Hear the CHILD
Curriculum and Resource
Hear the CHILD Curriculum and Resource

Meaningful Child Participation in Family Justice Processes

Produced by the International Institute for Child Rights and Development (IICRD)

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Since 1994 the International Institute for Child Rights and Development (IICRD) has been working to shape a world where children’s rights, outlined in the UN Convention on the Rights of the Child, become a lived reality within the daily lives of children who need them most, and the systems that affect them. IICRD advances the quality of life and development of vulnerable children through creative strategies to complex problems that draw on innovative research, education and capacity building and the strengths of children, their families, communities and cultures.

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Many Thanks!

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Notes

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# Table of Contents

## OVERVIEW

**INTRODUCTION**..................................................................................................................3

   *Re: Contribution to the Views of the Child Project* ..........................................................4

**CURRICULUM AND RESOURCE OVERVIEW**......................................................................5

**FACILITATOR NOTES**...........................................................................................................5

**SAMPLE AGENDA**................................................................................................................6

## MODULE 1

Introduction to Childhood and the Law ..................................................................................17

**CHILDHOOD BASICS**.........................................................................................................17

**QUESTIONS**..........................................................................................................................18

**DOMINANT VIEWS OF CHILDHOOD**..................................................................................19

**EMERGENT VIEWS OF CHILDHOOD**..................................................................................20

**CHILDHOOD REFLECTED IN LAW**....................................................................................21

**QUESTIONS**..........................................................................................................................23

**SOURCES & ADDITIONAL READING**..................................................................................24

## MODULE 2


**ACTIVITY**..............................................................................................................................27

**CHILD NEEDS**.....................................................................................................................27

   *A Framework of Child Needs*..............................................................................................28

**QUESTIONS**..........................................................................................................................29

**CHILD RIGHTS: INTERNATIONAL AND DOMESTIC LAW**..............................................30

   *Essentials about the CRC as International Law*..................................................................30

   *Summary of CRC Articles (Substantive Rights Provisions: Part I)*...................................31

**QUESTIONS**..........................................................................................................................32

   *Child Rights in Canada*.......................................................................................................33

**THE BEST INTERESTS OF THE CHILD**..............................................................................34

   *Possible Factors to Be Considered in Determining Best Interests of the Child*..................35

   *BC Legislation: Best Interests of the Child Determinations*..............................................36

**QUESTIONS**..........................................................................................................................38

**SOURCES & ADDITIONAL READING**..................................................................................39

## MODULE 3

An Introduction to CHILD Participation .................................................................................43

**WHAT IS “CHILD PARTICIPATION”?**..................................................................................43

**CHILD PARTICIPATION RIGHTS IN THE CONVENTION ON THE RIGHTS OF THE CHILD**....45

   *The Role of Family in Realizing a Child’s Right to Participate*............................................46

**WHY CHILD PARTICIPATION? (THE RESEARCH BASE)**..................................................47

   *In the Context of Family Law*.............................................................................................48

**QUESTIONS**..........................................................................................................................50

**CHALLENGES TO IMPLEMENTING CHILD PARTICIPATION**..........................................51

**DOMESTIC LAW AND CHILD PARTICIPATION**...............................................................51

**QUESTIONS**..........................................................................................................................56

**PUTTING CHILD PARTICIPATION INTO PRACTICE**...........................................................57

**SOURCES & ADDITIONAL READING**..................................................................................59
MODULE 4
CHILD Participation in Practice: Context ........................................................................... 63
A SYSTEMS APPROACH TO CHILD PARTICIPATION......................................................... 63
USING THE SOCIAL ECOLOGY TO INFORM THE CHILD’S CONTEXT............................... 65
Child........................................................................................................................................... 65
The Child’s Family .................................................................................................................. 66
The Child’s Community ......................................................................................................... 66
Civil Society Affecting the Child .......................................................................................... 67
The Child’s Culture ................................................................................................................ 67
Legal/political Framework ..................................................................................................... 67
QUESTIONS............................................................................................................................. 68
OPTIONS AVAILABLE TO SUPPORT A CHILD’S PARTICIPATION ................................. 69
THE CHOICE OF METHOD AND THE EXPERIENCE OF THE CHILD................................. 70
IDENTIFYING ONE CARING ADULT FOR THE CHILD ....................................................... 70
One Caring Adult .................................................................................................................. 71
QUESTIONS............................................................................................................................. 73
SOURCES & ADDITIONAL READING..................................................................................... 74

MODULE 5
CHILD Participation in Practice: Healthy Development....................................................... 77
WHAT IS CHILD DEVELOPMENT?........................................................................................ 77
THEORETICAL APPROACHES TO CHILD DEVELOPMENT................................................ 78
Biological Approach to Child Development ........................................................................ 78
Socio-cultural Approach to Child Development .................................................................. 78
HOW PIAGET AND VYGOTSKY RELATE TO THE PRACTICE OF LAW............................ 80
KEY CHARACTERISTICS OF CHILD DEVELOPMENT.......................................................... 81
QUESTIONS............................................................................................................................. 83
IMPACT OF FAMILY BREAKDOWN ON CHILD DEVELOPMENT.......................................... 84
A SPECIAL NOTE ON THE IMPACT OF CONFLICT ON CHILDREN..................................... 85
BUILDING ON CHILDREN’S RESILIENCY......................................................................... 87
PARENTS HAVE A KEY ROLE TO PLAY .............................................................................. 88
A CHECKLIST FOR PARENTS TO HELP CHILDREN AT ANY AGE DEAL WITH SEPARATION. 88
SUGGESTED STRATEGIES TO SUPPORT HEALTHY CHILD PARTICIPATION.................... 89
QUESTIONS............................................................................................................................. 91
SOURCES & ADDITIONAL READING..................................................................................... 92

MODULE 6
CHILD Participation in Practice: Information....................................................................... 95
WHAT THE RESEARCH SAYS REGARDING INFORMATION FOR CHILDREN...................... 95
Gaps in Communication Between Children and Parents ...................................................... 95
Failure to Provide Information to a Child may be More Harmful than Helpful.................. 96
Why Children are not Informed .......................................................................................... 97
Some Implications of Inadequate/Inappropriate Information for Children ......................... 97
Children Want ..................................................................................................................... 98
Children Need ...................................................................................................................... 98
INFORMATION RESOURCES FOR BC CHILDREN.............................................................. 99
Children in Care: Representative for Children and Youth of BC (www.rcybc.ca).................. 100
A Kids Guide to Separation and Divorce (www.familieschange.ca)........................................ 101
QUESTIONS............................................................................................................................. 102
STRATEGIES FOR PROVIDING APPROPRIATE INFORMATION TO CHILDREN................. 103
Education Programs for Parents ......................................................................................... 103
Education Programs Specific to Children ............................................................................. 104
Ensure the Information Provided to Children is Relevant and Appropriate ....................... 105
Family Justice Stakeholders Provide Appropriate Information and Resources to Children and Families .................................................................................................................. 107
QUESTIONS............................................................................................................................. 108
MODULE 7
CHILD Participation in Practice: Listening

LISTENING TO CHILDREN ................................................................. 113
IMPLICATIONS OF FAILING TO LISTEN TO CHILDREN .............. 114
CREATING ENABLING SPACES TO LISTEN TO CHILDREN ............ 115
Awareness of the Practitioner’s Filters ............................................ 115
Embracing Uncertainty: Recognizing each Child as Unique ............. 115
QUESTIONS ..................................................................................... 117
Putting the Child (and Parents) at Ease ........................................... 118
Attending Behaviour: Effective Listening and Communication ......... 118
PRINCIPLES TO FOLLOW IN INTERVIEWING CHILDREN .......... 119
LANGUAGE CONSIDERATIONS TO ENSURE THE CHILD HEARS AND IS HEARD .......................................................... 121
LISTENING TO CHILDREN THROUGH THE STRUCTURED INTERVIEW ............................................................................. 125
INTERVIEW STRUCTURE .................................................................. 128
QUESTIONS ..................................................................................... 130
LISTENING TO CHILDREN SUMMARIZED ...................................... 131
SOURCES & ADDITIONAL READING ................................................. 132

MODULE 8
CHILD Participation in Practice: Dignity

MEANINGFUL CHILD PARTICIPATION .............................................. 135
PRINCIPLES OF MEANINGFUL CHILD PARTICIPATION IN FAMILY JUSTICE PROCESSES ...................................................... 136
ETHICAL REFLECTIONS ................................................................... 137
SAFETY: SCREENING AND COMPLAINT MECHANISMS ............... 137
CONDUCT CONSIDERATIONS ............................................................ 138
QUESTIONS ..................................................................................... 140
National Association of Counsel for Children (NACC) Recommendations for Representation of Children in Abuse and Neglect Cases .......................................................... 142
QUESTIONS ..................................................................................... 143
NACC Needs Checklist ..................................................................... 144
QUESTIONS ..................................................................................... 145
SOURCES & ADDITIONAL READING ................................................. 146
OVERVIEW

Family breakdown can victimize children in many ways. It can effectively deprive them of a parent. It can have them living in poverty. It can result in abuse. And it does all this without allowing them an adequate voice. Where children's rights are at stake, perhaps more than anywhere else, reactive legal solutions are inadequate. It takes pro-active attitudes in lawyers and judges to bring children's problems to light and to find solutions to them.

Chief Justice Beverly McLachlin, Supreme Court of Canada
Introduction

Legislation such as the British Columbia *Family Relations Act*,\(^1\) case law such as *E.G. (L) v. G. (A.)*\(^2\) and the *UN Convention on the Rights of the Child*\(^3\) support hearing from children in family justice processes, particularly where a child’s best interests are being determined. Further, research shows that children of all ages are profoundly impacted by family breakdown and there are ways people within the justice system can improve their practice to support children through this difficult time. One way is to provide an opportunity for the child to be heard in a safe way when the child’s best interests are being determined, and to provide the child with information in a way that the child understands about decisions that profoundly impact his or her life.

The Hear the Child Curriculum and Resource is designed for lawyers, judges, mediators and others working in family justice processes who wish to learn about and support children’s participation in their daily practice, consistent with the child’s needs, rights and best interests. It is intended to assist those who work in the legal system to improve their respective practices in supporting children while families are separating or in transition, and can be used in training sessions or as a general resource. The primary focus of these materials is on custody and access of the child in separation or divorce proceedings. However, the material is also relevant to other family justice contexts such as those involving child protection or adoption.

\(^1\) *Family Relations Act*, R.S.B.C. 1996, C-128, s. 4(f).


Re: Contribution to the Views of the Child Project

I have been Chief Judge of the Provincial Court for just over a year, but have served as a judge of the court for over 13 years, regularly sitting throughout the province in all aspects of the court’s work. Over the years, but particularly since we instituted mediation-styled case conferences for child protection and family disputes in 1996 and 1998, I have fairly frequently interviewed children, whether because a) I sensed the dispute was such that the child might benefit from knowing someone in the process cared enough to talk to them, or b) I believed the child might have information which would contextualize or explain information I was receiving from the adversarial parents or the state, or c) I thought that discerning the interests and concerns of the child might become a useful tool in my continuing dialogue with the parents. On rare occasions, I have interviewed children in the context of trials, but there are considerable procedural challenges associated with that practice.

It is rare for me to find that the information provided by children is not helpful. My experience has been that the discussion with children generates not only useful information, but frequently a powerful tool in the continuing dialogue with the parents or social workers. So, for example, one can return to the parents after meeting privately with their daughter and the court clerk to say something along the lines, “You have a wonderful daughter and you both should be very proud of her. She is a credit to both of you. It is obvious to me that she loves you both very much. But as I talked to her and she told me about (various interests associated with school or recreational activities or extended family or whatever might be the issue), it made sense to imagine that for her right now, it would be best to have her home base with (mom or dad as the case may be).” This creates an opportunity for the parent who may be the proposed secondary care giver to take the approach that the most loving response, and the way for that person to be the best parent she or he can be - quite independently of the conflict between mother and father - is to be respectful about these sensible considerations that have been identified by the child. In other cases I have found simply that children, and often relatively young children, have a degree of insight into the dynamics of the family unit that is far beyond what we might be inclined to imagine is their capacity. In my experience, hearing the views of children is almost always worthwhile.

At the same time, I have concluded that for a number of very good reasons the majority of judges do not wish to speak directly to children. It is important, therefore, that we develop not just other processes, but legislation or court rules to support such processes, through which the views of children are required to be secured in a much higher percentage of cases than happens today.

Yours sincerely,

Hugh C. Stansfield
Chief Judge, Provincial Court of British Columbia
Curriculum and Resource Overview

The Hear the Child Curriculum and Resource is organized into 8 modules that can be considered individually or collectively, depending on the learning goals of a facilitator or audience.

- Module 1 addresses the concept of childhood and how its social constructs have been reflected in law.
- Module 2 examines the intersection between a child’s needs, rights and best interests.
- Module 3 introduces child participation, recognizing that consideration of the child’s views is one aspect of a child’s participation in family justice processes.
- Modules 4 through 8 deconstruct child participation by considering the implications of the child and
  - (4) Context;
  - (5) Healthy Development;
  - (6) Information;
  - (7) Listening (and being listened to); and,
  - (8) Dignity.

To encourage interaction and discussion each module is composed of informational text dispersed with self-reflective questions and activities. The intent is to foster an engaging learning experience to realize child rights and child participation in family justice processes.

Facilitator Notes

Although the Hear the Child Curriculum and Resource is organized into 8 modules, it is not necessary to present all modules at once. Rather, the material can be used in whole or in part to address the intended audience’s needs and time availability. For instance, the contents can be introduced in one hour, or each module could be presented in 1-2 hours to foster in-depth learning and discussion. Below is a sample agenda and some tips to aid in facilitation.
Materials that may be used as handouts in trainings include: (1) excerpts from this Guide with appropriate sources cited; (2) “10 Tips for Legal Professionals”, a booklet available through www.iicrd.org; and (3) the UN Convention on the Rights of the Child, which is available free of charge from the Department of Canadian Heritage, in the Government of Canada.

**Hear the Child: A One-Day Introduction for Family Justice Legal Professionals**

*Meaningful Child Participation in Family Justice Processes*

**Sample Agenda 1 (9 am – 4:30 PM)**

30 min  
Introductions: who we are and why we are here (time may vary depending on size of group).

Introduce facilitators and participants.

Interactive Icebreaker suggestion for a small group: Divide participants in pairs. Give participants 5-10 minutes to get to know one another and then have each person take a turn introducing their partner to the rest of the group: provide partner’s name and why they are taking the training.

**Childhood and the Law**

**Material Covered:** Module 1  
**Time Allocation:** 20 minutes

20 min  
Break into small groups of 3 – 5 people and discuss the following questions;

What words, phrases, feelings or ideas come to mind when you think about childhood? Where do they come from?

1. How do these perceptions translate into family law (provide examples)?

2. What challenges arise for children in the examples provided?

3. How might these challenges be overcome?

10 min  
Bring the group back together and summarize the prevailing and emerging views of childhood as indicated in the Guide; Module 1 Summary and Closing.
Child Needs, Rights, and Participation: What Underlies the Best Interests of the Child?

Material Covered: Module 2  Time Allocation: 45 minutes

10 min  Ask participants to clear their minds and think of a healthy child they know. Each participant considers what this child needs to grow into a healthy human being (consider the child holistically: physical, emotional, cognitive, spiritual, social needs) – jot down a few of these needs. As a large group ask for some feedback of what needs people wrote down.

10 min  Ask the group for their views on each of the following questions:

1. Do all children have the same needs?
2. What affects or influences the needs a child has?
3. Who is responsible for meeting the needs of a child?

10 min  Introduce the UN Convention on the Rights of the Child and draw links between the group’s answers to what a child needs to the CRC’s guiding principles and articles. Outline the role of the State (i.e. government) and arms of the State (e.g. courts and government supported services) as duty bearers, and the recognition of the role of the family (e.g. Article 5).

15 min  Ask the group for examples of when a child’s best interests are determined in family justice matters, and then ask for their views on how the following quotation relates to the way the best interests of children are determined in family justice matters.

Children’s rights have undergone significant evolution in the history of Canada. Children are no longer considered a form of chattel or possession, nor are they any longer simply part of a family unit. Children today are persons in their own right.


www.senate-senat.ca/rights-droits.asp
As a part of this discussion summarize Module 2.

15 min  AM BREAK

An Introduction to Child Participation
Material Covered: Module 3  Time Allocation: 60 minutes

10 min  What is Child Participation? Ask participants to craft their own definition of child participation and keep this for future reference for themselves (they can review it again at the end of the day).

10 min  Introduce Article 12 of the CRC (a CRC guiding principle as well as substantive right) and related CRC articles that broaden the concept of child participation

5 min  Where is Article 12 reflected in BC legislation? Outline examples.

20 min  Why Child Participation?

STANDUP, SIT DOWN

Ask the participants to close their training manuals and stand at their seats. Explain to the participants you will read a series of statements, and after each statement is read they should think about if they disagree or agree with the statement. If they agree they should remain standing, if they disagree they should sit down. After each statement has been read and the participants have taken their stance, engage the group in discussion. What are the reasons people feel the statement is true or untrue?

Statements include:
- Children want an opportunity to be heard
- Focusing on the needs of children early in family disputes can reduce both the intensity and duration of a family conflict
- Children’s participation can be beneficial to both themselves and their families
- Child participation begins and ends in a single event
- Child participation involves children receiving information as well as sharing information
- Parents have a role to play in their children’s participation
- Courts have a role to play in children’s participation
- The law requires children to participate in decisions that affect them
- Children are protected through their participation
- Children have valuable information to share
- Children’s participation can lead to better decision-making

Feel free to mix up the statements or include your own based on the contents of the Guide. This activity helps to gauge the mindset of the group and gets the participants moving and interacting from the start.

15 min  Conclude Module 3 introduction to Child Participation and address any questions arising from morning.

1 hour  LUNCH BREAK

PM  Putting CHILD Participation into Practice

5 min  Briefly introduce CHILD Participation: Context, Healthy Development, Information, Listening and Dignity

Context & Child Participation

Material Covered: Module 4  Time Allocation: 30 minutes

5 min  Introduce the systems approach to child participation through the Child Rights Social Ecology. Where do the participants see themselves in the social ecology (do they play a role in more than one system)?

