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**Legal Representation as a Critical Aspect of the
Realization of the Child's Right to Be Heard**

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Executive Summary

With the adoption of the United Nations Convention on the Rights of the Child (UNCRC) in 1989, children were specifically recognized in international law as holders of a broad range of civil, political, economic, social and cultural rights. While some of the rights accorded to children in the UNCRC overlap with those applicable to all human beings under other international and regional human rights instruments, a number are specific to children. Key among the unique entitlements under the treaty is the right of the child to be heard and to have her views given due weight in all matters affecting her.

Article 12 is frequently cited as the most significant achievement of the UNCRC, elevating children from objects of charity to independent rights-holders with active entitlements to participate in all decisions affecting their lives, including those arising in judicial processes. As one of the four general principles of the UNCRC, article 12 is of “fundamental importance”, integral to both the interpretation of all other rights and the implementation of the Convention as a whole.

As the 30th anniversary of the adoption of the UNCRC approaches, this thesis examines whether legal representation in family court processes where the child’s best interests are being determined, can be said to be a critical aspect of the realization of the seminal right to be heard. Article 12 itself provides little guidance on the manner of hearing the child who chooses to exercise this right through a representative, but clarification is provided by the Committee on the Rights of the Child (CRC Committee) in its General Comment on the best interests of the child, which identifies legal representation as a necessary procedural safeguard when the child’s best interests are being determined by courts when there is a potential conflict between the parties in the decision.

In considering the central question of whether legal representation is a necessary element of the child’s “right to be heard” under article 12 of the UNCRC in proceedings where her best interests are being assessed, the following related questions and issues are examined:

In chapter 2, the significance of the child’s participation in justice processes is explored, beginning with the evolution of children as rights-holders under the UNCRC, and progressing to consider the implications of children’s participation in family law proceedings for their short- and long-term interests and the contribution towards better, more sustainable outcomes.

Chapter 3 surveys the extent to which international and regional human rights standards support the child’s right to be heard and to have legal representation in justice processes. An overview of the status of legal representation for children in national legal systems is also provided.

A critical analysis of the various methods by which children’s views may be placed before the courts, beginning with non-legal methods (through parents, assessments, “views of the child reports”, directly through judicial interviews), is undertaken in chapter 4. The chapter also explores the most common models of adult-directed legal representation, including the appointment of a guardian *ad litem* (GAL) and an *amicus curiae*, as well as a “modified” model of child representation which combines aspects of the GAL and the traditional instructional advocate model. The extent to which these various methods fulfill the child’s right to meaningfully participate in best interests proceedings is examined. The chapter culminates in a discussion of the child advocate model of legal representation, arriving at the conclusion that the provision of this type of advocacy centered on the child’s views is most consistent with the child’s right to be heard, and to have her views given due weight, when the courtroom is the forum. Research which examines children’s perspectives on participation supports this analysis, as does a survey of selected international jurisprudence which considers the issue of independent legal representation for children and the role the child’s representative should play to give effect to the

child's right to be heard. Chapter 4 concludes with a discussion of the fundamental interests at stake for children in many family law processes and the consequent attenuated need for procedural due process guarantees, exemplified by the right to independent legal representation.

In chapter 5, this contribution closes with a synthesis of the analysis that has led to the conclusion that legal representation for children in family law proceedings where their best interests are being determined is a critical aspect of the child's right to be heard, achieving not only effective realization of article 12 of the UNCRC, but protection of the child's fundamental interests and rights to due process. Possible directions for further research are also considered and recommendations are provided to facilitate the implementation of the child's right to empowered legal participation in family justice processes

Article 12 of the UNCRC is based on the principle that participation is a fundamental human right. As such, "[i]t enables us to demand rights".¹ In the context of judicial processes where a child's interests are directly affected, the child requires a qualified legal representative to assist her in asserting her rights. This achieves not only effective realization of article 12 of the CRC, but facilitates substantive and procedural equality for the child in relation to the adult parties who are able to advocate their own legal positions or have lawyers who do this on their behalf. This is particularly important given that it is the child's best interests that are the focus of the inquiry.

Fulfilling our human rights obligations to children, rather than serving adult interests, should inform decisions regarding legal representation for children in family law processes. Although direct communication with the court, assessments and Views of the Child Reports may have a place in some cases, and may be available in addition to the provision of a child advocate, they are not a substitute for legal representation. As long as the courtroom is the forum, children require legal representation to ensure that their views are not only heard, but given due weight throughout the judicial process, and that their legal interests are protected. The issue of resources should not be "a race to the bottom"² – inadequate public funding should not mean that children's rights are not respected. As those most directly impacted by adult decision-making when their best interests are in issue, children require an equal footing in the proceedings, and resources must be allocated in State budgets for this purpose, failing which governments may face legal challenges for failing to guarantee basic rights. Children need to know that they have trusted, skilled allies with undivided loyalties to them in court processes where their best interests are being determined. It is only in this way that children can truly be respected as independent rights-holders empowered to participate in fundamental decisions about their own lives, as contemplated by article 12 of the UNCRC.

¹ M. Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 *International Journal of Children's Rights* 5 (2007), at 9.

² A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (2018), at 426.

Overview of Main Findings

This thesis examines whether legal representation in family court processes where the child's best interests are being determined can be said to be a critical aspect of the realization of the seminal right of the child to be heard. Article 12 itself provides little guidance on the manner of hearing the child who chooses to exercise this right through a representative, but clarification is provided by the Committee on the Rights of the Child (CRC Committee) in its General Comment on the best interests of the child, which identifies legal representation as a necessary procedural safeguard when the child's best interests are being determined by courts when there is a potential conflict between the parties in the decision. International and regional human rights standards also add substance to this fundamental right, including the fair trial and due process guarantees of the binding International Covenant on Civil and Political Rights, the report and resolution of the UN Office of the High Commissioner for Human Rights on access to justice for children, and Council of Europe Guidelines on Child-Friendly Justice, as well as the Guidelines on Children in Contact with the Justice System by the International Association of Youth and Family Judges and Magistrates.

