guest

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Listening to Children

New Divorce Act entrenches child's right to be heard

On July 1, 2020, s.16(3)(e) of the *Divorce Act* (Canada) comes into force. This section requires the court to consider the "child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained; when making parenting decisions." Cite: bit.ly/bt0620p12-1

This amendment brings the *Divorce Act* into line with Article 12 of the UN Convention on the Rights of the Child and the BC *Family Law Act* ("*FLA*").

There are various ways to obtain the views of a child. In many cases, parents can express their children's views. However, this can lead to further conflict as the child may express different views to different parents, or the parents may interpret the child's view in the context of their own agenda. Judges can interview the child or the child could give evidence in court. While the former is rare, the latter is virtually unheard of. The most common approach is a neutral third party report.

The amended *Divorce Act* does not contain a mechanism for obtaining third party evidence. However, the *FLA* does provide options. The authority for professional assessments is found at s. 211 and ranges from assessing the needs, and views, of the children, to the parties' abilities to meet the child's needs. Alternatively, s. 202 gives the court significant discretion to (a) admit hearsay evidence it considers reliable of a child who is absent; (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence [s.202 Report].

The difference between these approaches was summarized in *E.A.B. v. K.J.B.* 2016 BCSC 1167:

[26] ... The child's views with respect to parenting issues may be expressed to the court indirectly or directly. One method of receiving those views indirectly is through a Hear the Child report. This type of report does not provide an analysis of the child's views as they might impact parenting arrangements or responsibilities. Nor does the author of the report make any recommendations with respect to parenting of the child.

[27] In contrast, a report ordered under s. 211 is intended to be a more comprehensive investigation of parenting issues and may include recommendations on the parenting arrangements that will meet and promote the best interests of the child. Cite: bit.ly/bt0620p12-2

For counsel, the challenge is determining which is the optimum approach to ensure the child's right to be heard. s. 202 reports are more appropriate for mature children who appreciate the consequence of their views. s. 211 reports are more appropriate for younger children and those in high conflict situations.

Where there is a reasonable concern of coaching or coercion a s. 211 report, regardless of the child's age, is more appropriate. While more expensive, the goal is to provide the trier of fact with the best evidence to determine the needs of the child.

When selecting a report writer, it is important to understand their methodology. Different professionals will use different names for their reports and adhere to different practice standards. Ensure that the report writer treats each parent equitably. When possible, the child should be interviewed twice and the parents should take turns to bring the child to the interview.

Each child is different and each family is different. When obtaining a report for more than one child in the family, it is important for each child to have the opportunity to speak for themselves, and not be guided or influenced by their siblings.

It is paramount that the parties and the children understand that it is the voice of the child, not the choice of the child. Their voice is one of a number of considerations in determining their best interests. Allowing children to believe that their view equates to their choice puts the child in the middle of the conflict. Parenting arrangements are made by parents, or failing that by the courts. Children are not the decision-makers and should not be asked to make that decision.

Michael Butterfield, J.D. is a lawyer, mediator and parenting coordinator. Jayne Embree, M.A. (Psych). Both have prepared views of the child reports and Jayne has been an expert witness in family and CFCSA matters.