25 min  Ask participants to consider a child they work with or who they know who is affected by family justice processes. Hold that child in their minds and ask the following questions about the child based on the social ecology:

1. What does the life of the child look like?
2. What's going on in the child’s family?

3. What does the child’s community look like?

4. What culture does the child live within?

5. How might this child participate and what caring adults are available to support this child’s participation? What might your role be?

Participants can write responses down if they wish. Further probing questions can be found under each section in Module 5 under “Using the Social Ecology to Inform the Child's Context”. Wrap up by noting that these responses will likely vary from child to child, and ask what might happen if we fail to contextualize each child involved in family law matters?

**Healthy Development & Child Participation**

**Material Covered:** Module 5  
**Time Allocation:** 30 minutes

5 min  
Briefly introduce some of the basics of child development theory and the impact family justice matters may have on children across various developmental stages, how to buffer the ill effects and some strategies to address.

20 min  
Break into small groups of 3 – 5 people and discuss the following:

1. What additional strategies might you use to buffer the impact of family transition or break down on a child?

2. Select a strategy and discuss when, where and how it might be implemented in practice?

3. Which strategy do you think you could implement in your own practice?

5 min  
Conclude Module 5
Information & Child Participation

Materials Covered: Module 6   Time Allocation: 20 minutes

20 min  Provide overview of research, the importance of relevant and appropriate information, and the resources available to children and adults. Ask participants whether they have seen information provided to children in family justice processes, and if so where was it done well. If it wasn’t done well, what might be improved?

15 min  PM BREAK

Listening & Child Participation

Materials Covered: Module 7   Time Allocation: 45 minutes

15 min  Display the following quote:

\[\text{I want to hear the views of all children if at all possible. And so it’s really the choice of mechanism. And I would set probably about two or three years of age as the lower limit. And in terms of how would I assess the appropriateness of that, I say we hear the views of children in every case except where they are extremely young and the literature suggests, or the experts will tell me, that that’s way too young, they’re way too young.}\]

BC Provincial Court Judge, Through the Eyes of Young People (2006)

Facilitate a discussion with the group by asking the following question:

1. What do you think of this quote: do you agree or disagree?

15 min  Continue group discussion with the following questions (break group into pairs and have them discuss the three questions in 10 minutes. Take 5 minutes at the end to integrate some content from the material and draw their attention to it in relation to the questions):

2. What about the age of children: when should we listen to children?
(in the discussion incorporate research, and factors judges consider in determining when to hear from children)

3. What might happen if we fail to listen to children?
   (in the discussion incorporate implications of failing to listen to children)

4. What does it take to listen to children effectively and how do we create enabling spaces to do this?
   (in the discussion integrate parts of sections on practitioners filters, attending behavior, principles to follow in interviewing children, language considerations, listening to children summarized)

15 min Provide whole group with overview of structured interview and highlight some of the questions that might be asked in a non-therapeutic child interview: one mechanism to listen to children. Ask if anyone has participated in this type of mechanism and if so, what happened.

Dignity & Child Participation
Materials Covered: Module 8  Time Allocation: 20 minutes

LINE UP AND MOVE

Ask the participants to all stand at one end of the room. Explain to the participants that you will read a series of statements, and after each statement is read they should think about if they agree, disagree, or fall somewhere in between, with the statement. If they strongly agree they should remain at the end of the room where they are, if they strongly disagree they should move to the other end of the room, if they are somewhere in the middle stand in the middle of the room. After each statement has been read and the participants have taken their stance, engage the group in discussion to find out why they lined up as they did. What are the reasons people strongly agree/agree/disagree/strongly disagree etc?

Statements include:
- Every child is entitled to information about processes and decisions that affect them in a timely manner and in a way that the child understands.
Expert reports and assessments always include the views of the child.
- The views of the child must always be shared with the child’s parents.
- All lawyers must steadfastly adhere to the time-honoured virtues of integrity, honesty and dignity. This means they must uphold the dignity of the child.
- A lawyer should always follow a client’s instructions even when the instructions are to prolong a family conflict involving a child’s custody.

Feel free to mix up the statements or include your own based on the contents of the Guide. This activity is intended to get participants thinking about the dignity of the child and legal professionals’ responsibilities in their practices.

10 min  **Wrap Up** – Bring the group back together and open the space for their comments or questions about the day. You might ask them to reflect on what they wrote earlier about child participation, or to consider one thing they might do differently in their respective practices as a result of the training.

For a closing activity have participants stand in a circle. Going around the circle, each participant says one word that describes how they feel at the close of the day.

Provide each participant with a brief evaluation to complete for response on the day and to identify areas for further learning.
MODULE 1

INTRODUCTION TO CHILDHOOD AND THE LAW

Much of the child development research has undervalued the importance of context and has studied children as dependents rather than agents.

(Morrow, 1994; Richards, 1996; Woodhead, 2000)

Learning Objectives

1. Define childhood and reflect on perceptions and assumptions about childhood.
2. Recognize how these perceptions and assumptions influence the law.
3. Consider how these perceptions and assumptions affect how children participate in legal decision-making.
Module 1

Introduction to Childhood and the Law

Childhood Basics

- Constructions of childhood vary greatly over time and across different cultural contexts (Hendricks, 1997)
- Ideas about childhood are dominated by a western child development perspective viewing development as a pathway towards rationality (James and Prout, 1990; Mayall, 2002)
- Much of the child development research has undervalued the importance of context and has studied children as dependents rather than agents (Morrow, 1994; Richards, 1996; Woodhead, 2000)
- Adulthood is the normative state, with children being in a state of immaturity characterized by irrationality, incompetence, passivity and dependence (Lansdown, 2004)
Questions

1. What words, phrases, feelings or ideas come to mind when you think about childhood?

2. How do you think our society views childhood?

3. How do these perceptions translate into family law?
Dominant Views of Childhood

According to the *UN Convention on the Rights of the Child*, a child is defined as a person under 18 years of age (Article 1), implying a biological or natural distinction between adult and child. In BC, children are generally considered under 19 years of age. In addition there are particular experiences, traits and characteristics we consider to be natural to the child. These include:

- **Children are passive and weak**

  Parents have power over children and may exert their authority. They have the right to dictate what the child should do. Children are naturally weak, vulnerable, and constantly need protection. They are dependent on adults for their survival, safety and comfort. Often adults are reluctant to recognize the strengths and capacities of children.

- **Children are unaware, illogical and innocent**

  It is often thought parents know what is best for their children. Children need to be taught and fed knowledge and skills they will need in their lives. They have to be molded and given the proper values to be productive members of society. Often we fail to believe they have the capacity to understand. For example we say, “You are still a child, you won’t understand”.

- **Children are biologically determined, anticipating adulthood**

  The use of age as a marker for childhood also underscores the idea of childhood as a biological fact. Hence, childhood is viewed as a biologically determined stage on the path to adulthood - full human status. In a child’s life everything is done in preparation for adulthood. Education, household chores and even play activities are done in anticipation of being an adult in the real world.

- **Children are dependent and care-free**

---

*Adapted from Protacio-De Castro et. al. (2003). *Handbook for Social Workers on Basic Bio-Psychosocial Help for Children in Need of Special Protection* pp. 34-36, UNICEF.*
Assumptions about the naturalness of children often extend to the concept of childhood. For example since we think of children as naturally weak and dependent, we may also assume that childhood is naturally a period of dependence. Moreover the idea of children’s innocence paints a picture of childhood as a carefree existence, with play as the major preoccupation.

All these beliefs feed into the standard or universal model of childhood, where the child is in a small happy family, where the parents have stable jobs and where the child goes to school. The idea of a universal childhood assumes that all children go through similar experiences during their childhood. Culture, history and other differentiating factors are largely ignored.

### Emergent Views of Childhood

The emerging paradigm presents childhood as a social construction. This means that the experience of childhood is not a universal feature of humanity, but rather differs from society to society.

- **Childhood is deeply rooted in, and influenced by the cultural, contextual and structural components of society**

  Things that may seem appropriate or natural for a child in one society may be deemed unacceptable in another. For example, Canadian legislation does not permit a child under 12 to take care of younger children without adults, whereas in many other countries this is considered normal or acceptable. Other assumptions are more widespread, for example the notion that children are dependent on adults is often translated into circumstances where adults exert power and control over children and make decisions for them.

- **Children are not simply recipients of adult protection, but are social actors who demonstrate capacity to be involved**

  Childhood is constructed and deconstructed with children, and thus children play an active role in ‘constructing and determining’ their reality. Accordingly children and adolescents should be active participants in actions and decisions affecting them, rather than the recipients of interventions and protection mechanisms.

- **Children are the most reliable witnesses of their own experiences**
Assumptions based on specific notions of childhood and on the principle of the best interests of the child have been incorporated into family and legal knowledge while children’s interpretations of their own experiences are often ignored. Even within the same family, children have different experiences and feelings after parental separation.

- **Children’s resilience is furthered when they are treated as competent actors and can communicate with other people making decisions in their lives.**

Children are generally aware of the challenges facing their families. Any distress, anxiety or uncertainty can be voiced by children.

---

**Childhood Reflected in Law**

- **Parallel between children and mental incompetents:**

  *Parens Patriae Jurisdiction* vested in the BC Supreme Court has evolved from its jurisdiction over mental incompetents. For example, in *Wellesley v. Wellesley* (1828), 2 Bli, N.S. 124, 4 E.R. at 1078, the court noted that jurisdiction over infants resembles “the care which the Court takes with respect to lunatics, and supposed that the jurisdiction devolved on the Crown the same way”.

- **Capacity is in doubt:**

  Anyone under 14 years of age is a witness whose capacity is in doubt. Such persons must undergo an inquiry to determine that he or she understands the nature of an oath and is able to communicate the evidence (*BC Evidence Act* [1996] Chapter 124, s. 5).

- **No standing to children:**

  There is no provision for a child or a child’s representative to be a party to a private family proceeding or receive notice of hearings affecting the child (*Court Rules Act*, B.C. Reg. 417/98, *Provincial Court (Family) Rules*).

- **Child Views Considered When Child’s Best Interests Determined:**

  The BC *Family Relations Act* and *Child, Family and Community Services Act* both list the views of the child as one factor to weigh when determining the child’s best interests.
Note:
The need to find better ways of supporting children and their participation has been raised in a New Justice System for Families & Children: Report of the Family Justice Reform Working Group to the Justice Review Task Force (BC), released in 2005, and is the subject of the current review of the BC *Family Relations Act* in British Columbia.
Questions

1. What are some other examples in the law where perceptions or assumptions about childhood are reflected?

2. What messages do the above examples convey about children and their participation in justice processes?

3. What challenges might arise as a result of these messages for children in the justice system?

4. How might these challenges be overcome?
Sources & Additional Reading


MODULE 2

CHILD NEEDS, RIGHTS AND PARTICIPATION:
WHAT UNDERLIES THE BEST INTERESTS OF THE CHILD

What is best for any child or even children in general is often indeterminate and speculative, and requires a highly individualized choice between alternatives.

Mnookin

The best interests principle is suspect without a framework of children’s rights.

Eekelaar

Learning Objectives

1. Gain an understanding of the relationship between a child’s needs and rights.
2. Learn about child rights and the UN Convention on the Rights of the Child.
3. Learn how child needs, rights, and participation informs the child’s best interests.
4. Understand some of the needs and rights that underpin child participation (e.g. evolving capacity and role of parents; opportunity to be heard and received information).
Module 2
Child Needs, Rights, and Participation:
What Underlies the Best Interests of the Child?

Activity

Reflecting on your childhood, think of a scenario when your needs were not met. What needs were not met? Why were they not met? How might they have been met?

Now, reflecting on your practice, think of a child who you know whose needs were not met. What was the situation? Why were their needs not met? How might they have been met? Is there any role you could have played to meet the child’s needs?

Child Needs

A child’s needs define the prerequisites for his or her optimal growth, development, health and well-being.

For each of the three broad domains below identify what a child needs in order to fulfill his or her full potential for health and well-being:

1. Physical needs;
2. Social, Economic and Cultural needs;
3. Intellectual, Psychological and Emotional needs.

How would you define lower and upper age limits of childhood as they relate to the children’s needs you identified?

Approach this task in general terms. It is not necessary to define the exact detail of the needs that you are describing.
A Framework of Child Needs

The following table provides a suggested framework for considering and categorizing children’s needs.

<table>
<thead>
<tr>
<th>Physical needs</th>
<th>Social, Economic and Cultural needs</th>
<th>Intellectual, Psychological and Emotional needs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shelter</td>
<td>Knowledge of and respect for own language, religion and culture</td>
<td>Opportunities for play</td>
</tr>
<tr>
<td>Health care</td>
<td>Stable social and economic environment</td>
<td>Access to education</td>
</tr>
<tr>
<td>Water and sanitation</td>
<td>A family environment – whether the biological or a substitute family</td>
<td>Access to age appropriate information</td>
</tr>
<tr>
<td>Protection from environmental pollution</td>
<td>Access to appropriate guidance and support</td>
<td>Stimulation</td>
</tr>
<tr>
<td>Adequate food</td>
<td>Access to age appropriate information</td>
<td>Access to appropriate guidance and support</td>
</tr>
<tr>
<td>Adequate clothing</td>
<td>Respect for privacy and confidentiality</td>
<td>Respect for privacy and confidentiality</td>
</tr>
<tr>
<td>Protection from violence</td>
<td>Access to education</td>
<td>Recognition of and respect for emerging competencies</td>
</tr>
<tr>
<td>Protection from exploitation and abuse</td>
<td>Opportunities for friendship</td>
<td>Opportunities to be listened to and respected</td>
</tr>
<tr>
<td></td>
<td>Opportunities for play</td>
<td>A family environment, whether the biological or a substitute family</td>
</tr>
</tbody>
</table>
Questions

1. Do all children have the same needs?

2. What affects or influences the needs a child has?

3. Who is responsible for meeting the needs of a child?
Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance.

Preamble, UN Convention on the Rights of the Child

The United Nations Convention on the Rights of the Child (CRC) is the most widely ratified human rights instrument in the world (ratified by 190 of 192 States, including Canada in 1991). Although the United States has yet to ratify the treaty, its near universal ratification has enabled US courts to recognize the CRC as customary international law (see for example the federal court case of Beharry v. Reno (2002)). Child rights are universal, indivisible and inalienable and according to these principles apply to all human beings by virtue of birth.

Essentials about the CRC as International Law

- Children are defined as people under 18 years of age (Article 1).
  
  Note: in BC children are generally people under 19 years of age.
  
- The CRC contains 54 articles that set out the rights of all children. The rights enshrined by the CRC can be grouped according to child:
  
  - (1) Survival;
  - (2) Development;
  - (3) Protection; and
  - (4) Participation.

- Four Guiding Principles underlie all child rights:
  
  - Non-discrimination (Article 2);
  - Best Interest of the Child (Article 3);
  - Life, survival and development (Article 6);
  - Participation (Article 12).

- The CRC has two optional protocols, one on the involvement of children in armed forces and the other on the sale of children, child prostitution and child pornography.
Every State must report their progress on CRC implementation to the UN Committee on the Rights of the Child (Canada has reported twice and will report again in 2009).

Canada, as a State party, is bound to perform the obligations contained in the treaty in good faith as a matter of international law and cannot invoke its internal law to justify a failure to uphold treaty obligations (Articles 26 and 27, Vienna Convention on the Law of Treaty).

Summary of CRC Articles (Substantive Rights Provisions: Part I)

<table>
<thead>
<tr>
<th>Article 1</th>
<th>Article 11</th>
<th>Article 23</th>
<th>Article 32</th>
</tr>
</thead>
<tbody>
<tr>
<td>definition of child (under 18 years)</td>
<td>right to protection from abduction abroad</td>
<td>right of disabled children to dignity, self-reliance and the facilitation of their active participation in the community</td>
<td>right to appropriate working conditions and freedom from hazardous work</td>
</tr>
<tr>
<td>Article 2</td>
<td>Article 12</td>
<td>Article 24</td>
<td>Article 33</td>
</tr>
<tr>
<td>freedom from discrimination</td>
<td>right to be listened to and taken seriously</td>
<td>right to health and health services</td>
<td>right to be protected from drug use, production and trafficking</td>
</tr>
<tr>
<td>Article 3</td>
<td>Article 13</td>
<td>Article 25</td>
<td>Article 34</td>
</tr>
<tr>
<td>best interests considered and protected</td>
<td>freedom of expression</td>
<td>right of children in physical and mental health facilities to periodic review of their treatment</td>
<td>right to protection from sexual exploitation and abuse</td>
</tr>
<tr>
<td>Article 4</td>
<td>Article 14</td>
<td>Article 26</td>
<td>Article 35</td>
</tr>
<tr>
<td>States must undertake measures to implement the CRC to the &quot;maximum extent of their available resources&quot;</td>
<td>freedom of thought, conscience, and religion</td>
<td>right to benefit from social security</td>
<td>right to protection from abduction, sale, and trafficking of children</td>
</tr>
<tr>
<td>Article 5</td>
<td>Article 15</td>
<td>Article 27</td>
<td>Article 36</td>
</tr>
<tr>
<td>provision of parental guidance and direction in a manner consistent with the child’s evolving capacity</td>
<td>freedom of association</td>
<td>right to an adequate standard of living</td>
<td>right to protection from all other forms of exploitation</td>
</tr>
<tr>
<td>Article 6</td>
<td>Article 16</td>
<td>Article 28</td>
<td>Article 37</td>
</tr>
<tr>
<td>right to life and maximum survival and development</td>
<td>right to privacy</td>
<td>right to education and school discipline</td>
<td>right to protection from torture, degrading treatment, and deprivation of liberty</td>
</tr>
<tr>
<td>Article 7</td>
<td>Article 17</td>
<td>Article 29</td>
<td>Article 38</td>
</tr>
<tr>
<td>right to a name, nationality, and to know and be cared for by parents</td>
<td>right to information and role of media to this end</td>
<td>right to education that develops respect for human rights, their identity and democracy</td>
<td>protection for children in armed conflict</td>
</tr>
<tr>
<td>Article 8</td>
<td>Article 18</td>
<td>Article 30</td>
<td>Article 39</td>
</tr>
<tr>
<td>preservation of identity, name, nationality, and family relations</td>
<td>parents joint responsibilities assisted by the State</td>
<td>right of minority or indigenous children to their culture, language and religion</td>
<td>right of recovery and reintegration for child victims</td>
</tr>
<tr>
<td>Article 9</td>
<td>Article 19</td>
<td>Article 31</td>
<td>Article 40</td>
</tr>
<tr>
<td>right to not be separated from parents without having their views known</td>
<td>right to protection from all forms of violence</td>
<td>right to leisure and play</td>
<td>rights of children in the juvenile justice system</td>
</tr>
<tr>
<td>Article 10</td>
<td>Article 20</td>
<td>Article 32</td>
<td>Article 41</td>
</tr>
<tr>
<td>right to enter or leave a country for family reunification</td>
<td>right to special protection for children deprived of their family environment</td>
<td>protects respect for existing human rights standards</td>
<td></td>
</tr>
</tbody>
</table>
Questions

1. How do children’s needs relate to children’s rights?

2. What might affect how each child’s rights are realized?

3. Who is responsible for fulfilling a child’s rights? Who else has a role to play?
Child Rights in Canada

Children’s rights have undergone significant evolution in the history of Canada. Children are no longer considered a form of chattel or possession, nor are they any longer simply part of a family unit. Children today are persons in their own right.