Taken together, these human rights standards confirm the status of children as individual rights-bearers with distinct interests worthy of protection. They recognize that access to justice for children requires the legal empowerment of all children, which includes the provision of legal representation, particularly when there is a potential conflict of interest between the child and the parent or other party to the proceedings. The rule of law is seen to apply equally to children as it does to adults and due process guarantees should not be denied "under the pretext of the child's best interests".³ International jurisprudence is increasingly recognizing the fundamental issues at play for children not only in child protection matters, but in private family law disputes, including those arising under the Hague Convention on the Civil Aspects of International Child Abduction, and the consequent need for robust procedural safeguards, including the need for independent legal representation for children. Children themselves are clear about what they want from their lawyers – "to listen, provide information, and most significantly, to put forward their views in court".⁴ A best interests approach which usurps the views of the child as well as the role of the judge not only leaves children dissatisfied but is contrary to the professional obligations of lawyers.

The thesis concludes that the child advocate model of legal representation aligns most closely with the combined operation of the human rights principles espoused by the UNCRC and the other human rights instruments identified. In the context of judicial processes where a child's interests are directly affected, the child requires a qualified legal representative to assist her in asserting her rights. Although this does not preclude the possibility of the child expressing her views directly to the decision-maker or through the involvement of another representative should the child want this, as long as the forum is the courtroom, the child is also entitled to an instructional advocate to ensure her views are not merely heard, but have the potential to influence outcomes, within the legal framework of decisions which courts must make. This achieves not only effective realization of article 12 of the CRC, but facilitates substantive and procedural equality for the child in relation to the adult parties.

To give effect to children's meaningful participation in family court processes, States Parties must allocate sufficient resources to ensure children have access to legal representation. Adequate funding for family law matters must be seen as a priority given the centrality of children's interests and the

³ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice and their explanatory memorandum*, 17 November 2010, at para. III(A)(2).

⁴ R. Birnbaum and N. Bala, *The Child's Perspective on Legal Representation: Young Adults Report on the Their Experiences with Child Lawyers*, 25 *Canadian Journal of Family Law* 11 (2009), at 60.

heightened vulnerabilities of children relative to adults in proceedings that are frequently complex and have far-reaching implications for children's well-being and holistic development. In this way, children are respected as independent rights-holders empowered to participate in fundamental decisions about their own lives, as contemplated by article 12 of the UNCRC.

Keywords

UNCRC – right to be heard – participation – legal representation – child advocate – due process – family law – best interests of the child - views

List of Terms and Abbreviations

Terms

Legal representative, child advocate or instructional advocate – these terms are used interchangeably and refer to representation of a child by a qualified lawyer who advocates for the child's views, rather than a best interests lawyer, guardian *ad litem*, or some combination of the foregoing.

Family law – when used alone, this term encompasses private family law disputes, including those arising under the Hague Convention on the Civil Aspects of International Child Abduction, as well as public family law matters, i.e. child protection proceedings.

Custody/access – these terms are used to describe the residence and visiting arrangements for children following the separation and divorce of their parents. They will be used interchangeably with the terms "residence/contact".

Abbreviations

ACRWC - African Convention on the Rights and Welfare of the Child
CAFCASS - Children and Family Court Advisory and Support Service
CRC Committee – Committee on the Rights of the Child
ECHR - European Convention on Human Rights and Fundamental Freedoms
ECtHR - European Court of Human Rights
GAL – guardian *ad litem*
GC – General Comment
IACHR - Inter-American Commission of Human Rights
IACtHR - Inter-American Court of Human Rights
ICCPR – International Covenant on Civil and Political Rights
ICESCR – International Covenant on Economic, Social and Cultural Right
HCCH - Hague Conference on Private International Law
UDHR – Universal Declaration of Human Rights
UK – United Kingdom
UNCRC – UN Convention on the Rights of the Child

Legal Representation as a Critical Aspect of the Realization of the Child's Right to Be Heard

This is, and has always been, a case about children, their rights and the rights of their parents and teachers [...]. Yet there has been no-one here or in the courts below to speak on behalf of the children. [...] The battle has been fought on ground selected by the adults.⁵

1. Introduction

1.1. The Child's Right to be Heard under Article 12 of the Convention on the Rights of the Child and the Question of Legal Representation

With the adoption of the United Nations Convention on the Rights of the Child (UNCRC)⁶ in 1989, children were specifically recognized in international law as holders of a broad range of civil, political, economic, social and cultural rights. As the most widely ratified human rights treaty in history,⁷ it represents formal global recognition of the need to take children's rights seriously. While some of the rights accorded to children in the UNCRC overlap with those applicable to all human beings under other international and regional human rights instruments, a number are specific to children. Key among the unique entitlements under the treaty is the right of the child to be heard:

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12 is frequently cited as the crowning achievement of the UNCRC, elevating children from objects of charity to independent rights-holders with active entitlements to participate in all decisions affecting their lives, including those arising in judicial processes.⁸ As one of the four general principles of the UNCRC, article 12 is of "fundamental importance", integral to both the interpretation of all other

⁵ Baroness Hale of Richmond, *R. (Williamson) v. Secretary of State for Education and Employment* [2005] 2 UKHL 15, at para. 71.

⁶ UN General Assembly, Convention on the Rights of the Child, UN Doc. A/RES/44/25 (1989), [hereinafter UNCRC].

⁷ The U.S. remains the only non-ratifying country, although it is a signatory.

