
Hearing The Voices of Children in Family Disputes

Prof. Nicholas Bala
Faculty of Law
Queen's University

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Université de Montréal

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Judges, lawyers, mediators, assessors and parents always need to consider how the views of the child will be heard when parenting plan is being made or there is dispute between parents and take into account as plans change



How to “hear the child” in family dispute resolution process

- Will depend upon case and stage:
 - Negotiation vs mediation vs trial
- Also depends on
 - Legislation(eg Art 34 of *Civil Code*)
 - resources (public & private)
 - attitudes of professionals, **parents and child**

May be more than one way as case evolves



Parents and Their Lawyers Need to Consider Child's Perspective

(Kelly & Kishardt, 2009; Bala, Hebert & Birnbaum, 2017)

-
- Need to consider how children are informed about changes in their lives as parents go through separation
 - BUT parents also need to avoid engaging children in their conflicts & support relationship to other parent
 - Parents need to communicate in age appropriate ways
 - Expect that child will not be candid with parent & views will likely change over time



Why Listen to Children

- Better decisions if decision-makers are aware of child's perspectives
 - includes parents who often are not (fully) aware
 - > understanding of child's views can facilitate settlement
- Better outcomes if children feel they have been heard
- Right to be heard
- Legislation mandates



Views vs Experiences

Evidence of Views: children's perceptions *of relationships and their expressed preferences*, - *i.e. the child's statements about subjective matters* -> **family context** where concern about welfare of child and limited (or no) concern about due process or reliability

Evidence of Experiences: children's statements about what happened to them or what they observed about factual issues in dispute (especially relating to allegations of child abuse or spousal violence) - *i.e. the child's statements about objective matters*

->**family context:** **caution about due process & reliability**

->**criminal context:** Charter and due process rights of accused are significant -
> restricted scope for hearsay and children often have to testify.



Choice vs Voice

“...while most children want to have their views considered, very few want to be placed in the position of having to choose between their parents, as most **want** to have **strong relationships** with **both parents**, and do not want to be seen as rejecting either parent.”

Bala, Hebert & Birnbaum, 2017

- In high conflict case, may be important for child to be told by judge or assessor: “You are not deciding.”



Factors for Parties & Court to Balance

- as much information as possible
- concerns about reliability information
- fairness to adult parties
- avoid harm to child
- fairness to child
- efficiency & effectiveness (cost to parties, court time)



UN Convention on Rights of Child

Article 12

- (1) State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial ... 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.



Concerns



- Pressure from parents
 - loyalty, guilt, fear, suggestibility may influence child's statements and even memory
 - possibility of recrimination, retribution or deteriorating relationships after parent reads reports etc.
 - In some cases children may refuse to participate
- Children may not be reliable
 - incomplete, change views and reports
- Concerns about parental pressure & emotional well-being may affect **how** child's views are sought and weight to views, but should not preclude court from seeking those views

Alienation

- Due to parental influence, child may express strong preference for one parent and hatred for the other.
 - Even abused children usually express desire for relationship to parent so strong rejection of one parent usually reflects influence of favoured parent
- Child may “demand” right to representation etc.
- Even in alienation cases, children should be “heard,” and aware that judge knows views, but judicial control to protect children.
 - Alienated child may be more likely to comply if “heard” and then clearly told judge’s view



Ways to Hear Child in Court

- Hearsay statements from parents
 - Videos, email or affidavits of child
- Hearsay statements & reports from teachers, doctors, therapists, guardian etc.
- Assessments – Gov't or privately paid
- Lawyer for child telling court about child's view
- Hear the Child Report
- Interview with mediator or judge



Practice varies across Canada

- In Quebec more use of judicial interviews & quite extensive use of lawyers
 - More public funding
 - Art 34 of Civil Code
- In Ontario, Office of Children's Lawyer may appoint lawyer, do full assessment or have a voice of the child report, but judicial interviews less common than in Quebec
 - Ford government cuts are affecting OCL
 - If parents can afford, they may be ordered to pay for assessment or voice of the child report
 - Great variation from one judge to another in judicial interviews
- Newfoundland: never have lawyers for child, and no government resources for voice of child reports



Views of Child Report (aka Hear the Child Report)

(Birnbaum & Bala, 2017)

- usually two interviews with child by lawyer or social worker
- written report
- increasingly common in Canada (but not QC), with governments providing funding in some provinces (NB, NS, ON, MB)
- Courts may order parents to pay for VCR
Canepa v. Canepa, 2018 ONSC 5154, per Kitley J.; *E.P. v. S.P.* 2016 NSSC 173, per Jesudason J.