The Senate Standing Committee on Human Rights

Civil Code of Québec, C.c.Q, CHAPTER II

RESPECT OF CHILDREN’S RIGHTS

32. Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are able to give to him. 1991, c. 64, a. 32.

33. Every decision concerning a child shall be taken in light of the child's interests and the respect of his rights.

Consideration is given, in addition to the moral, intellectual, emotional and physical needs of the child, to the child's age, health, personality and family environment, and to the other aspects of his situation. 1991, c. 64, a. 33; 2002, c. 19, s. 15.

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. 1991, c. 64, a. 34.

- The CRC has been considered by Canadian courts in well over 100 cases.

- While the CRC is not automatically incorporated into domestic law, the CRC may assist in interpreting existing domestic law.

- Some legislation in Canada such as BC’s Child, Family and Community Services Act sets out the rights of children, and reflects some of the CRC’s contents (see s. 70 rights of children in care).

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The Best Interests of the Child

Article 3 of the CRC sets out the best interests of the child principle:

(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.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

In Young v. Young, [1993] 4 S.C.R. 3, as per the reasons of McLachlin J regarding “the Best Interests of the Child Test”, the court recognized that in applying the test: (1) the child’s best interests are the only consideration: parental rights or preferences have no role; (2) the test is broad and flexible, yet must be applied objectively based on the evidence; and (3) the court must maximize contact between the child and both parents, unless this conflicts with the best interests of the child.
### Possible Factors to Be Considered in Determining Best Interests of the Child

<table>
<thead>
<tr>
<th>Mark Henaghan</th>
<th>Justice R. James Williams</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Strength of existing and future bonding</td>
<td>1. Are both parents able to provide adequate care? [i.e. if there is no real choice about care arrangements, the child’s wish may not be relevant]</td>
</tr>
<tr>
<td>2. Parenting attitudes and abilities</td>
<td>2. How clear and unambiguous are the wishes?</td>
</tr>
<tr>
<td>3. Availability for, and commitment to, quality time with the child</td>
<td>3. How informed is the expression?</td>
</tr>
<tr>
<td>4. Support for continued relationship with the other spouse</td>
<td>4. The age of child</td>
</tr>
<tr>
<td>5. Security and stability of home environment</td>
<td>5. Maturation level</td>
</tr>
<tr>
<td>6. Availability and suitability of role models</td>
<td>6. Strength of the wish</td>
</tr>
<tr>
<td>7. Positive or negative effects of wider family</td>
<td>7. Length of time the preference has been expressed for</td>
</tr>
<tr>
<td>8. Provision for physical care and help</td>
<td>8. What is practical?</td>
</tr>
<tr>
<td>9. Material welfare</td>
<td>9. The influence of the parent(s) on the expressed wish or preference</td>
</tr>
<tr>
<td>10. Stimulation and new experiences</td>
<td>10. The overall context</td>
</tr>
<tr>
<td>11. Educational opportunity</td>
<td>11. The circumstances of the preference from the child’s point of view</td>
</tr>
<tr>
<td>12. Wishes of the child</td>
<td></td>
</tr>
<tr>
<td>13. Cultural factors</td>
<td></td>
</tr>
<tr>
<td>14. Location of parents - custodial or non-custodial</td>
<td></td>
</tr>
</tbody>
</table>
BC Legislation: Best Interests of the Child Determinations

<table>
<thead>
<tr>
<th>Family Relations Act</th>
<th>Child, Family, Community Service Act</th>
<th>Adoption Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Best interests of child are paramount</td>
<td><strong>Best Interests of Child</strong></td>
<td></td>
</tr>
<tr>
<td><strong>24</strong> (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:</td>
<td>(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:</td>
<td></td>
</tr>
<tr>
<td>(a) the health and emotional well-being of the child including any special needs for care and treatment;</td>
<td>(a) the child's <strong>safety</strong>;</td>
<td></td>
</tr>
<tr>
<td>(b) if appropriate, the views of the child;</td>
<td>(b) the child's physical and emotional needs and level of development;</td>
<td></td>
</tr>
<tr>
<td>(c) the love, affection and similar ties that exist between the child and other persons;</td>
<td>(c) the importance of continuity in the child's care;</td>
<td></td>
</tr>
<tr>
<td>(d) education and training for the child;</td>
<td>(d) the importance to the child of having a positive relationship with a parent and a secure place as a member of a family;</td>
<td></td>
</tr>
<tr>
<td>(e) the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.</td>
<td>(e) the child's cultural, racial, linguistic and religious heritage;</td>
<td></td>
</tr>
<tr>
<td><strong>2</strong> If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well-being of the child.</td>
<td>(f) the child's views;</td>
<td></td>
</tr>
<tr>
<td>(2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well-being of the child.</td>
<td>(g) the effect on the child if there is delay in making a decision.</td>
<td></td>
</tr>
<tr>
<td>(2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well-being of the child.</td>
<td><strong>3</strong> (1) All relevant factors must be considered in determining the child's best interests, including for example:</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(a) the child's safety;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(b) the child's physical and emotional needs and level of development;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(c) the importance of continuity in the child's care;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(d) the importance to the child of having a positive relationship with a parent and a secure place as a member of a family;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(e) the child's cultural, racial, linguistic and religious heritage;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(f) the child's views;</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(g) the effect on the child if there is delay in making a decision.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(2) If the guardianship of the estate of a child is at issue, a court must consider as an additional factor the material well-being of the child.</td>
<td></td>
</tr>
</tbody>
</table>

Canada’s *Divorce Act* states that the only consideration in making a custody or access order about a child is the child’s best interests “as determined by reference to the condition, means, needs and other circumstances of the child”.

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6 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 16(8).
Madam Justice L’Heureux-Dubé in Gordon v. Goertz, [1996] 2 S.C.R. 27, set out “fundamental and uncontroversial premises” as a starting point for her analysis of the test to be applied in determining custody and access under the Divorce Act, including that:7

1. It is the right of children that custody and access adjudications under the Act be governed by their best interests (ss. 16(8) and 17(5); Young v. Young, [1993] 4 S.C.R. 3; (1993) S.C.J. No. 112 (S.C.C.), at p. 63 (per L’Heureux-Dubé J.) and at p. 117 (per McLachlin J.).

2. The best interests of the child test under the Act is constitutional (Young, supra, at p. 71 (per L’Heureux-Dubé J.), and at p. 124 (per McLachlin J.).

3. The Act provides that the best interests of the child must be “determined by reference to the condition, means, needs and other circumstances of the child” (s. 16(8)) or, where “there has been a change in the condition, means, needs or other circumstances of the child, . . . by reference to that change” (s. 17(5)). It is thus from the child’s perspective, and not from the perspective of either parent, that his or her best interests must be assessed (J. D. Payne, Payne on Divorce (3rd ed. 1993), at p. 279; Young, supra, at p. 63 (per L’Heureux-Dubé J.)) [emphasis added].

7 Gordon v. Goertz [1996] 2 S.C.R. 27, per L’hereux-Dubé at paragraph XIV.
Questions

1. How do a child’s best interests vary between private and public family law proceedings (i.e. those involving the State)?

2. How can the best interests of the child test inform both the process and outcomes for the child involved in family justice processes?
Sources & Additional Reading


MODULE 3

AN INTRODUCTION TO CHILD PARTICIPATION

[A]ppearing to “listen” to children is relatively unchallenging; giving due weight to their views requires real change. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of children’s rights.

Committee on the Rights of the Child,
General Comment No. 5, para. 12.

Learning Objectives

1. Gain a better understanding of what is meant by child participation.

2. Learn about some of the key law and research underlying child participation in family justice decision-making.

3. Be introduced to the CHILD Participation Model (Context and One Caring Adult, Healthy Development, Information, Listening, and Dignity).
Module 3
An Introduction to CHILD Participation

One thing I have noticed about kids my own age or younger, or sometimes even older, is that when you ask them their opinions, they shrug and say “I don’t know.” I find this sad because I believe that everyone is entitled to have their own opinions and to be heard. Often, kids do not have opinions or they do not say that they have opinions because they feel that it does not matter because they are either not taken seriously, or when they do say their opinions, it does not change anything…

Joelle LaFargue, testimony before Canada’s Senate Standing Committee on Human Rights, 14 June 2005

What is “Child Participation”?

There are varying views of what child participation is, however, child participation may be described as children (1) partaking in and influencing processes, decisions, and activities; and, (2) engaging with other people around issues that concern their individual and collective life conditions.

Generally, children’s participation has been missing from justice processes, however, one aspect of child participation, the “views of the child”, is afforded some attention. The following law supports hearing from a BC child in family separation and divorce, or custody and access cases when the child’s best interests are being determined:

- s. 24(1)(b) Family Relations Act, R.S.B.C. 1996, c. 128;
- s. 16(8) Divorce Act 1985, c. 3 (2nd Supp.) pursuant to E.G. (L) v. G.(A.), 2002 BCSC 1455 (Can LII) (April 24, 2002); and

In addition the BC Child, Family and Community Services Act supports hearing from children when a child’s best interests are determined (s. 4f).

Between 2000 and 2003, more than 15,000 children in BC were subject to a divorce custody order, and in 2001 approximately 1 in 5 children birth to age 19 lived in homes affected by
marital transition, with children between 10-14 years being the highest percentage affected (Stats Canada, 2001; BC Attorney General, 2006). Of children and youth in care, more than 50 per cent are Aboriginal, yet comprise only seven per cent of the child and youth population in BC. The research is clear that:

- **the psychological and social well-being of children is profoundly impacted by separation/divorce** (Amato, 2000; Kelly, 2003; BC Ministry of Attorney General, 2006);

- **children want an opportunity to be heard**, and hearing children’s views in family justice matters can be **beneficial to both children themselves and their families** (Morrow, 1998; Smith, Taylor & Tapp, 2003; Parkinson, Cashmore and Single, 2006);

- **a lack of time, resources, training and procedural issues are some obstacles** to hearing from children in BC (Williams, 2006);

- **focusing on the needs of children early in family disputes can reduce both the intensity and duration of a family conflict** (Garon & Whitfill, 2003; McIntosh, 2003); and

- **BC children are not heard as a matter of course** in family justice processes (Williams, 2006; Henry, 2005).

In most common law jurisdictions the child’s views or feelings are most often conveyed to decision-makers through a trained counselor (Australia, New Zealand), government support services representative (England and Wales), custody evaluator (US), or assessor (Canada) who reports to the court. The conventional wisdom is that these methods are superior to a judge or decision-maker interviewing children directly as they are better able to interview children and interpret children’s views (Bala, 2004; L’Heureux Dubé & Abella, 1983; Starnes, 2003). They also overcome due process concerns (e.g. what the child tells the judge in private cannot be tested in court by cross examination).

This third party approach is sometimes challenged, in part because of the evolving research base that indicates that children wish to have the option of more direct involvement in decisions that deeply impact their lives as well as the increased awareness of the importance of children being heard, consistent with Article 12 of the UN Convention on the Rights of the
Child (CRC) (Bessner, 2002; Hale, 2006; Lyon, 2000, Nicholson, 2000; Tapp, 2006; Parkinson, 2006; Williams 2005).

While the “views of the child” is an important aspect of child participation in family justice processes, **child participation does not begin and end in a single event.** In family justice processes child participation is also about creating space in a system traditionally designed for adults where children, in decision-making processes that profoundly affect them, can:

- receive information in a way that they understand;
- ask questions;
- share their views and observations about their own lived experiences;
- have these views listened to in a respectful way and considered; and
- have decisions communicated to them once they are made in a way they understand.

## Child Participation Rights in the Convention on the Rights of the Child

<table>
<thead>
<tr>
<th>Article 12 of the UN Convention on the Rights of the Child, both signed and ratified by Canada, states:</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Parties <strong>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 according to the age and maturity of the child.</strong></td>
</tr>
<tr>
<td>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.</td>
</tr>
</tbody>
</table>

“When consulted, children should be included as active participants in decision-making – it is crucial that the voices, and not only the choices, of children are heard. Adults must not interpret the needs and wishes of children, but listen to them directly.”

Other concepts in the CRC encompassing child participation include:

- **Participation (Views)**: express views freely in all matters affecting the child and the views given due weight (Article 12).

- **Freedom of expression**: to seek, receive and impart information orally, in writing or in print, in art form or through any other media of the child’s choice (Article 13).

- **Freedom of thought, conscience and religion** (Article 14).

- **Freedom of association and to peaceful assembly** (Article 15).

- **Privacy and to protection from unlawful attacks on his or her honour** and reputation (Article 16).

- **Access to information** from national and international sources (Article 17).

- **Disabled children’s right to social integration and active participation** in the community (Article 23).

**The Role of Family in Realizing a Child’s Right to Participate**

- **Respect for the right of parents or guardians to provide direction** to the child in accordance with the child’s evolving capacities (Article 5).

- **Both parents have responsibility for upbringing and development of child. Parents/legal guardians have primary responsibility** and the best interests of the child is their basic concern (Article 18).

* All of the above rights are indivisible and informed by the CRC’s four guiding principles (non-discrimination, best interests of child, survival/development/protection, and participation) and other rights such as culture, religion, and language (Article 30). As a result the realization of rights for each child will be contextualized. For example, the role of “parents/guardians” might be expanded to include extended family for an Aboriginal child, thereby reflecting the cultural rights of the child.
Why participation is important generally:\(^8\)

- **To uphold children’s rights**: Children are citizens and service users and share the same fundamental rights to participate as others.

- **To fulfill legal responsibilities**: The right of children to be consulted is included in the *UN Convention on the Rights of the Child*, and their views are a factor to be considered in determining their best interests.

- **To promote children’s protection**: A recurring theme of successive inquiries into abuse has been the failure to listen to children. Participation is an important aid to protection.

- **To empower and enhance self-esteem**: Effective participation can provide a sense of self-efficacy and raise self-esteem.

- **To improve decision-making**: Participation leads to more accurate and relevant decisions, which are better informed and hence more likely to be implemented.

- **To enhance democratic processes**: Representative democracy can be strengthened as children gain new opportunities to become active members of their family and community, whether in schools, local authorities, organizations.

- **To enhance children’s skills**: Participation helps in developing skills useful for debate, communication, negotiation, prioritization and decision-making.

- **To improve services**: Consulting with children gives them a level of influence and an element of choice about the provision of services offered (e.g. do they want to speak to an interviewer, a decision-maker directly, or write or draw something that they can provide to a decision-maker) and can help them understand their own wants and needs.

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In the Context of Family Law

Research indicates that:

❖ **Most children want a say in matters that affect them** and want to be listened to. They recognize the difference between providing input and making the decision.⁹

❖ **Children are:**¹⁰

  o **Experts in their own lives**, with a competence to communicate a unique insight into their experiences and perspectives;
  
  o **Skillful communicators**, employing a huge range of languages with which to articulate their views and experience;
  
  o **Active agents, influencing and interacting with the world around them**; and
  
  o **Meaning makers**, constructing and interpreting the meaning in their lives.

❖ **Excluding young people in decisions affecting them may perpetuate adverse immediate and long-term effects.**¹¹ These include:

  o Feelings of isolation/loneliness;
  
  o Anxiety;
  
  o Fear;
  
  o Sadness;
  
  o Confusion;
  
  o Anger;
  
  o Difficulty coping with stress;
  
  o Longing for more time with one parent;
  
  o Loss of closeness in parent-child relationships;

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⁹ Carl, Eberhard, “Giving Children Their Own Voice in Family Court Proceedings: A German Perspective” at 1; Carl cites the work of Morrow at the Centre for Family Research, Cambridge University, UK, 1998; Williams, *Through the Eyes of Young People*” (2005) available at www.iicrd.org/childparticipation.

¹⁰ Clark & Moss 2001 referenced in Lansdown “Can You Hear Me: The right of young children to participate in decisions affecting them.”

¹¹ Cox & Cox 1982 and Wallerstein & Kelly, “Views of the Child”. Immediate effects of excluding young people include feelings of isolation or loneliness, anxiety, fear, sadness, confusion, anger and difficulty coping with stress; long-term effects include a longing by the young person for more time with one parent and loss of closeness in parent-child relationship, feelings of loss generally as well as loss of trust in parents and adults.
- General feelings of loss; and
- Loss of trust in parents and adults.

**Associated benefits of child participation in divorce and separation proceedings** include:\12
- Maintaining a focus on the child’s needs;
- Empowering the child;
- Improving child-parent relationships;
- Improving the quality of agreement reached; and
- Accessing other supports the child may require.

**Potential drawbacks of child participation in family proceedings?**\13
- Children may be put “on the spot”, be left with the impression that they are to decide the matter, or left feeling worse off, if the child and his or her views are not taken seriously, and the child’s participation is not done with care.
- Professionals may use child’s articulated needs as moral pressure on parents (Simpson, 1991).
- Participation can create loyalty conflicts in children (Gentry, 1985).
- Mediation, or other decision-making processes, can be an additional burden in an already stressful situation, and children may be exposed to negative and volatile dynamics between parents (Irwin, 1985).
- Child’s views can sometimes serve as a “trump card”.
- Children may not express their true opinions or feelings if they fear their parents’ retaliation or anger at their disclosures (Drapkin & Beinenfeld, 1985).