⁸ J. Tobin (Ed.), *The UN Convention on the Rights of the Child: A Commentary* (2019), at 398 [hereinafter Tobin 2019]; M. Freeman, *The Future of Children's Rights*, 14 *Children & Society* 277 (2000), at 288 [hereinafter Freeman, 2000]; M. Freeman, *The Sociology of Childhood and Children's Rights*, 6 *International Journal of Children's Rights* 433 (1998), at 438; A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (2018), at 11 [hereinafter Daly, Autonomy]; A. Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (2013), at 5 [hereinafter Parkes].

rights and the implementation of the Convention as a whole.⁹ Article 3(1) which requires the best interests of the child to be a primary consideration in all actions concerning children is one of the other general principles,¹⁰ aimed at ensuring the full and effective enjoyment of all rights in the Convention, as well as the holistic development of the child.¹¹ Articles 12 and 3 are seen to be “inextricabl[y] link[ed]”, and article 3 cannot be correctly applied if the requirements of article 12 are not met.¹² Similarly, article 3 reinforces article 12 by facilitating the essential role of children in all decisions affecting their lives.¹³ Significantly, interpretation of the best interests of the child “cannot trump or override any of the other individual rights guaranteed by other articles in the Convention”.¹⁴

As the 30th anniversary of the adoption of the UNCRC approaches, this thesis will examine whether legal representation in family court processes where the child’s best interests are being determined, can be said to be a critical aspect of the realization of the seminal right to be heard. Article 12 itself provides little guidance on the manner of hearing the child who chooses to exercise this right through a representative, but clarification is provided by the Committee on the Rights of the Child (CRC Committee) in its General Comment on the best interests of the child, which identifies legal representation as a necessary procedural safeguard when the child’s best interests are being determined by courts when there is a potential conflict between the parties in the decision.¹⁵

Despite this clear direction and growing recognition that access to justice and child-friendly justice encompass legal representation for children in proceedings which affect them, there is inconsistency across jurisdictions regarding the provision of legal representation for children.¹⁶ General consensus exists that children’s views are a relevant consideration in the best interests analysis but there remain different perspectives on how they should be placed before the courts. Some feel that children should be “shielded” from court processes as they may be harmed by them, while others believe that children’s views are best canvassed directly or through non-legal representatives and this is, in fact, reflected in the legal systems of various jurisdictions.¹⁷ Even where legal representation is afforded to children, there are different standpoints on the role the child’s lawyer should play.¹⁸

1.3. Central Issues and Outline

Having regard to the different perspectives on the central question of whether legal representation is a necessary element of the child’s “right to be heard” under article 12 of the UNCRC in proceedings where her best interests are being assessed, the following related questions and issues will be examined:

⁹ R. Hodgkin and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF), 3rd ed. (2007), at 149 [hereinafter *Implementation Handbook*]; Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC12 (2009), at para. 2 [hereinafter *GC12*].

¹⁰ The remaining two being articles 2 (non-discrimination) and 6 (life and maximum survival and development).

¹¹ Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc. CRC/C/GC/14 (2013), at para. 4 [hereinafter *GC14*].

¹² *Ibid.*, at para. 43.

¹³ *Ibid.*

¹⁴ *Implementation Handbook*, at 35.

¹⁵ *GC14*, at para. 96.

¹⁶ This will be discussed further in chapter 3.

¹⁷ This will be discussed further in chapter 4.

¹⁸ This will be discussed further in chapter 4.

- 1) In the next chapter, the significance of **the child's participation in justice processes** will be explored, beginning with the evolution of children as rights-holders under the UNCRC, and progressing to consider the implications of children's participation in family law proceedings for their short- and long-term interests and the contribution towards better, more sustainable outcomes.
- 2) Chapter 3 will then survey **the extent to which international and regional human rights standards support the child's right to be heard and to have legal representation** in justice processes. An overview of the status of legal representation for children in national legal systems will then follow.
- 3) A **critical analysis of the various methods by which children's views may be placed before the courts**, beginning with non-legal methods (through parents, assessments, "views of the child reports", directly through judicial interviews), will be undertaken in chapter 4. The chapter will then proceed to explore the most common models of adult-directed legal representation, including the appointment of a guardian *ad litem* (GAL) and an *amicus curiae*, as well as a "modified" model of child representation which combines aspects of the GAL and the traditional instructional advocate model. The extent to which these various methods fulfill the child's right to meaningfully participate in best interests proceedings will be examined. The chapter will culminate in a discussion of the child advocate model of legal representation, arriving at the conclusion that the provision of this type of advocacy centered on the child's views is most consistent with the child's right to be heard, and to have her views given due weight, when the courtroom is the forum. Research which examines children's perspectives on participation will support this analysis, as will a survey of selected international jurisprudence which considers the issue of independent legal representation for children and the role the child's representative should play to give effect to the child's right to be heard. Chapter 4 will conclude with a discussion of the fundamental interests at stake for children in many family law processes and the consequent attenuated need for procedural due process guarantees, exemplified by the right to independent legal representation.
- 4) In chapter 5, this contribution closes with a synthesis of the analysis that has led to the conclusion that **legal representation for children in family law proceedings where their best interests are being determined is a critical aspect of the child's right to be heard**, achieving not only effective realization of article 12 of the UNCRC, but protection of the child's fundamental interests and rights to due process. Possible directions for further research are also considered and some recommendations are provided to facilitate the implementation of the child's right to empowered legal participation in family justice processes

1.4. Methodology and Scope

As indicated, the central question will be examined through the framework of international and regional human rights standards, concentrating on the UNCRC and related instruments, as well as relevant legal and social science research. The analysis will be punctuated with jurisprudence and legislative examples from various jurisdictions, focusing primarily on Canada, given the author's familiarity and experience with the Canadian legal system, and specifically, as a senior lawyer for children with the Office of the Children's Lawyer in Ontario. However, attention will also be given to legal representation of children in other countries, for example, the Netherlands and the U.K., with more limited references to the practices of other countries as well, such as those in South Africa. While the main focus will be on common law adversarial justice systems given the particular disadvantages children (and to some extent, all parties) face in those systems without legal representation, the

challenges experienced by children in having their voices “heard” in countries with inquisitorial legal systems will be referenced as well, primarily through the practice in the Netherlands. This contribution does not seek to provide a comprehensive, comparative examination of the legal systems and practices of the identified countries. Rather, it centers on a conceptual analysis of the relevant child rights considerations relating to the legal representation of children, illustrated with country-specific examples.

The focus is on family law proceedings, with reference to private family law matters, including those arising under the 1980 Convention on the Civil Aspects of International Child Abduction (Hague Convention)¹⁹ and child protection proceedings. The scope of this thesis does not extend to children in immigration and refugee law proceedings or victims or witnesses in civil or criminal justice systems, although in many ways, the principles relating to the provision of legal assistance are relevant to these children as well.

