, s. 64(2); N.W.T., *supra* note 34, s. 83(2); & Nunavut, *supra* note 34, s. 83(2).

<sup>105</sup> Barbara Ann Bartlett, "Parenting Coordination: A New Tool for Assisting High-Conflict Families," Oklahoma Bar Journal Articles (Feb 14, 2004), online at: [http://www.okbar.org/obj/articles\\_04/021404.htm](http://www.okbar.org/obj/articles_04/021404.htm) (last accessed Jan. 11, 2007) & Marin County Task Force on Special Masters, "Marin County Special Master Program – Recommended Special Master Credentials and Qualifications," (1995).

<sup>106</sup> Marin County, Sample Special Master Stipulation and Appointment Order (1995).

<sup>107</sup> See, for example, *Arizona Rules of Family Law Procedure*, Rule 74 – Parenting Co-ordinator, R. 74F.

<sup>108</sup> *Ibid.*

<sup>109</sup> Family Justice Reform Working Group, *supra* note 2 at 75.