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\12 Ministry of Attorney General Justice Services Branch, Family Justice Services Division, “The Involvement of Children in Divorce and Custody Mediation: A Literature Review”, 2003

Questions

Do you think children should participate in family proceedings where the following exists? Why or why not?

1. If a child does not want to be involved.

2. In very high conflict situations where parents are openly hostile and angry.

3. If parents do not want their children involved in the process.

4. If parents are arguing because they do not want to take responsibility for the child.

5. When both parents describe the child’s needs similarly and have parallel ideas.
Challenges to Implementing Child Participation

- Lack of resources, time and training.
- Age of the child.
- A fear of harming children. Often children are excluded from participating because adults wish to protect children, perhaps from loyalty conflicts or from being burdened with making the decision. Sometimes this fear is misplaced.
- BC Provincial *Family Court Rules* fail to consider children or their representative as parties to the proceedings.
- There is no mandatory requirement for children to be represented at hearings where decisions impacting them are determined, and no one in BC is designated with the responsibility of advocating for the best interests of the child in justice processes. While parents may fill this role, they are most often concerned with their own emotional needs in family court matters and easily forget about the emotional needs of their children.\(^\text{15}\)
- The “best interests” principle often replaces a child’s right to participate, rather than supporting it.
- Practitioners are hesitant to give considerable weight to the views of children, particularly those who are pre-adolescent.
- Parties cannot afford to pay to support their child’s participation.
- Ethical considerations.

Domestic Law and Child Participation

As outlined in Module Two best interests of the child determinations are governed by provincial and federal legislation (e.g. *Family Relations Act; Child, Family, Community Service Act; Adoption Act; Divorce Act*) and case law (e.g. *Young v. Young; Gordon v. Goertz*), which requires the views of the child to be considered as a factor in deciding the child’s best


\(^{15}\) *Supra* note 18, “Views of the Child” session.
interests. The following outlines some of the law with respect to children’s participation in justice processes.

- **Teenagers’ wishes must be respected for orders to be practical.** Teens will “vote with their feet” as articulated by the BC Court of Appeal after at 13 year old boy ran away from home five times following custody being awarded to his mother by the lower court\(^\text{16}\):

  \[
  \text{“In order for custody orders relating to teens to be practical, they must reasonably conform to the wishes of the children”}. \]

- **Best interests determinations do not always follow the wishes of the pre-adolescent child in deciding custody and access arrangements.** See for example, *Alexander v. Alexander* (1986), 3 R.F.L. (3d) 408, 1986 Carswell BC 535 (B.C.C.A.) where the child wished to live with his mother but custody was awarded to the father.

- **A child’s testimony is to be assessed on its own individual merits.** The common law rule about the need for a warning about the “inherent frailty” of the evidence of every child witness no longer applies.\(^\text{17}\)

- **A non-therapeutic interview with the child is admissible and brings forward the views of the child to the court.** In a BC mobility case involving an 8 year old and 11 year old boy, the Court considered the report letter from an interviewer who completed a non-therapeutic “views of the child” interview.\(^\text{18}\) The court was satisfied that the interview was done under neutral circumstances, and was non-threatening. It went on to consider the views of the child in determining the child’s best interests.

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\(^\text{18}\) *A.E.O. v. K.O.* 2006 BCSC 990 (CanLII).
An assessment done by a professional may bring forward the views of the child. While the assessor may also provide his or her observations, the views of the child or children may be brought forward in this way.\(^{19}\)


Where a judicial interview is conducted with the consent of both parties, the judge need not set out the details of the interview for the parties. The BC Court of Appeal in \textit{Jesperson v. Jesperson} reasoned the interview was intended to obtain: \(^{20}\)

“A very frank statement by the child [in a manner] which will not cause embarrassment to the child or either parent, and hence ‘it must remain in the prerogative of the trial judge’ to decide what, if anything, should be said to the parties about the results of the interview.”

Note: This decision did not consider the previous BC Court of Appeal decision of \textit{Allan v. Allan} in which the court concluded that where the judge sees the child in private. Even on the consent of the parties, the information obtained by the judge should be disclosed to the parties so that they might have an opportunity to controvert it. However, \textit{Allan} predates Canada’s ratification of the CRC which contemplates a child’s right to privacy (CRC, Article 16) and hence the CRC may be a tool to use in settling any ambiguity in the law in this regard.

A child may be represented by legal counsel in family proceedings. Appointment of legal counsel for a child in family proceedings is commonplace in some Canadian jurisdictions such as Ontario and Quebec. Arguably, the BC Supreme Court could order representation for children as part of its inherent \textit{parens patriae} jurisdiction, and this may take the form of an amicus curiae. \(^{21}\) Even the BC Provincial Court might be

\(^{19}\) For example, in \textit{Gullett v. Gullett}, 2001 CarswellBC 1895, 2001 BCSC 1207(B.C.S.C [in Chambers]), Shabbats J [cited to CarswellBC] noted that: “Following a hearing before a master of the court, the children were interviewed by Mr. Ralph F. Frank, a registered clinical counselor . . . He said that the children expressed a closeness to each of their parents, and that they liked the ability to spend time at both of their parent’s houses. Mr. Frank said that the two older children were adamant that they did not want to have to leave Port McNeill”.


\(^{21}\) Supra. Bala.
able to arrange for counsel’s *pro bono* representation of a child. Further, s. 2 of the *Family Relations Act* enables the Attorney General to appoint a lawyer “to act as counsel for the interests and welfare of the child” at any stage of a family proceeding.

- **Use of a child’s hearsay evidence is generally subject to the *Khan* test requiring evidence to be “reliable” and “necessary”, although some courts have relaxed the test.** The party seeking to have a child’s hearsay evidence admitted bears the onus of establishing that it is “reliable” based on: timing of the statement; demeanor and personality of the witness; absence of motivation to fabricate; whether the statement is in response to non-leading questions; absence of suggestion or manipulation; corroboration by real evidence; consistency over time; and whether the statement is equally consistent with another hypothesis or alternative explanation.\(^22\) The court will consider the potential effect on a child in deciding whether it is “necessary” for a child to testify. This will depend on the age of the child, nature of statements and the circumstances of the case.\(^23\)

- **Letters, faxes, affidavits and other documents authored by children and submitted to the court have been admissible.** While these documents are technically hearsay, the evidentiary rules have generally been relaxed so as not to “silence” the child, so long as the child has not been manipulated by a parent to write the document.\(^24\) In the BC case of *Andrusiek v. Andrusiek*, a 10-year-old boy, who felt great pressure from both parents in a custody dispute and did not want to hurt either of them, wrote directly to the judge wanting to tell the judge about his wishes.\(^25\) The judge shared the contents of the letter with both parties, met with the child, and kept notes of the interview, but these notes were not shared with the parties or the appeal court.

- **Use of closed circuit television for a child to testify (and arguably other parallel alternate forms of hearing from children in civil proceedings) does not require evidence of “exceptional or inordinate stress” on the child.** This evidentiary


\(^{23}\) *Ibid.* Bala.

\(^{24}\) *Ibid.* Bala at 261-263;

requirement arises in the criminal context. However, the BC Evidence Act, R.S.B.C., 1996, c. S-16, s. 72 & s. 73 permit the use of screens or closed circuit television in any civil case. While evidence of the value of the device may come from a professional like a psychologist, evidence needed for the basis of such applications “need not take any particular form” and may come from parents or others about “the capabilities and demeanor of the child, the nature of the allegations and the circumstances of the case”.

- Where allegations of sexual abuse or violence are involved in a criminal case a support person of the child’s (under 14 years of age) choice may be present for testimony, provided the support person does not influence the child’s testimony.

Similarly, one might argue that it is in a child’s best interest that such a support person also be available to children in civil proceedings where sexual abuse or violence allegations arise.

- Videotapes of Interviews by Professionals with Children, and Recordings Made by Parents have been admissible in court. In family proceedings, interviews by professionals with children have been admissible and used in the place of the child testifying, where the evidence meets the Khan test of being “reliable” and “necessary”. Videotapes made by parents are often more problematic in terms of quality and editing.

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27 Ibid. Bala at 244. S. 486(1.2) Criminal Code of Canada.

28 Ibid. Bala at 264-268.
Questions

1. What positive experiences of child participation have you encountered in family justice processes? What lesson can you draw from that experience to share with others?

2. What do you think is the greatest challenge to children’s participation in family justice processes? How might this challenge be overcome?
Too often knowledge and concepts are left on paper and we struggle to translate these into practice. Utilizing the acronym CHILD, the next five modules explore the components of CHILD participation. They involve:

**C-Context and One Caring Adult:** each child must be put into context, including the child’s family, community and culture. Further, the caring adult(s) who can support the child’s participation must be identified.

**H-Healthy Development:** actions must support the child’s holistic, healthy development. The child must be safe.

**I-Information:** children need information at a developmentally appropriate level, in a way that they understand.

**L-Listening:** listening is the key to communicating with the child.

**D-Dignity:** the child is a person in his or her own right, and must be approached in this light meaningfully, practically and ethically.

Through the combined application of these five components (Context, Healthy Development, Information, Listening, and Dignity) we can bring CHILD participation to life!


The judge actually met with me and my brother in the judge’s chambers and asked questions about what we wanted. It was just the three of us. The judge was very intense looking into my eyes all the time. Yet, it wasn’t scary at all – no way! **I was so happy that someone was willing to listen to me finally.** You know, of all the people involved [social workers, foster parents, etc.], he treated me as if I was an intelligent young man which was very different than my other experiences where people in the system were treating me as a young child. 


**Learning Objectives**

1. Learn why it is important to consider context when implementing child participation in family justice processes.

2. Learn about the child rights social ecology as a model to inform a child’s context.

3. Learn how one caring adult can make a difference to a child’s experience.

4. Gain an understanding of how context can assist in the identification of available options to implement a child’s participation in family justice processes, and identify caring adults.
Module 4

CHILD Participation in Practice: Context

CHILD participation starts with the child. The child’s right to participate must be considered in concert with all rights and guiding principles articulated in the CRC. In this way a contextual tapestry of rights can be woven together, unique to each child. This tapestry can then inform how to best support a child’s participation.

A Systems Approach to Child Participation

Responsibility to support the young person within context rests with key surrounding social systems. This is illustrated in IICRD’s child rights social ecology model set out in the diagram below. The child is at the centre of a series of concentric nested circles that represent differing layers of support networks and systems, including family, followed by community, civil society (e.g. government, courts, non-governmental organizations), and culture. Ideally, these systems work in partnership to fully support the child at the centre. However, where one system breaks down or is completely lost, an increased pressure is placed on the other systems to support the child. The child rights social ecology assists in identifying supports, and/or one caring adult across the systems as well as informing the context of the child.

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29 This is consistent with the human rights principles of universality, indivisibility, and interdependence. “Implementation Handbook for the Convention on the Rights of the Child” (New York: UNICEF 2002), at XVII; The CRC’s four guiding principles are: (1) life, survival, development (recognizing the whole child); (2) best interests of the child; (3) non-discrimination; and (4) participation.

30 The Child Rights Ecology builds on Urie Bronfenbrenner’s (1979) social ecology of childhood developed by adding a child rights, “strength based” and culturally grounded developmental lens.
Research indicates that **stronger links** between each system of circles results in children having healthier connections through positive relationships with their human and natural environment, in turn leading to greater resilience and healthier development outcomes. Conversely, in situations of social and political breakdown where these supportive and protective mechanisms are eroded or damaged, children’s developmental outcomes will be negatively affected (Jessor, 1993; Shonkoff & Phillips, 2000; Werner & Smith, 1982).
In the context of family law, where the family is breaking down or lost, there is a need for other systems (e.g. community, government services, courts), and the people within them, to step up their support to children to be more child-inclusive and child focused.\(^{31}\)

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### Using the Social Ecology to Inform the Child’s Context

The following considers each system in the child rights social ecology and poses possible questions to consider in determining the context for each child. Ideally the systems unique to each child will work in concert to support the child.

**Child**

*My mom was trying to prove me incompetent and so asked that the judge order an IQ test. It was the best thing they could have done because it came back normal and so they realized that they could ask me questions and value my opinion. After that test at the age of 12, they didn’t really treat me any worse than other young people the same age...*


What does the life of the child look like?

- Gender?
- Where does the child live (e.g. city, rural, with family member)?
- Age?
- Grade?
- At school (what time is in school)?
- Any disabilities or difficulties?
- What activities is the child involved in? (e.g. sports, music, etc.)
- What has gone on for this child? (e.g. any allegations of abuse or violence against the child; been in the middle of a divorce proceeding for 10 years; been “assessed” several times, etc.)?

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\(^{31}\) There appears to be some debate on this issue. See for example: McIntosh, Long, Maloney “Child-Focused and Child-Inclusive Mediation: A Comparative Study of Outcomes”, *Journal of Family Studies*, Vol. 10, No. 1, April 2004, pp. 87-95. Each child must be placed at the centre of, and respected by, all decision-making systems that surround that child in fulfilling and supporting his or her rights, participation and development.
Has the child participated in the proceeding in any way to date?

Has anyone talked to the child about what is going on?

Does the child want to participate?

Has the child been provided with information in a way that he or she understands about participating?

The Child’s Family

What’s going on in the child’s family?

Who is the child’s family (sometimes the child will describe his or her family differently than adults might think)?

Where do the members of the child’s family live?

What type of legal proceedings is the family involved in, where are the proceedings taking place, and at what stage are the proceedings, do they affect the child (e.g. custody, access, placement at issue)?

Any siblings: older or younger?

Do family members have legal counsel, a divorce coach or other advocate or support person?

Do the family members want the child to participate?

Who does the child respect and turn to within the family?

The Child’s Community

What does the Child’s community look like?

What city or town is closest to where the child lives?

What school does the child attend?

Who are the child’s friends?

What activities is the child involved in (e.g. school band, skateboarding)?

Is there a church that the child attends?

Are there any community groups that the child connects with (e.g. at community centre)?

What clubs does the child belong to?
Who does the child respect and turn to within the community?

Civil Society Affecting the Child

What civil society mechanisms are available to the child?

- If a legal proceeding has been started, through which court registry in the Province?
- What government services are available to the child (local, provincial and federal)?
- What non-governmental services are available to the child (e.g. in the United States, a Court Appointed Special Advocate (CASA) volunteer is often available to a child involved in justice proceedings).
- What options are available to support the child’s participation in family justice processes?
- Has the court made an order regarding the child’s participation?

The Child’s Culture

- What culture does the child live within?
- Are there special cultural considerations?
- Is culture more collectively grounded, whereby the extended family has a greater involvement in the child’s life?
- What protocols must be followed to ensure the child’s participation is culturally appropriate?
- What resources are available to assist in working with cultural nuances?

Legal/political Framework

What aspects support a child’s participation appropriately in light of the contextual factors?
Questions

1. What might be the implications of failing to contextualize a child before supporting the child’s participation?

2. Are there other factors you would consider in contextualizing a child?
Options Available to Support a Child’s Participation

- Parents talking with children directly
- Divorce education programs, including those for children
- Websites or other information for children in a way they understand about what is going on
- Mediation: a child at the table with the mediator or his or her views being brought forward from outside the mediation.
- Lawyers for children
- Friend of the Court (assists the court to ensure all necessary evidence is before the court)
- Best interests Guardian (may produce evidence about the child as well as advocate for the child)
- Child’s Advocate (advocates based on the child’s instruction)
- Therapists for children
- Social Workers
- Third party neutral interviewers outside of the formal process (e.g. Kelowna experience; or a curator ad litem in Scotland)
- Collaborative processes (e.g. child specialists)
- Professional evaluations
- Judicial interviews in court or chambers
- Judgments written so the child can understand the things that apply to them
- Parenting coordinators
- Invitation to the child to respond to court application (e.g. practice in Scotland)
The Choice of Method and the Experience of the Child

The method of engaging the child’s participation and ascertaining the child’s views can:  

- Dictate the impact those views have on the proceedings; and  
- Shape the child’s experience of participation in the proceedings.

As a result, the process for obtaining a child’s views is as important as the act of getting them. Further, a balance must be struck between protecting the welfare of a child and expressing his or her feelings. Therefore, it is important that children:

- Are assured that they are not deciding the outcome of their family’s case (this is the role of the adults involved);  
- Feel respected in the process of their views being obtained; and  
- Hear how their views were considered and feel that the decision-maker took them seriously.

The opportunity to create good experiences for children happens with each encounter a child has with the family justice process, and the people working within it.

Identifying One Caring Adult for the Child

The judge actually met with me and my brother in the judge’s chambers and asked questions about what we wanted. It was just the three of us. The judge was very intense looking into my eyes all the time. Yet, it wasn’t scary at all — no way! I was so happy that someone was willing to listen to me finally. You know, of all the people involved [social workers, foster parents, etc.], he treated me as if I was an intelligent young man which was very different than my other experiences where people in the system were treating me as a young child.

Male Child, Through the Eyes of Young People, p 29, www.iicrd.org/childparticipation

32 See discussion in Raitt, Judicial Discretion and Ascertaining the Views of a Child, CFLQ 05/10/2007
In the work in BC underlying Through the Eyes of Young People, the majority of children interviewed felt it was ‘hit and miss’ as to whether they had someone in their life during family breakdown that could really support them in a sustained way. Some young people experience professionals who ‘don’t care’, didn’t advocate for them strongly enough, or who tried to convince them their opinion was misguided, whereas other young people felt ‘lucky’ that they had someone to help them understand what was going on and support them.

*Half the time it’s not the judge’s fault that they don’t listen – it’s the people that represent you.* (BC girl)

Discussions with young people about the experience with family court processes reiterate the importance of having one caring adult who listens to them. Research further attests to this notion, whereby one caring adult can support the resiliency of young people at risk.\(^{33}\)

The importance of a caring adult for the child is consistent with the research conducted by experts such as Masten and Coastsworth (2002), and Werner (1994) on supporting the resilience of children at risk.\(^{34}\) The caring adult must be available solely for the child (not other family members) and can explain the process to the child and answer questions, prepare the child for his or her participation, and explain decisions that are made that affect the child. This role need not be therapeutic, and can provide an opportunity for a relationship characterized by trust, respect and understanding to be built between the child and caring adult.