2. Child Participation in Judicial Processes

*We are not the sources of problems; we are the resources that are needed to solve them. We are not expenses; we are investments. We are not just young people; we are people and citizens of this world.*²⁰

2.1. Children as Rights-Holders

Prior to the advent of the UNCRC, children were largely seen as objects of concern rather than independent rights-holders capable of participating in decision-making in all aspects of their lives. The predecessors to the Convention, the 1924 Declaration of the Rights of the Child and 1959 Declaration of the Rights of the Child, reflected a decidedly welfare-oriented agenda, focusing on the protection rather than empowerment of children.²¹ After ten years of negotiation and consensus-building, the UNCRC was adopted by the UN General Assembly in 1989,²² ushering in participation rights for children,²³ with article 12 demanding a reconceptualization of children from “passive objects in need of adult protection to active participants in decision-making processes affecting them at all levels of society”.²⁴

Although the word “participation” does not appear in article 12, the CRC Committee has clarified that it includes the processes by which the views expressed by children add relevant perspectives and experience that should be considered in decision-making, policymaking and preparation of laws and/or measures, as well as their evaluation.²⁵ The Committee also emphasizes that participation is not a “momentary act” but the starting point for ongoing exchange between children and adults in regard to

¹⁹ Hague Conference on Private International Law, Hague Convention on the Civil Aspects of International Child Abduction, 25 October 1980, Hague XXVIII.

²⁰ Excerpt from The Children’s Statement Address at the opening of the UN General Assembly’s Special Session on Children, 8 May 2002, delivered by Ms. Gabriela Azurduy Arrieta (Bolivia) and Ms. Audrey Cheynut (Monaco), delegates representing the Children’s Forum, UNICEF, *A World Fit for Children: Millennium Development Goals Special Session on Children Documents the Convention on the Rights of the Child* (2002), (https://www.unicef.org/specialsession/docs_new/documents/wffc-en.pdf), last visited (23-06-2019).

²¹ Tobin 2019, at 3-4.

²² *Ibid*, at 5-6; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Legislative History of the Convention on the Rights of the Child* (2007).

²³ The participation rights under the UNCRC include articles 12, 13 (freedom of expression), 14 (freedom of thought, conscience and religion), 15 (freedom of association) and 17 (access to information).

²⁴ Tobin 2019, at 398.

²⁵ GC12, at paras. 12-13.

measures taken in all relevant contexts of their lives.²⁶ This is particularly germane to the child's right to be heard in court processes, which may take place over periods of months, or even years. Landsdown elaborates on the concept of participation under article 12 as more than a one-off event, describing it as:

an ongoing process of children's expression and active involvement in decision-making at different levels in matters that concern them. It requires information-sharing and dialogue between children and adults [...] and requires that full consideration of their views be given, taking into account the child's age and maturity.²⁷

Like the need for an ongoing dialogue with the child, the provision of information is critical to effective participation in decision-making. The child must be informed of all options, their viability and potential consequences, as well as the conditions under which she is being asked to share her views and how they will be used.²⁸ The Committee emphasizes that "[t]his right to information is essential, because it is the precondition of the child's clarified decisions".²⁹

2.2. Better Outcomes

There is significant research supporting the fact that meaningful participation by children in judicial decision-making not only results in a better process experience for them but that it leads to more sustainable outcomes, with fewer appeals, greater compliance with court orders, and less trauma.³⁰ With regard to the latter, in the context of international child abductions, there are numerous examples of the high level of distress experienced by children subject to forcible return orders.³¹

As noted by the Yukon Supreme Court in *B.J.G. v. D.L.G.*, a custody decision which was positively cited by the CRC Committee in its 2012 Concluding Observations to Canada:³²

Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to better decisions for children that have a greater chance of working successfully. They have important information to offer about such things as schedules, including time spent with each parent, that work for them, extra-curricular activities

²⁶ *Ibid* at 13.

²⁷ G. Lansdown, *Every Child's Right to Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12 (UNICEF/Save the Children) (2011)*, at 3 [hereinafter Landsdown 2011].

²⁸ For a "legal" adaptation of Lundy's model of child participation, see Appendix "A".

²⁹ GC12, at para. 25.

³⁰ J. Cashmore, *Promoting the participation of children and young people in care*, 26 *Child Abuse and Neglect* 837 (2002); R. Birnbaum and N. Bala, *The Child's Perspective on Legal Representation: Young Adults Report on Their Experiences with Child Lawyers*, 25 *Canadian Journal of Family Law* 11 (2009), at 24 [hereinafter Birnbaum & Bala, 2009]; K. Hollingsworth and H. Stalford, *Judging Parental Abduction: What Does it Mean to Adopt a Children's Rights-Based Approach?*, in G. Douglas, M. Murch & V. Stephens (Eds.), *International and National Perspectives on Child and Family Law: Essays in Honour of Nigel Lowe* (2018), at 135.

³¹ *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, see Factum of the Appellant dated 14-08-2017, at para. 30, (https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37250/FM010_Appellant_Office-of-the-Children's-Lawyer.pdf), last visited (23-06-2019); *Re M. (A Minor) (Child Abduction)* [1994] 1 FLR 390 (EWCA), at 2; *Re M. (Republic of Ireland) (Child's Objections) (Joinder of Children as Parties to Appeal)* [2015] EWCA Civ. 26, at para.124; *F.K. v. M.L. (Child's Objections)* [2016] EWHC 517 (Fam).

³² Committee on the Rights of the Child, *Concluding Observations: Canada*, UN Doc. CRC/C/CAN/CO/3-4 (2012), at para. 36.

and lessons, vacations, schools, and exchanges between their two homes and how these work best.³³

Canada's Supreme Court has also recognized the significance of child participation in reaching more positive outcomes. In *A.C. v. Manitoba (Director of Child and Family Services)*, a case which considered the constitutionality of the provisions of a provincial child welfare statute regarding a child's right to make medical treatment decisions, the Court stated:

With our evolving understanding has come the recognition that the quality of decision making about a child is enhanced by input from that child. The extent to which that input affects the "best interests" assessment is as variable as the child's circumstances, but one thing that can be said with certainty is that the input becomes increasingly determinative as the child matures.³⁴