Lawyer for Child

(Birnbaum, Bala & Cyr, 2011; Bala & Birnbaum, 2018)

- May have value as advocate & advisor for child, especially **in negotiation, but concern that in some cases, lawyer for child may worsen parental relations to child**
- Great variation in use (most in QC and ON); more if older and child protection
 - Generally paid by government or Legal Aid
 - concern if one parent pays for counsel child has “retained”
 - *JESD v. YEP*, 2018 BCCA 286 in dispute between parents, gov’t cannot be ordered to provide counsel for child.
- Significant variation in role, but always to ensure court knows views of child
- Limits on counsel for child “giving evidence from counsel table”

R.M. v. J.S., [2013] AJ 1390 (ABCA); *Strobridge v. Strobridge* (1994, ONCA.)



Judge Meeting the Child

(Birnbaum, Bala & Cyr, 2011)

- Studies comparing jurisdictions where judicial interviews are common (Ohio & Quebec) with those where rare (Ontario)
- Almost all children in studies say that children should have the right to decide whether and how to participate
- About half of those not given opportunity to meet judge wished that they had met the judge
- All children who met judge were satisfied with the experience, even if they did not get what they wanted
- Many were nervous before meeting, though none report distress after meeting
- Parents who put pressure on children do so regardless of whether child meets social worker, judge or lawyer





bala@queensu.ca



References

- Bala & Birnbaum (2018), Rethinking the Role of Lawyers for Children : Child Representation in Canadian Family Relationship Cases, 59 *Les Cahiers de Droit* 787
- Bala, Birnbaum, Cyr & McColley (2013) "Children's Voices in Family Court: Guidelines for Judges Meeting Children" 47 *Family Law Quarterly* 381-410.
- Bala, Hebert & Birnbaum, Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer (2017), 95 *Can Bar Rev* 557-589.
- Birnbaum & Bala, "Views Of The Child Reports: The Ontario Pilot Project" (2017) 31:3 *International Journal of Law, Policy and the Family* 344-362.
- Birnbaum, Bala & Boyd, " *The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?*" (2016) 30 *International Journal of Law, Policy and the Family* 158-178.
- Birnbaum, Bala & Cyr (2011), "Children's Experiences with Family Justice Professionals in Ontario and Ohio" 25 *Inter J Law, Policy & Family* 398-422.
- Birnbaum & Saini,(2012a). A scoping review of qualitative studies on the voice of the child in child custody disputes. *Childhood*, 20(2), 260-282.
- Birnbaum & Saini, (2012b). A qualitative synthesis of children's participation in custody disputes. *Journal of Social Work Research Practice*, 22(4), 400-409.



References (2)

- "Guidelines for Judicial Interviews and Meetings with Children in Custody & Access Cases in Ontario" (2014), 36 RFL (7th) 489.
- Kelly & Kishardt (2009), "Helping Parents Tell Their Children About Separation and Divorce" 22 Journal of American Academy of Matrimonial Lawyers 325
- Martinson & Tempesta (2018) "Young People as Humans in Family Court Processes : AChild Rights Approach to Legal Representation", 31 Can. J. Fam. L.. 151.
- McIntosh, Wells, Smyth & Long (2008), "Child-focused And Child-inclusive Divorce Mediation: Comparative Outcomes From A Prospective Study of Post-separation Adjustment" 46 Family Court Review
- Morag et al, (2012) Child's Participation in the Family Courts- Lessons from the Israeli Pilot Project, 26 *International Journal Law, Policy and the Family*
- United Kingdom (2015) *Final Report of the Voice of the Child Dispute Resolution Advisory Group*
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421005/voice-of-the-child-advisory-group-report.pdf
- "Voice of the Child Reports Now Offered Across Ontario," *Lawyers Daily*, Aug. 20, 2018
- Walker & Lake-Carroll (2015), "Child-Inclusive Dispute Resolution: Time for change," 45 Family Law 695-702
- Walker & Sherwood (2016), "It's My Life Too: Radical Innovations in Child-Inclusive Mediation" (53rd AFCC Annual Conference, Seattle, June 1-4, 2016)