**One Caring Adult**

- Helps young people feel listened to and respected
- Answers questions and helps allay fears
- Prepares the young person for their participation
- Explains decisions and how they affect the child
- Provides a safe environment
- Does not put the child at further or unnecessary risk

A caring adult in the child’s life may be one or more of the following people:

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\(^{34}\) Ibid. McIntosh.
Family member
Teacher, coach or other person the child trusts
Friend
Neighbour
Lawyer appointed by the Attorney General for the child
Family advocate\textsuperscript{35} (appointed by the judge)
Social worker (MCFD):\textsuperscript{36} (appointed by the director of MCFD)
Legal Services Society supported lawyer:\textsuperscript{37} (often only in cases of abuse, but currently under review)
Family Justice Counsellors:\textsuperscript{38} (appointed by AG under section 3 of the FRA to provide counseling and mediation services for those wishing to resolve family issues, or judge may order custody and access report when FJC completes investigation)
The Representative for Children and Youth of BC (provides support and advocacy assistance to children, youth and families regarding services in British Columbia)
Experts (e.g. psychologists or psychiatrists) (assess and report to court)
Individuals called upon by the court or the parties themselves to speak to young people (former professionals and individuals who work well with young people such as former family advocates and persons with supervised access experience)
Community Organizations (direct support to families)
Judge;
Volunteers (e.g. CASA volunteers in the United States)
You!
Precautions need to be put in place such as ensuring criminal background checks are done on these adults being placed in positions of trust with children. Further, a complaint mechanism available to young people who are not comfortable with their caring adult is advisable.


\textsuperscript{36} \textit{Ibid. “Social Workers”}.  

\textsuperscript{37} \textit{Ibid. “Legal Services Society”}.  

\textsuperscript{38} \textit{Ibid. “Requesting Services from Family Justice Counsellors”}.  

International Institute for Child Rights and Development (IICRD)
Questions

1. What caring adults are available to children where you work?

2. If no one comes to mind, how might you find them? What resources are available?
Sources & Additional Reading


MODULE 5

CHILD PARTICIPATION IN PRACTICE: HEALTHY DEVELOPMENT

Learning Objectives

1. Be introduced to the theories of child development.
2. Learn how family breakdown can impact children’s development.
3. Consider strategies to support a child’s healthy development in family justice decision making.
Module 5

CHILD Participation in Practice: Healthy Development

What is Child Development?

Child development refers to the growth of the child. It is a process of change in which a child develops his or her skills of moving, thinking, feeling, and relating to others. It is how a child creates a sense of belonging, of mastery, of independence and of generosity as the child grows into an adult.

Guiding principles from the BC Child, Family, Community Service Act to Foster Healthy Child Development

2. This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and according to the following principles:

(a) children are entitled to be protected from abuse, neglect and harm or threat of harm;

(b) a family is the preferred environment for the care and upbringing of children and the responsibility for the protection of children rests primarily with the parents;

(c) if, with available support services, a family can provide a safe and nurturing environment for a child, support services should be provided;

(d) the child's views should be taken into account when decisions relating to a child are made;

(e) kinship ties and a child's attachment to the extended family should be preserved if possible;

(f) the cultural identity of aboriginal children should be preserved;

(g) decisions relating to children should be made and implemented in a timely manner.
Theoretical Approaches to Child Development? 39

Biological Approach to Child Development

- Jean Piaget (1896 – 1980)
- Focused on the assumptions of naturalness and the universality of childhood
- Children progress through 4 stages of cognitive development to ultimately become adults (rational and logical):
  - **Sensori-motor stage (birth – 2 years)** – “characterized by extreme egocentricity, since the infant sees the world only in her own terms” (Smith, 1998, p. 219).
  - **Preoperational stage (2 – 7 years)** – marked the beginning of representational thought in children, but involved significant limitations in their thinking as demonstrated by Piaget’s empirical studies of conservation. These required “children to judge whether two amounts (quantity, substance, number, weight, volume, length) are still equal even after their appearance has been changed” (Smith, 1998, p. 6). Children’s grasp of this measure of operational competence determined whether they were operating at a preoperational or concrete operational stage of development.
  - **Concrete operational stage (7 – 12 years)** – children’s stable mental structure meant they were no longer deceived by appearances.
  - **Formal operational stage (12 years – adulthood)** – exemplifies logical process, scientific rationality, and freedom from domination by immediate experience (Jenks, 1996). At this highest level of cognitive development, the individual is able to think abstractly, to generalize, to deduce, to manipulate, to transform, and to analyze.

Socio-cultural Approach to Child Development

- Lev Vygotsky (1896 – 1934)
- Development occurs through children’s activities within their social contexts, profoundly affected and influenced by relationships and interactions with other people, culture and the tools of culture (language), institutions and history (Smith 1998)
- Two key concepts:

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- **Zone of Proximal Development** – the distance between the actual developmental level as determined by independent problem solving and the level of potential development as determined through problem solving under adult guidance or in collaboration with more capable peers. (Vygotsky, 1978, p. 86)

   It indicates the difference between independent solving of the task by the child, and aided performance. **What the child can do with help defines the child’s zone of proximal development.** Adults and peers actually stimulate a child’s development by challenging the child within their zone of proximal development, but if challenges are beyond the zone of proximal development, the child will not benefit from the help offered.

- **Scaffolding** – the guidance and interactional support given to the child by a more competent other (adult or peer) in the zone of proximal development. These more skilled people act as ‘scaffolders’ to aid the building of the child’s understanding (Smith, 1998), and the quality (how high the scaffold is, and at what level and for how long it is kept in place, the different ways the assistance is offered including modelling, asking questions or giving encouragement) of the scaffolding support have a crucial influence on the child’s acquisition of knowledge and skills (Smith, 1998; Tharp & Gallimore, 1988).

   The scaffold gradually diminishes, as do the roles of learner and teacher. Tharp and Gallimore (1988) used the term ‘**guided reinvention**’ to reflect the fact that children do not just passively absorb the adult’s strategies, but rather jointly construct their understanding and knowledge through a reciprocal partnership between the adult and the child. The child is not simply moulded by the environment - instead it is a mutual relationship (van der Veer & Valsiner, 1991).
Jean Piaget 1896 – 1980  
(Swiss)  
· Focus is on how individuals’ interactions with the environment might lead to a set of universal logical structures that govern human action and thought (based on the naturalness and universality of childhood)  
· Primacy of individual processes  
· Development drives learning  
· Teaching should follow the maturation of cognitive development  
· Individualistic orientation  
· Process of learning is one of individual discovery by the child  
· Passive role of adults/teachers  
· Play is diverting fun or fantasy which deflects child from their purpose  
· Cognitive structures are the precursors to new thinking skills

Lev Vygotsky 1896 – 1934  
(Russian)  
· Focus is on how children’s cognitive development is embedded in the context of social relationships and socio-cultural tools and practices  
· Primacy of social processes  
· Learning drives development  
· Teaching can evoke and promote cognitive development  
· Collective orientation  
· Process of learning requires scaffolding and guided participation of the child by more competent others  
· Active, collaborative role of adults/teachers  
· Play is a source of development and can create the zone of proximal development  
· Thinking emerges out of interpersonal processes where the learner and teacher are involved in joint reciprocal activity

### How Piaget and Vygotsky relate to the Practice of Law

Piaget’s theory has profoundly influenced societal expectations of normal development and the law (i.e. legal and clinical practices regarding children’s competence and the age of consent) (Hendrick, 1990; Mayall, 2000). Thus understanding Piaget’s theory is essential for an effective analysis of the law relating to children, as well as being an important precursor to identifying Vygotsky’s significantly different, but now more accepted, orientation to children’s learning and development.

Conversely Vygotsky’s socio-cultural theories provide unique opportunity to rethink the way family transitions are managed within the family law system, to re-orient the role of parents, children and professionals, and to underpin child-inclusive modes of practice.

In the context of parental separation, children initially struggle to make sense of their changed personal circumstances. They need parental guidance, information and support to help them construct and internalise the meaning of their new lived reality. If this scaffolding is unavailable, or inconsistent, then it needs to be provided by others within the extended family or by agencies and professionals external to the family. However, these

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40 Ibid.
people need to be tuned into the need to work sensitively with children, within their zone of proximal development, helping them to adjust to and manage the transition experience positively.

Aligned with Piaget’s stages of development, below you will find key characteristics of children at each stage. It is important to remember that although children’s development follows general stages, it is unique to each individual. How quickly a child develops, how well they develop, and the personality that emerges will depend on the context in which they grow up (culture, society, family, circumstances etc). There are 4 main stages of child development shown in the following table.

### Key Characteristics of Child Development

(Recognizing that each child’s development is unique)

<table>
<thead>
<tr>
<th>Development Stage</th>
<th>Developmental Characteristics</th>
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</thead>
<tbody>
<tr>
<td><strong>0-23 months (Infancy)</strong></td>
<td><strong>At first, children:</strong>&lt;br&gt;· Bond with the care givers and develop feelings of love and trust.&lt;br&gt;· Feel emotions such as fear and separation anxiety, especially when their needs are not met.&lt;br&gt;· Learn to move their bodies, holding up their head, sitting up, feeding themselves, talking and walking.&lt;br&gt;· Learn to use their hands and eyes together and develop their senses, hearing, seeing, tasting.&lt;br&gt;**Over the course of the first two years they <strong>begin to</strong>:&lt;br&gt;· Understand that they are separate from other people and things, especially their mother.&lt;br&gt;· Understand what is being said to them and follow simple requests.&lt;br&gt;· Learn about the consequences of their actions.&lt;br&gt;· Understand how objects work and the names of familiar things.&lt;br&gt;· Begin to become independent, as they start to do things on their own.</td>
</tr>
<tr>
<td><strong>2-5 years (Early Childhood)</strong></td>
<td>· Have a lot of energy&lt;br&gt;· Develop most of their language skills and understanding&lt;br&gt;· Think they have a greater affect on the world than they really do.&lt;br&gt;· Learn social rules. For example, the expectations within their families, schools, and communities and general routines.&lt;br&gt;· Learn right from wrong and the consequences of their actions.&lt;br&gt;· Develop self-care skills. For example, dressing, feeding, and toileting.&lt;br&gt;· Try to understand what is real and what is fantasy (imagination).&lt;br&gt;· Think in the present and may have difficulty understanding things in the future.&lt;br&gt;· Ask a lot of questions and experiment with ideas and concepts.&lt;br&gt;· Often begin school.</td>
</tr>
</tbody>
</table>
### 6-12 years (Middle Childhood)
At this age, children continue to work on their skills and need a great deal of emotional support and a secure environment in which to do this.

- Begin to understand that another person’s point of view may be different from their own.
- Gain a greater understanding of emotions and how people are feeling.
- Begin to think logically.
- Have an increased understanding of social roles and norms. For example, a man can be a father, a son, and worker.
- Begin to understand how objects relate to each other. For example, a tomato, a cucumber, and an eggplant are all vegetables.
- Are better able to solve problems as their memory skills greatly improve.
- Can understand most concepts that are explained to them.
- Can learn skills such as reading, writing, and mathematics.
- Have increased responsibility around the house.

### 13 year – adulthood
Children or youth in this age are becoming young adults.

- Begin to think about the future.
- Think mostly of themselves (self-centered).
- Relationships with peers are very important.
- Develop an idea of how they relate to the rest of the world.
- Experience a stronger division in the roles of males and females.
- Begin to think about abstract things like social class and how their behaviours affect their family or community.
- Gain an increased understanding of moral issues and what is right or wrong.
- Experience intense physical changes in the body (puberty).
- Have increased emotional needs and insecurities, but often act boldly and confidently.
- Practice being an adult and may be initiated into adulthood by getting married.
Questions

1. What aspect of these development theories do you find most interesting?

2. What are some examples of how each child’s development is unique?

3. How can you ensure that child development theory takes into account these unique aspects of each child?

4. Can knowledge of these theories assist you in your daily practice, and if so, how?
Impact of Family Breakdown on Child Development

It is well known that family breakdown takes its toll on young people: enduring parental conflict can significantly hamper the core development needs of young people and their psychological growth across the lifespan,\(^\text{41}\) and despite young people reacting to separation with distress, anxiety, anger, grief, shock and disbelief, little is done to prepare them emotionally for this experience.\(^\text{42}\)

For many young people within a supportive care environment these crisis-engendered responses diminish or disappear in the span of one or two years.\(^\text{43}\) Unfortunately many children do not have a supportive environment, and even if they do, the breakdown of their family can have a lasting impact on their lives.\(^\text{44}\) The responsibility therefore rests with adults to support young people and their participation through the one, two or several years of family conflict.

According to Crockenberg & Langrock (2001) developmental tasks that are vulnerable to family stress include:

- Development of core trust and understanding of cause and effect;
- Development of attachment;
- Experience of emotional arousal and regulation of affect;
- Development of internalized beliefs about oneself;
- Establishment of peer relationships; and,
- Adaptation to school and academic achievement.

An Attorney General of BC 2006 Summary of the Impacts of Separation and Divorce on Children as Reported in the Literature is the basis for the following impacts on children:

For Children under 6 years of age Separation and Divorce can have:

- Cognitive effects;

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\(^{42}\) Ibid. The work of Hetherington, Cox, & Cox 1982 and Wallerstein & Kelly is referenced.

\(^{43}\) Ibid.

Psychological/Behavioral Impacts (e.g. poorer adjustment, lower self-esteem, the 2 year “crisis period” following divorce typically causes reactions such as confusion, sadness, distress and anxiety); and

Social and Family Relation Impacts (e.g. less positive interaction with mother).

**For Pre-adolescent Children Separation and Divorce can have:**

- Academic Achievement Impacts (e.g. poorer performance);
- Economic Impacts (e.g. decline in standard of living);
- Family Relationship Impacts (e.g. diminished parenting);
- Psychological and Behavioral Impacts (e.g. increased level of distress or anxiety and depression, poorer sense of well-being; high rates of child abuse and sibling violence in high conflict relationships; self-blame);
- Residential Impacts (e.g. high level of relocation removing child’s contact with important social relationships); and,
- Social Relationship Impacts.

**For Adolescents Separation and Divorce can have:**

- Academic Achievement Impacts (e.g. higher drop out rate from school);
- Economic Impacts (e.g. decreasing child support);
- Psychological and Behavioral Impacts (e.g. delayed autonomy, higher rate of delinquency);
- Health Impacts (e.g. increased use of drugs, alcohol, tobacco);
- Family Impacts (e.g. earlier marriage, poorer relationships with parents);
- Other Impacts (may leave home earlier or find it more difficult to continue with education).

These impacts can also vary between boys and girls. For example, adolescent boys may disengage from the family and adolescent girls may be more likely to have a child out of wedlock.

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**A Special Note on the Impact of Conflict on Children**

According to Kelly (2000) marital conflict is a more important predictor of child adjustment than divorce itself. Further, according to McIntosh, parents’ conflictive behavior impacts children in different ways, and their ability to appraise conflict differs at different stages:
5 year olds:
- Less likely to understand conflict is about divergent goals (Jenkins & Buccioni, 2000);
- More likely to self blame (Jenkins & Buccioni, 2000);
- Can't conceptualize that parents play two roles - parent and spouse;
- Conflict and its resolution are understood in behavioral terms – when the shouting stops the conflict ends.

5 – 8 year olds:
- Typically propose helping parents in conflict, trying to distract them through their own aggression, or avoid conflict altogether (Adamson & Thompson, 1998).

7 – 9 year olds:
- Understand that conflict requires change in the goal of at least one parent;
- More sophisticated understanding of triangulation;
- Most sensitive to whether argument has been resolved or not.

8 – 12 year olds:
- Often propose stepping in to stop parental conflict.

Older adolescents:
- Most likely to try to avoid conflict.

Further, some of the research states:
- Threats to leave the marriage and parents’ expression of fear are the most distressing forms of non-physical conflict (Cummings & Davies, 2002).
- All children are sensitive to parental anger, but children with histories of spousal violence respond with greater intensity (Adamson & Thompson).
- The forms of adult conflict most distressing to children are those that lack resolution and include high levels of hostility, physical violence, or threats to leave (Margolin et al, 2001).
- Children fare better when conflict is reduced rather than when conflict remains high (Kitzmann & Emery, 1994; Long, Slater, Forehand, & Fauber 1998). Lasting impacts on children of unresolved parental conflict can be traced into their adult lives.
- Ongoing parental conflict is a chief protagonist, within a complex web of factors, contributing to the creation of the alienated child (Kelly & Johnston, 2001).
Building on Children’s Resiliency

Resilience can be described as “demonstrated competence in the face of challenges to adaptation or development” (Masten & Coatsworth, 1998). It is a relative term that varies with differing stressors. Protective factors, intrinsic and extrinsic to the child, interact with sources of risk, reducing the probability of negative outcomes from children in stressful situations. In some cases, young adults may even emerge from their parents’ divorce enhanced.

<table>
<thead>
<tr>
<th>Masten &amp; Coatsworth, 1998</th>
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<tbody>
<tr>
<td><strong>Individual protective factors</strong> include the child’s:</td>
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<tr>
<td>❖ Intelligence;</td>
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<tr>
<td>❖ Easy going temperament;</td>
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<tr>
<td>❖ Talents;</td>
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<tr>
<td>❖ Physical attractiveness;</td>
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<tr>
<td>❖ Child’s interpretation of events; and</td>
</tr>
<tr>
<td>❖ Ability to respond effectively when confronted with stressful situations.</td>
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</tbody>
</table>

In the context of family justice processes, the following factors can buffer the ill effects of family breakdown:

❖ A good relationship with one or both parents;
❖ An environment that reduces daily stress through consistency of rules, routines, expectations within the household and quality of parental monitoring;
❖ Parental warmth and praise with low levels of derogatory comments about the other parent;
❖ Good sibling relationships;
❖ Sufficient economic resources;
❖ Resolution of parental conflict;
❖ Separating children from parental conflict;
❖ Competent, involved parents, especially Mom;
❖ Access to both parents;
❖ Successful co-parenting;
❖ A network of pro-social friends.
Parents Have a Key Role to Play

How Parents Can Help Children Deal with Separation

- Offer structure
- Encourage the expression of feeling and acknowledge it
- Allow for grief
- Offer reassurances
- Set limits on behaviours
- Protect children from witnessing arguments and violence between you and the other parent

When to get professional help for children

It is time to seek professional help when:

- A child’s distress and problems are constant and chronic.
- A child’s symptoms get worse rather than better over time.
- You feel unable to cope with your child.