2.3. Important for Children's Short- and Long-Term Interests

As has been discussed, the philosophical underpinning of the UNCRC reflects a construction of childhood that recognizes children as competent social actors whose perspectives and opinions are worthy of consideration and who are not only able to operate within adult constructs but are capable of influencing them as well. There is an abundance of research that suggests that participation is not only a right but that it can improve children's skills and self-esteem, inform decision-making and consequently, promote children's safety and short- and long-term well-being.³⁵ Despite the legal obligations created by the UNCRC and a broadening consensus recognizing children as competent actors in their own lives, there remains an implementation gap, with concerns from some commentators, including judges, that participation will unduly burden children and harm them by placing them in the middle of adult conflicts.³⁶

The potential harm to children from the pressure of participation, however, must be balanced against the harm of being denied autonomy.³⁷ Citing extensive social science research, the harm of exclusion was recognized by the Yukon Supreme Court in the previously-referenced decision, *B.J.G. v. D.L.G.*:

[23] Excluding children and adolescents may have immediate adverse effects such as: feeling ignored, isolated and lonely; experiencing anxiety and fear; being sad, depressed, and withdrawn; being confused; being angry at being left out; and having difficulty coping with stress.

³³ *B.J.G. v. D.L.G.*, 2010 YKSC 44, at para. 21.

³⁴ *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, at paras. 92-93.

³⁵ R. Birnbaum and M. Saini, *A Qualitative Synthesis of Children's Participation in Custody Disputes*, 22(4) *Research on Social Work Practice* 400 (2012) [hereinafter Birnbaum & Saini, *Participation Synthesis*]; R. Birnbaum and M. Saini, *A scoping review of qualitative studies about children experiencing parental separation*, 20(2) *Childhood* 260 (2012) [hereinafter Birnbaum & Saini, *Scoping Review*]; S. Holt, *A voice or a choice? Children's views on participating in decisions about post-separation contact with domestically abusive fathers*, 40 *Journal of Social Welfare and Family Law* 459 (2018), at 460 [hereinafter Holt]; J. Cashmore and P. Parkinson, *Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce*, 46 *Family Court Review* 91 (2008).

³⁶ *Re L.C.* [2014] UKSC 1, at para 48. See also (highlighting the sources of the debate): Birnbaum & Saini, *Participation Synthesis*, at 407; Birnbaum & Bala 2009, at 24-25; Holt, at 460; Daly, *Autonomy*, at 35-36; Daly & Rap, at 12; M. Henaghan, *What Does a Child's Right to Be Heard in Legal Proceedings Really Mean? ABA Standards Do No Go Far Enough*, 42 *Family Law Quarterly* 117 (2008), at 118 [hereinafter Henaghan, 2008].

³⁷ Daly, *Autonomy*, at 35-36; Daly & Rap, at 16; K. Marshall, *Children's Rights in the Balance: The Participation-Protection Debate* (1997), at 103 and 104.

[24] Further, longer-term adverse effects of not consulting children and adolescents may include: loss of closeness in parent-child relationships; continuing resentment if living arrangements don't meet their needs in time or structure; less satisfaction with parenting plans, less compliance, more "voting with their feet"; and longing for more or less time with the non-resident parent.³⁸

Research also suggests that participation can, in fact, be protective, a factor that is particularly significant for children who experience domestic or other forms of violence.³⁹ This is recognized by the CRC Committee which emphasizes that "child participation promotes protection" and that children must be provided with the space to freely express their views and have them given due weight in all aspects of prevention, reporting and monitoring violence against them.⁴⁰

2.4. Concluding Remarks

A rights-based approach to children's participation does not deny that children have vulnerabilities due to their age and dependency status and acknowledges that measures may be needed to protect them from threats to their rights and well-being.⁴¹ Undue pressure or manipulation by parents to express a particular view is an oft-cited concern in the context of family and child protection proceedings, for example, and although not a central focus of this thesis, this issue is discussed further in Appendix "C" on the Role of the Child Advocate. However, a rights-based approach does not define children only through the lens of their vulnerabilities but also recognizes their evolving capacities, as required by article 5 of the UNCRC, and demands that adults, both parents and justice system professionals, support children to develop and exercise their decision-making capacities.⁴² As this chapter has demonstrated, not only is this important for children's current and future well-being, it leads to more positive and sustainable outcomes in court processes.

³⁸ *B.J.G. v. D.L.G.*, 2010 YKSC 44, at paras. 18, 23-24. See also, N. Taylor, *What do we know about involving children and young people in family law decision making? A Research update*, 20 Australian Journal of Family Law 154 (2006), at 164; and Daly, *Autonomy*, at pp. 35-36, citing J. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 Virginia Journal of Social Policy and the Law 129 (2002), at 148, and G. Melton, *Parents and Children: Legal Reform to Facilitate Children's Participation*, 54 American Psychologist 935 (1999), at 938.

³⁹ D. Martinson and M. Jackson, *Family Violence and Parenting Assessments: Law, Skills and Social Context*, Simon Fraser University FREDA Centre for Research on Violence Against Women and Children (2019), at 20-22, (<http://www.fredacentre.com/wp-content/uploads/2010/09/D.-Martinson-and-M.-Jackson-Report-Family-Violence-and-Parenting-Assessments-Law-Skills-and-Social-Context.pdf>), last visited on (24-06-2019) [hereinafter Martinson & Jackson]; J. Cashmore and P. Parkinson, *Children's and Parents' Perceptions on Children's Participation in Decision Making after Parental Separation and Divorce*, 46 Family Court Review 91 (2008); J. Cossar, M. Brandon and P. Jordan, *You've got to trust her and she's got to trust you: Children's views on participation in the child protection system*, 21 Child & Family Social Work 103 (2016), at 104; Holt, at 460; D. Jones, *Communicating with Children*, in M. Thorpe and J. Cadbury (Eds.), *Hearing the Children* (2004); D. Martinson and C. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 31 Canadian Journal of Family Law 151 (2018), at 168 [hereinafter Martinson & Tempesta].

⁴⁰ GC12, at para. 119; Committee on the Rights of the Child, *General Comment No. 13 (2011), The right of the child to freedom from all forms of violence*, UN Doc. CRC/C/GC/13 (2011), at para. 63.

⁴¹ J. Tobin, *Understanding Children's Rights: A Vision beyond Vulnerability*, 84 Nordic Journal of International Law 155 (2015), at 175-176.

⁴² *Ibid*, at 175-176 and 177.

3. The Child's Right to be Heard and the Case for Legal Representation

*Rights are also an important advocacy tool, a weapon which can be employed in the battle to secure recognition. Giving people rights without access to those who can present those rights, and expertly, without the right to representation, is thus of little value.*⁴³

3.1. In International Instruments

3.1.1. UNCRC and General Comments

Although the UNCRC does not make explicit reference to a right to legal representation or assistance for children in civil court processes (i.e. not those in conflict with the law), support for such representation may be found in other international and regional standards, as well as the General Comments of the CRC Committee. A purposive reading of the Convention⁴⁴ also supports such an interpretation, starting from the preamble which recognizes that children, by reason of their physical and mental immaturity, require special safeguards and care, including *appropriate legal protection*. The preamble also expresses the conviction that the child (as a member of a family) should be provided with *necessary protection and assistance* to be able to fully assume her responsibilities in the community, underlying the principle that children require appropriate support commensurate with their evolving capacities until such time as they are able to exercise their rights independently.⁴⁵

In addition to article 12, a number of other articles in the UNCRC contemplate children's participation in decision-making that may take place in court processes. Article 9(2) indirectly references the child's right to be heard as an "interested party" in proceedings where her best interests may require her to be separated from her parents against her will, i.e. in cases of abuse, neglect or parental separation.⁴⁶ Article 21(a) refers to "the informed consent" of the "persons concerned" in adoption proceedings, suggesting the need for representation of the child in this context as well.⁴⁷ Article 25 speaks to the requirement for periodic reviews of alternative placement and treatment decisions. To the extent that these decisions are made in judicial or administrative proceedings, the child may require legal representation to ensure her views are heard and interests protected. Children deprived of liberty and those in conflict with the law are afforded greater legal protections under articles 37(d) and 40(2) of the UNCRC,⁴⁸ as is generally the case for adults in criminal law matters, despite the fact that liberty and security of the person interests may be engaged in civil court processes as well, for example, in the

⁴³ M. Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 International Journal of Children's Rights 5 (2007), at 8 [hereinafter Freeman, 2007].

⁴⁴ Article 31(1), United Nations, Vienna Convention on the Law of Treaties, Treaty Series, vol. 1155, p. 331 (1969) [hereinafter VCLT].

⁴⁵ Articles 5 and 14, UNCRC.

⁴⁶ Landsdown, at 66. According to Sandberg, whether the child was meant to be included in the term "all interested parties" is not clear from the *travaux préparatoires*, but this may be because it was not considered that children could participate in court proceedings at that time. She acknowledges that children's right to participation is further developed today than in the 1980s. K. Sandberg, *Alternative care and children's rights*, in U. Kilkelly, and T. Liefaard (Eds.), *International Human Rights of Children* (2018), at 14-15.

⁴⁷ In Ontario, an order for the adoption of a child who is 7 or older shall not be made without her written consent. The consent cannot be given until the child has had independent legal advice (and an opportunity to obtain counselling). Ss. 180(6) and (7), *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1.

⁴⁸ Although only article 37(d) makes the provision of *legal* assistance mandatory. Articles 40(2)(ii) and (iii) contemplate the possibility of legal *or other* appropriate assistance.

context of children removed from their parents and placed in alternative care, and police enforcement of contact orders or return orders in family law matters. This will be discussed further in section 4.3.3.

The General Comments of the CRC Committee provide more explicit support for the implementation of the procedural safeguards necessary for children to “access justice”. General Comment No. 5 on the general measures of implementation states that for “rights to have meaning, effective remedies must be available to redress violations”.⁴⁹ The Committee makes specific mention of children’s difficulties in pursuing remedies for breaches of their rights in light of their special and dependent status, thus requiring States to give particular attention to ensuring that “effective, child-sensitive procedures” are available to children and their representatives, including:

the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures and to the courts *with necessary legal and other assistance*.⁵⁰ (emphasis added)

This is consistent with General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration, which identifies the best interests of the child as a threefold concept encompassing a substantive right, an interpretive principle and a rule of procedure.⁵¹ With respect to the latter, the Committee outlines eight procedural safeguards that must be followed to ensure the correct implementation of the best interests principle in decision-making,⁵² including the need for “all appropriate legal representation when his or best interests are to be formally assessed and determined by courts and equivalent bodies.”⁵³ The Committee adds that, in particular, the child “should be provided with a legal representative, *in addition to* a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision”.⁵⁴ (emphasis added)

General Comment No. 12 on the right of the child to be heard suggests that the “representative” mentioned in article 12(2) through whom the child may be heard in a judicial proceeding can be “the parent(s), a lawyer or another person (*inter alia*, a social worker)”. The Committee goes on to stress, however, “that in many cases (civil, penal or administrative), there are risks of a conflict of interest between a child and their most obvious representative, parent(s)”.⁵⁵

By definition, this is almost always the case in family law proceedings. Parents are in court because they cannot agree on what is best for the child.⁵⁶ Similarly, in child protection matters, a case will come to court because the State feels it is necessary to seek an order revoking or limiting parental authority in order to protect the child. In each of these contexts, the child may have views which do not coincide in whole, or in part, with one or both parties, thus necessitating legal representation for the child to ensure that her views *and* legal interests are independently advanced in the court process. General Comment No. 12 also states that where children are capable of forming their own views “in a reasonable and independent manner”, decision-makers must consider those views “as a significant

⁴⁹ Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5 (2003), at para. 24 [hereinafter GC5].

⁵⁰ *Ibid.*

⁵¹ GC14, at para. 6.

⁵² *Ibid.*, at paras. 85-99.

⁵³ *Ibid.*, at para. 96.

⁵⁴ *Ibid.*

⁵⁵ GC12, at para. 36.

⁵⁶ See *C.M.M. v. D.G.C.*, 2015 ONSC 2447 (SCJ – Divisional Court), at para. 24.

factor in the settlement of the issue”.⁵⁷ Children also have the right to information about the impact their views have on the outcome.⁵⁸ Legal representation can facilitate each of the processes, including through access to an appeals procedure.