A Checklist for Parents to Help Children at Any Age Deal With Separation

*This checklist helps to highlight what parents are doing to help their child adjust and identifies areas for improvement

- I reassure my children that this separation is not their fault.
- I do not talk negatively, or with anger, about my partner to my children. If I cannot talk positively, I limit what I say.
- I try to avoid arguing bitterly in front of my kids.
- I try to agree with the other parent about disciplinary matters at least in the presence of the children.

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46 Ibid.
I am making special efforts to maintain individual relations with each child.
I assure my children that it is okay to love the absent parent.
I do not compare my child to my ex-partner, even when the similarities are striking and painful to observe.
I do not blame my children’s anxieties, fears, and problems at this difficult time on the absent parent – either to the child or the absent parent.
I am trying to help my children not to feel shame about the separation or divorce.
I understand that separation or divorce does not make me a failure.
I have let my children’s teachers know about the change in my family’s structure so they can help the children.
I am not making too many changes in my children’s life at once.
I am allocating family chores so that they get done despite the absence of the other parent.
I do not ask my child whom she or he wants to live with or loves more – I do not ask either directly or indirectly.
I am encouraging my children to resume their normal activities.
I acknowledge my children’s deep-seated wish for a reunited family without offering false hopes or angry denials.
I am trying to maintain as much emotional control as I can so my children will not feel obligated to take on adult roles that are beyond them.
I am not turning my child into my adult confidante.

Suggested Strategies to Support Healthy Child Participation

The evidence base points to the need for strategies to effectively support children when their families are in transition or breaking down. The following are some suggested strategies:

1. Educate Parents about the Effects of Their Behavior on the Child.
2. Provide Information to Children in a way that they understand to minimize adverse effects such as self-blame.
3. Minimize the intensity of the conflict wherever possible.
4. Resolve family disputes quickly.

5. Ensure children are not exposed to affidavit or other material that speaks poorly of a parent or family member.

6. Create enabling spaces for children to ask questions, receive information and share their thoughts that build on a child’s efficacy, success and reinforcement.

7. Select child participation options that best support a child’s healthy development by reducing the stress on the child (e.g. less formal settings vs. testifying in court).

8. Be emotionally supportive and responsive when talking to, or interacting with, children.
Questions

5. How are the impacts of family breakdown reflected in your own experience?

6. What additional strategies might you use to buffer the adverse impact of family transition or break down on a child?

7. Select a strategy and discuss when, where and how it might be implemented in practice?

8. Which strategy do you think you could implement in your own practice?


MODULE 6

CHILD PARTICIPATION IN PRACTICE: INFORMATION

“It gets confused sometimes. I don’t know where I am going”.47

Boy whose family is in transition, 11 yrs.

“My mom tells me about court but my dad does not. My dad asked me yesterday who I want to live with and when. I didn’t answer because I didn’t want to hurt his feelings.”48

Girl whose family is in transition, 9 yrs.

Learning Objectives

1. Learn about research on information for children involved in family justice processes.

2. Gain an understanding of the importance of ensuring appropriate information is provided to a child directly and in a way the child understands.

3. Identify options available to obtain and provide appropriate information to children.


48 Ibid. at p. 15.
Module 6

CHILD Participation in Practice: Information

**Article 13, UN Convention on the Rights of the Child**

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

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   
   (a) For respect of the rights or reputations of others; or
   
   (b) For the protection of national security or of public order, or of public health or morals.

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**What the Research Says Regarding Information for Children**

Researchers in a study involving more than 460 young people (as young as 5 years), whose parents had separated, found that the **children had little information about their parents’ separation, what was happening and why**:49

- 25% of the children whose parents had separated said no one talked to them about the separation when it happened; and

- 5% per cent said they had been fully informed and encouraged to ask questions.

**Gaps in Communication Between Children and Parents**

Parents/caregivers are often dealing with their own emotional needs when their child’s custody is being determined. As a result, they may not fully consider their children in processes that affect them. For example, a study in the United Kingdom in which researchers listened to 104 children talk about their views, feelings and understanding about their role as active participants in separation and divorce found there was a gap in communication between parents and children:50

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99% of parents said they had told the child about the divorce;

71% of children agreed that they had been told by their parents about the divorce;

Few children felt they had been actively ‘prepared’ by their parents for the separation, even where parents themselves were planning the split.

In the words of one young participant51:

*It was like, ‘Oh well, it’s not really your problem; you don’t have to go through all the divorce things. But no one seemed to realise I was sort of THERE. They were all concerned with what they were doing.* (Libby, aged 13)

Children have their own emotional needs during family separation or breakdown. Upholding a child’s rights in family proceedings means opportunities are created for children to express themselves, to ask questions, and to receive information in a way that they understand about the separation. In the end, this can serve to overcome some of the communication gaps, provide much needed information and space to children to express themselves, and provide support to families who may require additional assistance in supporting their children through a challenging time.

**Failure to Provide Information to a Child may be More Harmful than Helpful**

Research with children also indicates that excluding them from the process, often in a desire to protect children, can further contribute to their pain and confusion.52 As a result, the way a separation is handled, and not just the fact that it is happening can impact a child:53

- Ignorance (including partial, partisan information) meant that [children] could not make much sense of what was going on. In turn this made children powerless in relation to their parents and sometimes they withdrew. Knowledge and understanding did not necessarily make them happy, but it could give them an emotional and cognitive map of the terrain they occupied. (Smart, 2003b, p. 34, emphasis added)

Further, where the children’s right to receive information in a way that they understand (CRC Article 13) is not fulfilled, the children may be more likely to suffer from such symptoms as

51 Ibid.

52 Taylor, Supra. note 26, citing Smart, 2003a; Smith et al., 1997.

53 Ibid. at 6-7.
anxiety, depression and conduct disorder, to exhibit distress, and blame themselves for their parents’ separation.\textsuperscript{54}

\textbf{Why Children are not Informed}

Some reasons why children are not provided with information about what is happening in a way that they understand includes:

- Sometimes adults are so focused on their own emotional needs or professional roles, they forget to talk to the children involved;
- Divorce/separation and other legal proceedings are often considered “adult” business, and children are excluded in a desire to protect them;
- Parents do not always pass information along to their children (e.g. research shows that most leaflets given to parents for their children are not passed on to their children);\textsuperscript{55}
- Adults may not be adequately equipped to talk to children about what is going on;
- Language and terminology pose a barrier to children in understanding what is being said to them, especially about the process (e.g. “an interlocutory application was brought by your Mom in the custody proceeding today” is language that a child, or most adults, cannot understand);
- Explanations often fail to reflect the developmental stage of the child;
- ‘Explanations’ are one-off experiences, rather than continuous information sharing where a child can feel comfortable and ask questions;
- Inappropriate information may be provided to the child (e.g. affidavits) that does not explain the things that are important to the child (e.g. what will happen to me) and may increase the child’s anxiety.

\textbf{Some Implications of Inadequate/Inappropriate Information for Children}

The lack of information can lead some children to take action that could otherwise be avoided with adequate provision of child-friendly information such as:\textsuperscript{56}

\textsuperscript{54} Ibid. at 7. Children suffer from such symptoms as anxiety, depression and conduct disorder (Hawthorne et al., 2003), to exhibit distress and to blame themselves for their parents’ separation (Garwood, 1992; Richards, 1996; Wallerstein & Kelly, 1980).


Confusion;
Self blame;
Lying about what is or is not going on;
Unresponsiveness;
Signing papers they do not or cannot read or understand (e.g. care consent orders);
Saying ‘yes’ to things when they do not understand what they are saying ‘yes’ to or the implications of saying ‘yes’.

Children Want

- To be told, in an informative and respectful way, what is going on with their parents or caregivers and the separation and/or ‘custody’ processes (e.g. guardianship, temporary care orders, etc.);
- To be able to ask questions of those they trust about what is going on and what their role is in the process;
- To be assured that what is going on is not their fault;
- To have consistent information provided to them regardless of the adult speaking to them;
- To have input into decisions that affect them (asked how they are feeling and what they think), but not to make the big decisions that adults should make.

Children Need

- To have information communicated to them directly in a way that they understand, appropriate to each child’s developmental capacity;
- To receive information that is sensitive to each child’s context (e.g. takes into account situation of family, community, culture, disability, existence of abuse etc);
- To know what happens in family justice processes, what their rights are, and what their role is in all of it;
- To have multiple opportunities to receive consistent information in a comfortable environment so the child can have time to absorb what information as been provided and ask questions as the process unfolds;
- To be made aware of services that are available to them so they can make an informed decision about how they want their views to be heard.
Information Resources for BC Children

- Representative for Children and Youth in BC (information for children in care)  
  www.rcybc.ca

- Families Change (a kids’ guide to separation and divorce)  
  www.familieschange.ca

- Federal portal of resources for children (national and international websites, publications etc)  
### Children in Care: Representative for Children and Youth of BC (www.rcybc.ca)

#### Section 70 rights

If you are in government care in B.C., you also have rights under Section 70 of the *Child, Family and Community Service Act*. These are often called Section 70 rights.

No matter how young or old you are, you have the right to:

- Live in a caring, secure and nurturing environment where you are properly fed, clothed and looked after
- Be told what is in your plan of care
- Be consulted and to express your views, according to your abilities, about important decisions that affect you
- Reasonable privacy and to have your own personal belongings
- Not be punished physically or in any other abusive way
- Be told how your caregivers expect you to behave, and what will happen if you do not meet their expectations
- Receive medical and dental care when you need it
- Take part in social and recreational activities if they are available in the community, and suited to your interest and abilities
- Receive religious instruction and to take part in the religious activities of your choice
- Receive guidance and encouragement to maintain your cultural heritage
- An interpreter if language or disability keeps you from getting involved in plans for your care or custody
- Talk privately with members of your family unless a court order restricts your right to have contact with someone
- Privacy during discussions with a lawyer, the Ombudsman, a member of British Columbia’s Legislative Assembly (MLA) or a Member of Parliament (MP)
- Be informed about the Office of the Representative for Children and Youth and to have someone help you get in touch with them
- Be told about your rights under the *Child, Family and Community Service Act* and how to enforce them.

If you are 12 years old or older, you also have the right to:

- Know that a decision is being made about you in court, so you can be there when it happens
- Ask to have your case reviewed or say you disagree with your placement
- Be part of planning for your care

Children and youth also have other rights in some situations. If you have any questions about your rights, call the RepLine at 1-800-476-3933 from anywhere in B.C. to talk to someone at the Rep's office.

#### Your Privacy

Caseworkers and other people who gather information about you must keep your file information private. They are not allowed to tell others about you unless that information is shared to help you or your family get the services you need. You have a right to know what information is being kept about you in your file. It might include your history, places where you have lived or programs, services and plans that have been given to you.
A Kids Guide to Separation and Divorce (www.familieschange.ca)

### Rights and responsibilities (children)

You have the right to:
- Feel the way you feel about your parents splitting up
- Express your feelings
- Ask questions about what is going to happen and why
- Love and be loved by both parents
- Feel safe
- Talk to someone if you need help
- Not take sides
- Not carry messages between your parents
- Not hear your parents say bad things about each other
- Not have grown-up worries

It is your responsibility to:
- Express your feelings in a way that doesn’t hurt other people or things
- Speak up if your parents are asking you to do things that don’t feel right
- Ask for help if you need it

### Rights and responsibilities (parents)

It is your parents’ responsibility to:
- Take care of you and keep you safe even though they live apart
- Let you spend time with both parents and others who are important to you
- Listen to what you say, even if they can’t always do what you want them to
- Answer your questions about money, where you are going to live, and so on, when you ask
- Talk to each other with respect in front of you
- Talk to each other about the things that involve you
Questions

1. Is the research on information for children consistent with what you have experienced in family justice processes? Why or why not?

2. What information do you think is most important to convey to children?

3. What information resources do you draw on to support children in family justice processes?
Strategies for Providing Appropriate Information to Children

Education Programs for Parents

To address the gap in communication between parents and children, education programs must equip parents to talk to their children about what is going on in a way that children understand. Presently, the Parenting after Separation Course in BC provides an opportunity to do this, but parents must be strongly encouraged to ensure that information they learn in the course gets implemented into communications with their own children. Topics canvassed in the Parenting after Separation workbook for parents include learning about how separation and divorce can affect children, how children respond and what parents can do to best support their children through a difficult time.

**What children need to hear (parents)**

<table>
<thead>
<tr>
<th>Telling the children may be the most painful part of the entire separation process. These are statements that parents might find helpful and can make together. Some of these statements may not fit if you have concerns about safety.</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>We will continue to take care of you and provide for you and keep you safe.</strong></td>
</tr>
<tr>
<td><strong>While our feelings for each other have changed, the special relationship we have with you as our child will go on forever. Feelings can change between adults, but never between parents and children.</strong></td>
</tr>
<tr>
<td><strong>Your relationship with your sisters and brothers, grandparents, and other relatives will continue.</strong></td>
</tr>
<tr>
<td><strong>You did not cause the separation. Nobody thinks you did.</strong></td>
</tr>
<tr>
<td><strong>The separation was not an easy decision to make. We put a lot of effort into making our relationship work, but we have decided that we can no longer live together as partners.</strong></td>
</tr>
<tr>
<td><strong>When we began our relationship, we loved each other and hoped things would work out. We loved each other when you were born.</strong></td>
</tr>
<tr>
<td><strong>We will honour your wishes but we will decide where you will live. You don’t have to make that decision.</strong></td>
</tr>
<tr>
<td><strong>We are not going to ask you to take sides.</strong></td>
</tr>
<tr>
<td><strong>You may wish we’d get back together again. Kids often wish for that, and it’s a natural thing to want. But it’s not going to happen. We have separated.</strong></td>
</tr>
<tr>
<td><strong>We are very sorry for the hurt this decision is causing you.</strong></td>
</tr>
<tr>
<td><strong>We will never stop loving you. Never.</strong></td>
</tr>
</tbody>
</table>

**Parenting After Separation, A Handbook for Parents**
What children do NOT need to hear (parents)

- The separation is the other parent’s fault. I am the good guy and your other parent is the bad guy. (Do not say this even if you feel it.)
- Your Mom/Dad was having an affair, money problems, personality problems, etc. (Children do not need to hear the details of why you are separating; they are burdened by this information.)
- The other parent is selfish/unkind/incompetent/foolish. (You may have negative feelings about the other parent, but expressing these feeling to the children puts them in emotional conflict.)

How to tell the children (parents)

The separation itself is not as devastating to children as the conflict and confusion that may surround it. Tell the children only when you have made clear plans about what will be happening to them.

- Tell your children together, if you can.
- Pick a time and place where there will be no distractions or interruptions.
- It may help to tell your children at the same time, rather than separately, so they can provide support to one another.
- Discuss your future living arrangements. Tell them they will be loved in two homes now, if that is going to be the arrangement.
- Address their particular needs such as friends, toys, and school.
- Allow your children to show grief and invite them to talk it out, write it out, or cry it out.

Education Programs Specific to Children

In 2003 the BC Attorney General reviewed children of divorce and separation programs in all the provinces and territories of Canada, several states in the United States (including California, Oregon, and Florida), and Australia and produced its findings in *Children’s Programs on Separation and Divorce, Report* (see [http://www.ag.gov.bc.ca/justice-services/publications/fjsd/children/DivorceSeparationPrograms.pdf](http://www.ag.gov.bc.ca/justice-services/publications/fjsd/children/DivorceSeparationPrograms.pdf)). There is no such education program that is made available to children as a matter of course in BC. However, in the AG’s report, it was noted that:

The Victoria, B.C., *Caught In the Middle* program evaluation showed it was successful in helping children to act independently of others, improve their school behavior, increase their sense of well-being, and enhance their vocabulary. Improvements were also shown in the children’s ability to talk about their feelings and to share them with their parents. The program, however, had little effect in lowering the levels of anxiety or increasing self-esteem.
The report concludes with a summary that states “of the programs which have been properly evaluated, the consensus is that they can help children adjust and they can improve their coping skills” and is preceded with:

**What are some objectives and principles that need to be applied to any new program for children?**

Regardless of how information is provided to children in future programs, there should be a core set of *objectives* and *principles*, *which* should include the following:

- Children should perceive the information they receive as relevant and helpful;
- Children should be treated with dignity and feel safe and comfortable;
- Children and their parents should know where and how to get additional information if they need it;
- Children’s needs should be clearly addressed by the program in terms of it fitting into their schedules and providing relevant age-appropriate information; and,
- Children's rights to receive information and to be consulted should be respected.

**Ensure the Information Provided to Children is Relevant and Appropriate**

Children do not need to know everything that is going on but will be interested in what is relevant to them. Often those who can best indicate what is relevant are children themselves. The following table outlines tips from children who have been through challenging times when their parents have separated.
Tips for children: How to survive your parents’ fights

Parenting After Separation, A Handbook for Parents

When parents separate, children can have a difficult time. Here are some tips from children who have been through it with their parents.

1. Understand that IT IS NOT YOUR FAULT. Your parents’ arguments are not your fault. Don’t feel guilty when your parents argue. It’s not up to you to get them to stop.
2. DON’T TRY TO SOLVE YOUR PARENTS PROBLEMS. Don’t take sides. If one parent asks your opinion or advice about the other parent, you might want to say, “I think I’d better stay out of this.”
3. If you can, LEAVE THE ROOM WHEN YOUR PARENTS ARGUE. Do something that helps take your mind off it. Call up a friend, put on a CD or video, or get out of the house.
4. THESE EXPERIENCES ARE REALLY HARD ON EVERYONE. You’re not crazy to feel the way you do.
5. DON’T KEEP YOUR FEELINGS INSIDE. Find someone you can trust and talk to them.
6. ASK YOUR PARENTS FOR WHAT YOU NEED.

Examples:

- Please spend some time alone with me, even five minutes of my very own time, not related to school, cleaning my room, or things like that.
- Don’t get angry when I say I want to live with my other parent. Usually when I say it, I am angry, hurt and scared, too. And I really miss my other parent.
- Please let me tell you what I want about my visits with the other parent. Sometimes I’m afraid I’ll hurt your feelings if I say I had a good time.
- Please don’t call me the man or the mother of the house. I need to be a child.
- Please trust me if sometimes I don’t want to talk. You may be ready to talk when I’m not.
- REMEMBER: Life at home won’t always be like this. Things will get better.

Family Justice Stakeholders Provide Appropriate Information and Resources to Children and Families

When a child and his or her family become involved in family justice proceedings, those involved in the family’s case have the opportunity to assist children and their families receive appropriate information in a way that they understand. The information outlined can be adapted by any professional or stakeholder to use in the course of his or her practice with children. In addition, professionals and other stakeholders can refer children and families to resources whenever possible.
Questions

1. What other strategies can you think of to ensure children are provided with appropriate information in a way they understand?

2. If you came across a child involved in family justice processes what three pieces of information might you provide to them? Why are these important?

3. How could you best convey these pieces of information and why?


Family, Children and Youth Section, Department of Justice Canada, “What Happens Next? Information for Kids About Separation and Divorce” (May 2007)


A Kids Guide to Separation and Divorce: <www.familieschange.bc.ca>.

Representative for Children and Youth of BC: <www.rcybc.ca>.

MODULE 7

CHILD PARTICIPATION IN PRACTICE: LISTENING

For most of my childhood, ages 2-9, I was in the middle of a long and acrimonious child custody dispute in my family. I always knew I wanted to live with my dad and I told everyone who would listen but felt no one heard me or considered what I had to say… I spent a lot of time wishing I was 12 so someone would listen to me.

Tarryl McNamara,
Through the Eyes of Young People (2006)

Learning Objectives

1. Learn how children at different stages of development take in and communicate information.

2. Learn about the structured interview process, and why it is important when interviewing children.

3. Consider how to implement effective listening and speaking techniques with children.
Module 7
CHILD Participation in Practice: Listening

Listening to Children

In addition to being informed, children want to be listened to and are capable of providing information relevant to their case. For example:

- Children as young as 2 and 3 years old can recall and report past experience accurately (Hewitt, 1998; see Peterson, 1990, for a review).
- Children as young as 3 years old have testified competently and credibly in court;
- Children of all ages can tell us what they know if we ask them the right questions.

While it is unlikely that you will seek the views of children as young as 2 or 3 years old in family law cases, it is important to be aware of the capacity of even very young children to participate. Some factors judges consider when determining whether to hear from a child include:58

- Presumption and preference of the child to be heard;
- Willingness of the child to share views;
- Age;
- Maturity;
- Vulnerability to emotional harm;
- Ability of the child to verbalize, articulate, express views;
- Disability as a limiting factor;
- Alienation (whether present in case);
- Level of intelligence;
- Parental influence (includes whether young person was coached).

Children want to have the opportunity to tell decision makers what is important to them and what they would like to see happen, no matter their age or particular circumstance. Whether they choose to participate once given the opportunity, must be the child’s choice. However, once that choice is made, adults must be prepared to listen and take the child’s views seriously.

Effectively listening to children involves creating supportive, safe spaces where each child can:

- Be told up front who will hear their views and what might happen when they are heard;
- Express him/herself;
- Ask questions that are answered in a way that the child understands;
- Provide input to adult decision-makers if the child wants to;
- Be listened to; and,
- Have his or her views taken seriously by the decision-maker.

<table>
<thead>
<tr>
<th>Implications of Failing to Listen to Children</th>
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</table>

If opportunities are not created for children to be listened to:

- A child may go to extremes to be heard: run away, state involvement in high risk behavior such as prostitution, threaten, yell, or otherwise become emotional;
- The child may withdraw because the child thinks no one cares how he or she feels;
- The child’s right to have his or her views considered is disregarded;
- Decisions may not adequately reflect the best interests of the child, as ‘best interests’ may be decided from the perspective of the adults involved rather than from the perspective of the child (e.g. it’s more convenient for mom and dad to alternate weekends, but it interferes with the child being able to participate in a weekly activity important to the child).
Creating Enabling Spaces to Listen to Children

Awareness of the Practitioner’s Filters

According to James et al (2003), the model of childhood most often used by private and public practitioners in the field of family court welfare work is the traditional Piagetian, child development approach, comprising three main assumptions:\(^{59}\)

- The age-relatedness of children’s competence;
- The importance of stability in children’s family life; and,
- The importance of meeting children’s needs now in relation to their future development.

This model of childhood is interpreted through three filters:\(^{60}\)

- The practitioner’s own history of family life;
- The context of everyday practice; and,
- The legal and structural constraints within which family court practice is set.

The practitioner will therefore make common assumptions about what is possible given the child’s age when obtaining the views of the child, and ‘not all children will be seen as ‘old’ enough to talk’ (e.g. by age 5 children can talk, by age 10 children can talk and be listened to, but practitioners will not automatically give weight to what they have said, by their teens children are generally listened to and weight is given to their views).

Whether the Piagetian approach or other approaches are used, there is no universal standard with respect to what age a child can or cannot talk, and be effectively listened to.

Embracing Uncertainty: Recognizing each Child as Unique

It may be easier to avoid attempts to pre-categorize children in terms of their age and related competence, particularly where practitioners are not in a therapeutic role. Instead, adopting a stance of uncertainty, and treating each child as unique (Trinder, 1997) avoids expert or adult


\(^{60}\) Ibid. at 505.
constructions of what the child is like based on the child’s age and related developmental ability. This approach diminishes the importance of the child’s age and recognizes that:

- All children have the ability to participate, regardless of their age (Alderson, 2000; Smith et al, 2003);
- All children have a right to be involved; and,
- Each child is unique.

Embracing uncertainty and treating each child as unique, can assist practitioners to avoid pre-judgment of children, unintentional or otherwise. This approach does not ignore the knowledge base regarding a child’s developmental ability, it merely challenges our pre-conceived notions and ensures the knowledge base is used to serve the child’s best interests rather than diminish it in terms of hearing from children and taking their views seriously.
Questions

1. What are your filters with respect to hearing from children (e.g. how does your own upbringing, your own children, the attitudes of those you practice with, or the legal and structural realities of BC justice systems shape your filters)?

2. How might these filters affect how you view a child who:
   a. Is 7 years of age?
   b. Has run away from home and is in care?
   c. Has a disability?

3. What are the implications of treating each child as unique? How might this approach affect your filters?
Putting the Child (and Parents) at Ease

Bringing a child to the courthouse or other formal setting may be stressful in and of itself for a child. Some children may for example, associate sitting across a big desk from an adult with being called into the principal’s office. There are steps that a practitioner can take in an effort to put the child at ease when speaking to a child including:

- Create a child-friendly physical space for the interview (e.g. meet the child in his or her space, or in a more formal place use comfortable chairs, non-structure toys (e.g. slinky), low table);
- Explain the process to the parents or caregivers and child (including duration, expectations, confidentiality, ethics around disclosure, etc.): your goal is to demystify the process;
- Do not place a child in an environment where he or she has to ‘confront’ a parent or caregiver, or feels pressured to answer a question.

Attending Behaviour: Effective Listening and Communication

Attending Behaviour (Ivey, 1994) encourages children to talk freely and is communicated through four components:

- Body language
- Vocal qualities
- Eye contact
- Verbal tracking

**Body Language** - children will know you are interested in them and what they have to say if you use an expressive face and use facilitating gestures. While talking with children:

- Face the child
- Get to their level (this could mean sitting on the floor or crouching down)
- Maintain a distance that is comfortable for the child
- Raise your eyebrows and nod your head to let the child know you are listening

**Vocal Qualities** - Pay close attention to your vocal tone and speech when speaking with a child. Speak slowly and use language the child will understand. Let the child know you are

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61 Adapted from Interviewing Children and Child Development, www.kidscounsel.org
listening, by using “uh-huh” and “hmms.” Use direct prompts to find out more information. Repeat back what the child has said to ensure clarity.

**Eye Contact** - Make eye contact with the child in a manner that is comfortable. Recognize that eye contact may not always generate a comfortable environment and can be disrespectful in certain cultures. It is important to recognize the cultural expectations and nuances before the interview begins.

**Verbal Tracking** - Let the child guide the discussion, bearing in mind the intention and focus of the discussion. Be careful of abruptly changing topics.

**Linguistic and Cultural Differences** - Establishing appropriate attending behaviours when working with a child with a significantly different cultural or linguistic background can be challenging. Try to learn about cultural values, practices and beliefs, and be willing to ask the child or family to educate you.

**Non-verbal communication** - In addition to the children’s words, pay attention to pauses and non-verbal clues. Remain sensitive to the child, stopping if it appears necessary or if it is requested.

**Be Present** - Remember above all to ‘be present’. Children are extremely perceptive and recognize when you are disinterested or are ‘off’ somewhere else. Give the child your full attention and truly engage. This is their time. They have valuable insights and information to share.

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**Principles to Follow in Interviewing Children**

- **We do not question “children”**: Question children one at a time, unless the child has indicated he or she would like other children to be present.

- **Language is shaped by experience**: Children pick up the words in their vocabulary from 1) what they see, hear and experience around them (real-world context), and 2) listening to how words are put together (linguistic context).

- **Children and adults do not speak the “same” language**: Children may sound a lot like the adults in their everyday lives, but that is not so.

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Language is not an all-or-nothing affair: Once a child uses a particular word or syntactic structure (e.g. relative clause, passive voice etc, negation) s/he has not fully acquired it. Language acquisition is a gradual process.

Inconsistency in children’s statements is normal: inconsistency in language is a normal part of the development process.

Children are very literal in their early approach to language: the child denies going to a man’s house but later says he went to his apartment. Likewise, consider who was the agent: “Did you ever sleep with your daddy?” (It was daddy who slept with her).

Adult-like use of language does not necessarily reflect adult-like linguistic or cognitive capabilities: Language and cognition don’t mature simultaneously.

Young children in particular have difficulty attending to more than one or two things at once. This includes multi-part, multi-idea questions.

Praising is productive: Pauses (silent or filled) allow the brain more time to do work.

Children will not necessarily tell you they don’t understand you: This may not happen for a number of reasons including: inequality, power, unaware they don’t understand, or that they can let the interviewer know they don’t understand.

Framing is good: It is easier to answer questions when we are prepared. We know what the subject is and why we are asking the questions.

Children’s responses to your questions are not necessarily answers to your questions: A response can fail to be an answer if a) it doesn’t supply the kind of information required, b) the parties don’t agree on meaning of question, c) failure to recognize question or answer as ambiguous.

The ability to recite a list is not the same as the ability to understand its contents.

Children are not born with the ability to give adult-like accounts of their personal experiences. Until sometime in the teen years, children’s narratives tend to be incomplete and disorganized by adult standards (Labov, 1972; Whitehurst, 1976).

Some families talk to each other; some families do not. Conversation habits of families differ significantly and may reflect the ability of children to tell you what they know.
Familiarity matters: Familiarity provides a level of comfort allowing us to concentrate on the task at hand. Children are apt to be more accurate and complete in their responses when they have been familiarized with the setting, the language and the process of the interview (Saywitz & Snyder, 1993).

Culture matters too: Not all children learn language the same way, nor do their non-verbal expressions mean the same thing (e.g. when a child fails to look at you when talking it should not automatically be equated to lying).

Even young children can be competent and articulate their views: Language can be a barrier, and accordingly the interviewer must know how to ask appropriate questions reflecting age, gender, culture and developmental capacity.

Language Considerations to Ensure the Child Hears and is Heard

Children of all ages have troubles with use of negatives.

Preschoolers

- Use and interpret language very literally.
- Do not handle abstractions well and are particularly ill equipped to discuss the difference between truth and lies. They do better when asked to demonstrate their understanding.
- Difficulty categorizing things.
- Use words for time, distance, kinship, size, etc., before they understand their meaning.
- Define words in simple action oriented ways (e.g. mother - she takes care of me).
- Difficulty with pronoun references.
- Have difficulty with negatives, even simple ones like didn’t.
- Tend to give an answer to every question even if they don’t know the answer. Often this answer is yes.
- Do best with simple sentences - subject, verb and object.
- Tend to focus on one aspect of a question or situation at a time. Keep questions simple.
- Don’t organize events in their minds in an adult way, often leaving out settings, descriptions, chronology, motivations and emotions.
- Are still in the process of acquiring language.


Usually don’t know that they don’t understand something.
Believe in general that adults speak the truth, are sincere and would not trick them.

**Ages 7 – 10 years (middle childhood)**
- Sometimes their use of language and understanding appear to be similar to adults.
- Have difficulty with use of negatives and passive voice.
- Difficulty with use of more than one verb tense in a question.
- Difficulty with less common words, jargon, and legal terms.
- Often misinterpret abstract or vague terms.
- Can carry out logical reasoning but only at concrete levels.
- Memory is susceptible to suggestion.
- Difficulty understanding time and space in unfamiliar or complex situations.
- Difficulty establishing causal relationships.

**Linguistic Development**
- Have difficulty with the conditional and passive voices which may lead to misunderstanding questions.
- During this period a child’s vocabulary grows by 5000 words, indicating that they do not yet have the vocabulary of adults.
- Adults must be careful to ensure children understand the words they’re using.
- If the word is not common, have the child use the word in a sentence.
- Avoid legal or jargon terms.
- Frequently misinterpret questions involving negatives.
- Until 9 years a child may apply a negative to the wrong part of a sentence (e.g. “Could you see that he was not home” may be interpreted as “You could not see that he was home”).
- May not understand that the negative is different from its usual form (e.g. “unresponsive” may be interpreted as “responsive”).
- Complex sentences pose problems.
- May lack ability to put all the parts of the sentence together correctly.
- Short term memory may not be developed enough to allow them to remember the beginning of a long question, once the end is reached.
- Keep sentences simple and to the point.
- Phrase sentences in the subject-verb-object order.
- Likely can’t interpret pronouns that precede the referring noun.
- Frequently misunderstand complex sentences that contain “Do you remember?”.
- Understand generalizations and can give more than one meaning to a word.
- Understand that a person’s house can be an apartment, or you can “touch” something with a part of their body other than their hand.
- Become aware of different perspectives so they can consider more ideas.
- Develop logic: able to predict events and foresee some consequences; however they cannot apply logical processes to abstract ideas. This means the child can reason about the consequences of crossing the street but cannot theorize about the importance of traffic laws.
- When asking questions that require logical thinking to predict events or consequences, giving examples is important: “What if you told a lie?” is better than “What happens when people tell lies?”.
- Can say whether something was “like” something else.
- Can say a person was “taller” or “shorter” than someone else.
- Know the seasons and the differences between them.
- Cannot accurately estimate distances or sizes.
- Have troubles comparing time periods – may relate events out of chronological order.
- May still believe adults in general speak the truth.

**Age 11 – 18 years (Adolescence)**
- May misunderstand legal phrases and jargon but best not to use them.
- May still struggle with complex forms of negation – multiple negatives or phrases where a negative must be applied to a different clause in the sentence.
- Probably not understand the passive voice until the end of this stage.
- Questions should be stated so every verb has a clearly expressed subject.
- Are reluctant to ask for clarification of a question or acknowledge they don’t understand.
- May, depending on their circumstances (under-educated, under-parented, unattached), remain stuck in the middle childhood stage.

It is important to note that these notes serve as a guideline, and the needs, abilities and potentials will differ from child to child based on a multitude of interrelated and multidimensional factors.

As an interviewer you must assess the situation and pose your questions accordingly to ensure the child can participate meaningfully, reflecting the child’s age, abilities and developing capacity.
General Suggestions for Phrasing Questions:

- Keep sentences in subject-verb-object order.
- Do not use the passive voice.
- Avoid using “do you remember . . .?”. 
- Start questions and comments with the main idea (e.g. “Did the doorbell ring when were eating”, rather than “When you were eating, did the doorbell ring”).
- Avoid using negatives (e.g. “did you go to the store?” rather than “didn’t you go to the store?”).
- Do not use “tag” questions – e.g. “didn’t you . . . “.
- Do not use the negative form of words (e.g. incorrect).
- Avoid pronouns – repeating the noun is always better.
- When using a word that has a critical meaning, ensure that both the child and questioner share the same meaning (ask the child to use the word in a sentence). For example: Q: Who’s Tim? A: He’s my advocate? Q: What’s an advocate? A: Someone who prays and has sex with you (Baladerian, 1993).
- Do not use jargon- i.e. attorney, subsequent, counsel, etc.
- Use simple everyday terms (e.g. “go to” rather than “proceed”).
- Use concrete terms (e.g. “knife” rather than “weapon”).
- Do not ask school age children to answer questions involving abstract ideas like “justice” or “love”. Until adolescence, it is generally difficult for children to think in the abstract.
- Avoid asking children to speculate.
- Young children cannot determine another person’s motives, no matter how obvious they may seem.
- Do not use sarcasm.
- Children’s understanding of time, space and size is dependent on their level of development.
- Let the child know he or she should tell the questioner when he or she does not understand a word or question.
- Children should never be told that they cannot have a break or go to the bathroom until all questions have been asked.
- Avoid asking exactly the same question more than once.
- Refrain from praising particular answers.
- Speak slowly and clearly.
- Above all try and listen with a child’s ears.
The interview format used in the ‘Hear the Child’ interview process piloted in Kelowna, BC, in separation and divorce proceedings drew on the structured interview to obtain the views of the child.