In addition to the General Comments, in the recommendations arising from the CRC Committee’s 2006 Day of General Discussion on the Right of the Child to be Heard, the Committee specifically requested that States Parties “establish specialized legal aid support systems in order to provide children involved in administrative and judicial proceedings with qualified support and assistance”.⁵⁹

Some commentators have expressed concern that the qualification in article 12(2) with respect to hearing the child “in a manner consistent with the procedural rules of international law” gives States Parties the scope to regulate the manner of representation in a way that would undermine the child’s right to participation.⁶⁰ The Committee makes clear in General Comment No. 12 that article 12(2) should not be interpreted in this way.⁶¹ This would be contrary to article 4.⁶² Instead, the Committee indicates that States are expected to “comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one’s own files”.⁶³ It is suggested that the right to legal representation is also encompassed by the right to a fair hearing in proceedings where the child’s interests are directly impacted. Fair trial rights are also supported by various other international and regional instruments, which will be addressed in section 3.1.2.

It is significant to note that the Committee has also emphasized that implementation of the general principles of the Convention, including article 12, cannot be dependent on resources.⁶⁴ The limitation on the implementation of economic, social and cultural rights “to the maximum extent of available resources” (i.e. progressive implementation) in article 4 does not apply to civil and political rights, including the child’s rights under article 12. It is therefore posited that the failure to adequately fund a legal aid system that allows children to consistently have access to legal representation in matters where their best interests are being assessed runs contrary not only to the interpretive principles espoused by the Committee in its General Comments, but to article 4 of the Convention.⁶⁵ Given the liberty and security of the person interests implicated in many family law and child protection proceedings, this is also contrary to the principles of fundamental justice, a concept that will be discussed further in section 4.3.3.

3.1.2. Other International Standards

“For rights to have meaning, effective remedies must be available to redress violations.”⁶⁶ This is “implicit” in the UNCRC and consistently referred to in other major international human rights treaties.⁶⁷ A number of the rights recognized in the International Bill of Rights⁶⁸ are not specifically

⁵⁷ GC12, at para. 44.

⁵⁸ *Ibid*, at para. 41.

⁵⁹ Committee on the Rights of the Child, Day of General Discussion on the Right of the Child to be Heard (2006).

⁶⁰ Freeman, 2000, at 288; Implementation Handbook, at 157-158.

⁶¹ GC12, at para. 38.

⁶² Implementation Handbook, at 158.

⁶³ GC12, at para. 38.

⁶⁴ Article 4, UNCRC; GC5, at para. 6; Implementation Handbook, at 160.

⁶⁵ It should also be noted that no country has made an express reservation to article 12, hence it must be implemented in all ratifying States, regardless of the legal culture or tradition.

⁶⁶ GC5, at para. 24.

⁶⁷ *Ibid*.

⁶⁸ The Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217 A (III); International Covenant on Civil and Political Rights, UN General Assembly, 16 December 1966, United Nations,

reiterated in the UNCRC, including the right to legal personality and the right of access to the courts or the right to a remedy for the protection of one's rights.⁶⁹ However, children are not only encompassed by the human rights guarantees afforded by these treaties, but the rules of treaty interpretation make it clear that it is appropriate to consider any relevant rules of international law when interpreting a treaty.⁷⁰ Thus, the interpretation of the UNCRC may have regard to the provisions of these other treaties. Also, article 41 of the UNCRC ensures that children may avail themselves of the provisions most conducive to the realization of their rights in any national or international law in force for the country in question.⁷¹

Both article 6 of the Universal Declaration of Human Rights (UDHR) and article 16 of the International Covenant on Civil and Political Rights (ICCPR) recognize the right to "legal personality":

Everyone shall have the right to recognition everywhere as a person before the law.

Articles 7, 8 and 10 of the UDHR and articles 2.3, 14 and 26 of the ICCPR also contain a right of access to the courts or to a remedy for the protection of one's rights. Equality before the law is also a common protection in national constitutions.⁷² With respect to articles 26 and 14.1 of the ICCPR, they enshrine the right to equality before the law without any discrimination, including the right to a fair and public hearing by a competent, independent and impartial tribunal.

Together, these rights confer capacity to exercise and defend one's rights in legal proceedings. However, all legal systems recognize that certain categories of persons lack capacity to exercise their rights *personally*.⁷³ (emphasis added) Children, by virtue of their age and dependency, are often precluded from initiating legal actions in their own names without the assistance of a litigation guardian (sometimes referred to as a guardian *ad litem* or next friend). As discussed in section 3.1.1, narrower participation rights than those afforded under the UDHR and ICCPR are conferred to children under various provisions in the UNCRC, including articles 12(2), 9(1), 21, 25, 37(d) and 40. As noted, however, as persons, children also enjoy the benefits conferred by the legally-binding ICCPR. This offers robust potential for children to access remedies for rights violations separate and apart from the mechanisms in place under the UNCRC and its optional protocols. This is significant given the relatively low rate of ratification of the Optional Protocol on a communications procedure.

General Comment No. 32 of the Human Rights Committee on article 14 of the ICCPR confirms that the guarantee of equality before the courts applies regardless of the nature of the proceedings. Similarly, the right to a fair trial includes rights and obligations determined in a "suit of law", in addition

Treaty Series, vol. 999, p. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, UN General Assembly, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3 [hereinafter ICESCR].

⁶⁹ D. O'Donnell, *The rights of children to be heard: Children's rights to have their views taken into account and to participate in legal and administrative proceedings*, UNICEF Innocenti Research Centre (2009), at 1, (<https://www.unicef-irc.org/publications/553-the-right-of-children-to-be-heard-childrens-rights-to-have-their-views-taken-into.html>), last visited (10-12-2018) [hereinafter O'Donnell].

⁷⁰ Article 31(3)(c), VCLT.

⁷¹ The ICCPR and ICESCR have been widely ratified, with 117 and 119 ratifications, respectively. The UNCRC has been ratified by 116 countries.

⁷² See, for example, article 15 of the *Canadian Charter of Rights and Freedoms* and section 9 of the South African Bill of Rights.