**Rationale for interviewing children**

- Brings child into focus for family decision making
- Obtains input relevant to parental decisions
- Provides clarification and education to the child
- Provides feedback to parents and other decision-makers re: voice of child
- Establishes precedent for listening to child

**Criteria for including Children:**

- Want to be heard
- Parents agree they want mediator or child specialist or interviewer to talk to child
- Access problems – child wants change, resisting contact
- Parent’s views highly polarized
- High conflict parents are using children to express their disputes and anger
- The model routinely includes the child interview (i.e. collaborative divorce)

**A structured interview is:**

- Informal
- Single session
- Structured, focused agenda
- No contract for counseling or therapy
- Child not identified patient
- No assessment of pathology or diagnosis

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Problems with children’s interviews

- Not sufficiently structured
- Don’t focus sufficiently on separation, parenting and children’s living arrangements
- Too therapeutic
- Inquiry not age appropriate
- Inappropriate question’s or closed ended question’s

Risks in interviewing children

- Children’s vulnerability to be pressured or say punitive responses
- Worry about parental well-being
- Unstable opinions and views
- Unhealthy identification with parent
- Child in the middle of dispute
- What child says he/she wants is not in best interest
- Lack of understanding of children’s needs
- Poor interview techniques
- Dismissal of child’s views in court

Parameters of structured child interview:

- Age: 6 - 17 (younger if child-trained)
- ~1hr
- Parent’s prepare child appropriately
- Separate interview with each child
- Optional joint interview with all children may include younger children
- Each parent involved in transportation

It is important to really listen to the child. What do they want? Provide them information and see what they would like to happen? Do they want tot talk? Do they want to have a sibling present? Meaningful participation does not mean imposing a particular setting or way of interviewing on them.

Views of children’s abilities:

- Age related gradient of cognitive abilities

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Resilient, not fragile
Capable of responding to Q’s posed in age-appropriate ways
Knowledgeable about family relationships and own situation
Can provide thoughtful input for parental discussion and negotiation

Providing feedback to parents:
- Preparation is important
- Discuss each child separately
- General observations
- Child’s specific input, feelings, concerns and ideas
- Parent’s reactions to child input
- Relevance to parental disputes and proposals regarding living arrangements

Providing feedback to children:
Children also want feedback. They want to know their views were taken seriously as well as the decision that is actually made. Ideally this will be communicated by all adults involved in a way that reflects their role, be it a judge making a decision and providing feedback in how the child’s views were considered in the judgment rendered, or parents sitting down with their child to discuss what happened.
### Interview Structure

**NOTE:** Never ask the same question twice!!! Give the child lots of time to respond.

<table>
<thead>
<tr>
<th>Interview Stages/Purpose</th>
<th>Sample Questions</th>
<th>Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. INTRODUCTION</strong></td>
<td>Do you know why you’re here?</td>
<td>Assure the child that they are NOT making the decision.</td>
</tr>
<tr>
<td></td>
<td>What have your mom and dad or anyone else told you about coming here?</td>
<td>Helping adults to make decision.</td>
</tr>
<tr>
<td></td>
<td>I am here to listen to what you want to tell the judge, and your parents.</td>
<td>Assure the child:</td>
</tr>
<tr>
<td></td>
<td>I want to go over why you are here. &lt;Go over consent form and have child sign&gt;.</td>
<td>- can ask questions at any time</td>
</tr>
<tr>
<td></td>
<td>What you say is very important. I don’t want to forget anything so I’m going to try to write it all down.</td>
<td>- don’t have to answer questions</td>
</tr>
<tr>
<td></td>
<td>Do you have any questions before we begin?</td>
<td>- interview is private (only if it is!)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- only share information they want passed on to parents/judge/mediator</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- can take a break</td>
</tr>
<tr>
<td><strong>2. ESTABLISH RAPPORT</strong></td>
<td>Lots of kids find it hard when their parents stop living together. How is it going for you?</td>
<td>Be empathetic (e.g. lots of kids feel sad when Mom and Dad decide to live apart) / ask general questions</td>
</tr>
<tr>
<td><strong>3. SEPARATION SPECIFIC INFO</strong></td>
<td>What’s happened since Mom and Dad stopped living together?</td>
<td></td>
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<td></td>
<td>How are things at school?</td>
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<td></td>
<td>How are things with your friends?</td>
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### 4. EXPLORE

**- Living arrangements**
You are living sometimes at Mom’s house and sometimes at Dad’s house? How is that going?
What do you do at Mom/Dad’s house?
How do you feel when you’re at Dad’s/ Mom’s house?
What do you like to do at Mom’s/ Dad’s house?
What things don’t you like at Mom’s/Dad’s house?
Is anyone at Mom/Dad’s house when you’re there?
What is it like doing homework at Mom/Dad’s house?
What do you do with your friends at Mom/Dad’s house?
What clothes/toys do you keep at Mom/Dad’s house? How do you decide what to keep at Mom/ Dad’s house?
Do you have any suggestions of how things could work for you living between Mom and Dad’s house?

**- Child’s thoughts, reactions, suggestions**

The brief from counsel may indicate a specific issue to address.
- consider any changes in living
- views of each parent & communication
- advice or specific requests for parents
- raise issues of what might help child (e.g. less conflict, stop demeaning other parent, be flexible)

### 5. REVIEW
**(this can be done periodically or at the end of the interview)**

I’ve written down what you said. Can I read back to you what you have said to me? Is there anything that needs to be changed?
Is it okay if I share this with Mom, Dad, and the Judge? (if yes – okay, if no – clarify what parts okay)

Ensure the child’s views are written down word for word – this has a much greater impact on the receiver of the information.
Ensure the child knows he/she is not making the decision. Info will help adults make decisions about child

### 6. CLOSURE

Ensure child knows what happens next.
Give child an opportunity to ask any final questions.
Give child your phone number.
Thank child for coming.

We are just about finished:
Is there anything else you wanted to say?
What are you doing when you leave here?
Do you have any questions?
How was it talking to me today?
Here’s what happens next . . .
Here is my telephone number in case you want to say anything else or ask a question.
Thank you for coming today!

Tell child what will happen next.
Don’t end abruptly.
Provide the child with your phone number if they want to tell you something they forgot to say.
Questions

1. Have you ever questioned children, and if so, what questions were most effective?

2. Can you think of other questions that might be asked of a child for each stage of the interview?
Listening to Children Summarized

- Create a child-friendly space for the interview (e.g. comfortable chairs, non-structure toys (e.g. slinky), drawing materials, low table, etc.).
- Explain the process to the parents and child including duration, expectations, confidentiality, ethics around disclosure, etc. Demystify what’s going on.
- Be direct and open.
- Be emotionally supportive.
- Be aware of your own influences as an interviewer on questions, demeanor, etc.:
  - Your own “stuff”;
  - Personal values and life experiences;
  - Culture;
  - Old child development research; and,
  - Alliance with one parent or lawyer.
- Listen, listen, listen.
- Tolerate pauses, tears and anger.
- Use simple language - avoid jargon and legal terms.
- Keep questions simple and direct.
- Avoid using negatives, complex or conditional sentences.
- Concentrate – ensure you are available to the child.
- Be patient in words and body language – children often take time to find words, or formulate ideas.
- Be respectful and polite.
- Match your conversation with the child.
- Never press the child to tell things he or she does not want to tell.
- Never leave a child with a sense of failure because he or she cannot or has not answered the question.
- Record the children’s views in writing word for word.
- Clarify – don’t interrupt.
**Sources & Additional Reading**


Kelly, J.B. – various materials including:


MODULE 8

CHILD PARTICIPATION IN PRACTICE: DIGNITY

Dignity: “the quality of being worthy of esteem or respect.”

Learning Objectives

1. Consider some of the ethical issues that arise when child participation is put into practice.
2. Review the professional conduct responsibilities of lawyers and how they apply to children in family justice processes.
3. Consider what practices uphold the dignity of the child and how you might implement them in your own practice.
Module 8

CHILD Participation in Practice: Dignity

I know you are all busy – lots of work that demands paper, paper, paper. But I am here to tell you that I am more than a file. I am a person. I have feelings and am entitled to respect. Please don’t only see the problems, see the potential. Over the years, I have had good and bad experiences in the system. The good parts have been some of the caring, trusting, and supportive people I have come in contact with. The bad parts are when people don’t listen or trust me.  

BC child

Meaningful Child Participation

Child participation must be authentic and meaningful. It must start with children and young people themselves, on their own terms, within their own realities and in pursuit of their own visions, dreams, hopes and concerns. Most of all, authentic and meaningful child participation requires a radical shift in adult thinking and behaviour — from an exclusionary to an inclusionary approach to children and their capabilities.


A shift in adult thinking and behaviour to support meaningful participation starts with the fundamentals of Trust, Respect and Understanding in relations with children: like the acronym TRU these cannot be faked.

In terms of practice, meaningful child participation is characterized by:

- An ethical approach and a commitment to transparency, honesty and accountability;
- A safe approach in which children’s protection rights are properly safeguarded;

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69 Larry Brendtro and Lesley du Toit, Response Ability Pathways (Circle of Courage, 2005) at 56-57.

70 Save the Children Canada, http://www.savethechildren.ca/whatwedo/rights/participate.html
A non-discriminatory approach ensuring all children, regardless of their class, gender, ability, language, ethnicity, etc., have an equal opportunity to be involved;

A child-friendly approach enabling children to contribute to the best of their abilities in an age appropriate manner and in a supportive environment; and,

Follow-up and evaluation.

Principles of Meaningful Child Participation in Family Justice Processes

Put into practice, participation involves adults listening to children – to all their multiple and varied ways of communicating, ensuring their freedom to express themselves and taking their views into account when coming to decisions that affect them…

…Authentic and meaningful participation requires a radical shift in adult thinking and behaviour – from an exclusionary to an inclusionary approach to children and their capabilities – from a world defined solely by adults to one in which children contribute to building the kind of world they want to live in.

Carol Bellamy, the State of the World’s Children 2003, (2002), at 4-5.

1. Every child has rights as enshrined in the UN Convention on the Rights of the Child.

2. Every child has the fundamental right to be heard, their views considered, and to meaningfully participate in proceedings that directly affect them. Adults have a responsibility to ensure this right is upheld.

3. All processes must include provisions for listening to children and such processes must be available throughout proceedings to enable meaningful child participation.

4. Every child is entitled to information about processes and decisions that affect them in a timely manner and in a way the child can understand.

5. Every child is entitled to participate regardless of age, developmental capacity, culture, gender, ethnicity, religion, sexual orientation, class, etc.

6. Every child is an expert in their own lived experiences – they have unique and valuable contributions to make in deliberations affecting their current and future well-being.

7. Every child has strengths that must be identified and acknowledged in all processes affecting them.

8. All decisions affecting children will be made in the context of their families, communities and culture.

In the context of this Project, we are talking about processes in the family justice system.
9. Processes and services must be the least restrictive and most empowering suitable to the child’s needs and must be accessible, timely and safe throughout the province.

10. Families should be encouraged and opportunities provided to resolve disputes in a non-adversarial manner that protects and supports children.

**Ethical Reflections**

You now know what CHILD participation is all about: Context, Healthy Development, Information, Listening and Dignity. How would you handle the following situations?

1. **Best Interests vs. Views of the Child**: what do you do when you obtain a report that is proffered as evidence of the child’s views and best interests based on the author’s analysis without the author stating the actual views of the child in the report?

2. **Instruction from Client vs. Healthy Development of Child**: Given the research outlining the adverse affects of enduring conflict on children, what responsibility do lawyers have when their client’s instruct them directly, or indirectly, to prolong a family dispute?

3. **Privacy vs. the Right to Know**: What would you do if a child wants his or her views shared with the decision-maker but not with his or her parents? How might you prevent this from happening?

4. **Child Does Not Want to Share Views vs. Judge Orders Hearing the Child’s Views**: What happens when a court makes an order to obtain the child’s views (e.g. through a third party interviewer) and all the adults agree but the child does not?

**Safety: Screening and Complaint Mechanisms**

In order to ensure children and their participation are supported in a safe way, it is important to consider both screening and complaint mechanisms such as criminal record checks for those working directly with children (e.g. interviewing, supporting, coaching), and disciplinary or reporting mechanisms to ensure complaints or misconduct are adequately addressed.

What other safeguards might you take to ensure children’s participation is implemented safely?
Conduct Considerations

Provisions from the Law Society of BC’s Professional Conduct Handbook for lawyers

Chapter 1 – Canons of Legal Ethics

1. To the state
   (1) A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel, or assist any person to act in any way contrary to the law.

3. To the client
   (3) Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

4. To other lawyers
   (3) A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests, which do not prejudice the rights of the client or the interests of justice.

5. To oneself
   (1) A lawyer should assist in maintaining the honour and integrity of the legal profession, should expose without fear or favour before the proper tribunals, unprofessional or dishonest conduct by any other lawyer and should accept without hesitation a retainer against any lawyer who is alleged to have wronged the client.
   (6) All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

Chapter 2 – Integrity

Dishonourable conduct

1. A lawyer must not, in private life, extra-professional activities or professional practice, engage in dishonourable or questionable conduct that casts doubt on the lawyer’s professional integrity or competence, or reflects adversely on the integrity of the legal profession or the administration of justice.

Discrimination

3. A lawyer must not discriminate on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, marital or family status, disability or age.

Chapter 3 – Competence, Quality of Service and Relationship to Clients
Knowledge and skill
1. With respect to each area of law in which a lawyer practices, he or she must acquire and maintain adequate:
   (a) knowledge of the substantive law,
   (b) knowledge of the practice and procedures\(^1\) by which that substantive law can be effectively applied

Chapter 8 – The Lawyer as Advocate

Prohibited conduct
1. A lawyer must not:
   (a) abuse the process of a court or tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party,
   (b) knowingly assist the client to do anything or acquiesce in the client doing anything dishonest or dishonourable,
Questions

1. How is the lawyer’s duty referenced in Chapter 1, s. 1, affected by the UN *Convention on the Rights of the Child* and relevant domestic law in BC regarding a child’s best interests?

2. What responsibility does a lawyer have when a client provides instruction to go to trial over a child’s custody when a fair settlement offer is on the table? How does the research base on the adverse effects of enduring conflict on children affect what the lawyer does?

3. If opposing counsel has omitted consideration of obtaining the views of the child and the child’s best interests are being considered during a justice process, what might be your obligation? Consider Chapter 1, s. 4.

4. How might the code of conduct apply if counsel treats a child’s interview and the views obtained during the interview as another tool in the arsenal of litigation battle?
5. How would the professional conduct rules apply to counsel who resists hearing from a child who is 8 years of age on the basis that the child is too young without any knowledge of the child and his or her context?

6. What level of knowledge do you think family law lawyers need regarding the law and practices and procedures as they relate to children?

7. How would a lawyer advise a client if the lawyer suspects or becomes aware that the client is coaching a child on what to say before sharing his or her views in family justice proceedings?
National Association of Counsel for Children (NACC) Recommendations for Representation of Children in Abuse and Neglect Cases

- Designed to improve legal representation of children.
- Provides a policy framework and a checklist of needs that should be met, for whatever form of representation chosen.

Legal Representation Policy

- Each child must be valued as a unique human being, regardless of race, ethnicity, religion, age, social class, physical or mental disability, gender or sexual orientation.
- Each child is vested with certain fundamental rights, including a right to physical and emotional health and safely. In order to achieve the physical and emotional well-being of children, we must promote legal rights and remedies for children. This includes empowering children by ensuring that courts hear and consider their views in proceedings that affect their lives.
- Children’s lawyers play a critical role in empowering children and ensuring their views are heard.
- Lawyer’s representing children should have a combination of knowledge, training, experience and ability which allows them to serve their client (express their views and empower children).
- While legal representation is not required for all every child subject to child custody determination, the judge should appoint a lawyer in certain cases as follows:

<table>
<thead>
<tr>
<th>Should appoint lawyer for child</th>
<th>Should consider appointing lawyer for child</th>
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<tr>
<td>• allegation of child neglect or abuse (physical, sexual or emotional) by a parent or household member</td>
<td>• allegation of mental illness on the part of a parent</td>
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<td>• culture of violence between the parents</td>
<td>• custodial parent relocating geographically</td>
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<td>• allegation of substance abuse by a parent</td>
<td>• child representation can reduce undue harm to the child from the litigation itself</td>
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<tr>
<td>• allegations of non-paternity</td>
<td>• child has exceptional physical or mental health needs</td>
</tr>
<tr>
<td>• allegation of or fear of child snatching</td>
<td>• child expresses strong desire</td>
</tr>
<tr>
<td>• certain procedural situations which make child representation necessary</td>
<td>• is a pro se parent</td>
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<td></td>
<td>• third-party custody action against a parent</td>
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<td></td>
<td>• failure to appoint a representative of the child would otherwise impede the judge’s capacity to decide the case properly</td>
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Questions

1. Do you agree with the NACC legal representation policy? Why or why not?

2. Do you think this policy could be adapted for family cases not involving abuse or neglect? If so, how would you adapt it?
NACC Needs Checklist

To be afforded dignity within the legal system, children need:72

Systemic Safeguards

- Competent, independent, and zealous lawyers who represent the child as long as the child is subject to the court’s jurisdiction.
  - Competent: knowledge, skills, thoroughness and preparation.
- Lawyer’s with adequate time and resources.
  - No more than 100 individual clients at a time.
  - Attorney must be provided appropriate and reasonable compensations.
- Lawyers who understand their roles and duties.
- An opportunity for children to present their positions to the court through counsel
- Confidential communication with their lawyers in developmental appropriate language
- To be involved as litigants in the entire process, including any post disposition, termination of parental rights, and adoption proceedings.
- Judicial review of adverse decisions.
- To be able to hold their lawyers accountable.
- A lawyer with a fair opportunity to be effective in the court system.

Advocacy Duties

- Lawyers who fully understand their cases.
- Meaningful communication with their lawyers. The attorneys must observe the child and dependent upon the child’s age and capabilities, interview the child. The attorney must engage in regular and meaningful communication with the child.
- Loyal lawyers.

Advocacy Issues

- Timely and permanent resolution of their cases
- Their immediate and basic needs to be met. The lawyer must advocate for food shelter, clothing and safety, including a safe temporary placement when necessary for educational, medical, mental health and dental needs.
- Family relationships.
- To be protected from unnecessary harm that can result from legal proceedings. The lawyer must advocate for processes that minimize harm to the child.

72 Developed in the context of abuse and neglect but similar principles would apply.
Questions

1. Are there any other “needs” required to uphold a child’s dignity?

2. What would you select as top priorities in upholding a child’s dignity in family justice processes? Why?

3. What action might you take in your own practice to further a child’s dignity in family justice processes?
Sources & Additional Reading