⁷³ O'Donnell, at 2.

to criminal proceedings.⁷⁴ The Committee specifically recognizes that “the availability of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way”.⁷⁵ While article 14 explicitly addresses the guarantee of legal assistance in criminal proceedings, the Committee also encourages States to provide free legal aid in other cases for those who do not have the means to pay for legal representation.⁷⁶ The Committee further recognizes the principle of “equality of arms”, suggesting that the same procedural rights should be provided to all parties unless distinctions are grounded in law and can be justified on objective and reasonable grounds, “not entailing actual disadvantage or other unfairness” to the affected party. The Committee makes clear that this also applies in civil proceedings and requires, *inter alia*, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.⁷⁷

The Human Rights Committee has also confirmed that children, as “individuals”, benefit from all the civil rights enunciated in the ICCPR⁷⁸ and has pointed out the importance of ensuring accessible and effective remedies, adapted to take into account the special vulnerabilities of children.⁷⁹

In 2013, the UN High Commissioner for Human Rights issued a report devoted to the issue of access to justice for children, defining it as the ability to obtain a just and timely remedy for violations of rights contained in national and international norms and standards, including the UNCRC.⁸⁰ It applies to all civil, administrative and criminal areas of law, including the care, custody or protection of children.⁸¹

The concept of access to justice for children requires the *legal empowerment* of all children. They should be enabled to access relevant information and effective remedies to claim their rights, including through *legal* and other services [...]⁸² (emphasis added)

Like the Human Rights Committee, the High Commissioner further confirms that all the fair trial guarantees in the ICCPR apply equally to children and include prompt access to legal assistance.⁸³ The Report identifies various barriers to access to justice for children, including, *inter alia*, frequent conflicts between children and their most obvious representatives, parents; the costs of proceedings; and an inability to travel to courts.⁸⁴

Since children are typically at a disadvantage when engaging with the legal system, they have a particularly “acute” need for legal assistance.⁸⁵ Without such assistance, children will largely be unable to access complex legal systems that are generally designed for adults.⁸⁶ The High Commissioner identifies access to legal assistance, even in non-criminal matters, as “essential” for

⁷⁴ Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (2007), at para. 3.

⁷⁵ *Ibid*, at para. 10.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, at para. 13.

⁷⁸ Human Rights Committee, *General Comment No. 17 on article 24 of the Covenant* (1989), at para. 2.

⁷⁹ Human Rights Committee, *General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 15.

⁸⁰ Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Access to justice for children, UN Doc. A/HRC/25/35 (2013), at para. 3 [hereinafter OHCHR Access to Justice Report].

⁸¹ *Ibid*, at para. 4.

⁸² *Ibid*, at para. 5.

⁸³ *Ibid*, at para. 12.

⁸⁴ *Ibid*, at para. 15.

⁸⁵ *Ibid*, at para. 58.

⁸⁶ *Ibid*, at para. 40.

ensuring that children are able to take action to protect their rights and recommends that States provide such assistance to children free of charge in all matters affecting them.⁸⁷

The UN Basic Principles on the Role of Lawyers similarly establish that all persons should have effective and equal access to lawyers, and call on governments to “ensure the provision of sufficient funding and other resources for legal services [...] to [...] disadvantaged persons” to enable them to assert their rights where necessary and call upon the assistance of lawyers.⁸⁸

In March 2014, the Human Rights Council issued a resolution on the “Rights of the child: access to justice for children”.⁸⁹ The Council identifies a number of barriers to children’s access to justice and makes several strong recommendations regarding due process guarantees, including the child’s right to their *own lawyer* in their *own* name in proceedings where there is a potential conflict between the child and a parent.⁹⁰ Two of the key recommendations are cited below:

3. *Recalls* that children are entitled to the same legal guarantees and protection as are accorded to adults, including all fair trial guarantees, while enjoying at the same time the right to special protection because of their status as children;

[...]

9. *Reaffirms* the need to respect all legal guarantees and safeguards at all stages of all justice processes concerning children, including due process, the right to privacy, the guarantee of legal aid and other appropriate assistance under the same or more lenient conditions as adults, and the right to challenge decisions with a higher judicial authority;⁹¹

In the context of alternative care decisions, the UN Guidelines for the Alternative Care of Children provide that legal safeguards, including, where appropriate, legal representation, should be provided on behalf of children in any legal proceedings.⁹² The child must be fully consulted at all stages of alternative care decision-making, with the provision of necessary information on which to base their opinions.⁹³

Access to justice has also been included in the 2030 Agenda for Sustainable Development (Sustainable Development Goals or SDGs).⁹⁴ Goal 16 targets “access to justice for all” which includes promotion of the rule of law and “responsive, inclusive, participatory and representative decision-making at all levels”.⁹⁵ In her 2013 Access to justice for children report, the UN High Commissioner for Human Rights reinforced State Parties’ responsibilities to ensure that access to justice for children is integrated in the development agenda and that children’s rights form an integral part of broader justice reforms and rule of law initiatives.⁹⁶

⁸⁷ *Ibid*, at para. 42.

⁸⁸ UN Basic Principles on the Role of Lawyers (1990), at paras. 3 and 4.

⁸⁹ Human Rights Council, Right of the child: access to justice, UN Doc. A/HRC/25/L.10 (2014).

⁹⁰ *Ibid*, at para. 11.

⁹¹ *Ibid*, at paras. 3 and 9.

⁹² UN General Assembly, Guidelines for the Alternative Care of Children, UN Doc. A/RES/64/142 (2010), at paras. 57 and 104(b) [hereinafter UN Guidelines].

⁹³ *Ibid*.

⁹⁴ UN General Assembly, Transforming our world: the 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (2015). See also T. Liefwaard, *Access to Justice for Children: Toward a Specific Research and Implementation Agenda*, 27 International Journal of Children’s Rights 1 (2019), at 3 [hereinafter Liefwaard 2019].

⁹⁵ *Ibid*, Preamble and Goal 16 (16.3 and 16.7).

⁹⁶ OHCHR Access to Justice Report, at para. 61.

As can be seen, the concept of access to justice for children has enjoyed increasing attention from international organizations in recent years. In addition to the UN-based institutions already mentioned, the International Association of Youth and Family Judges and Magistrates (IAYFJM) ratified Guidelines on Children in Contact with the Justice System in 2017.⁹⁷ Under the topic of “Guarantees of Fair Proceedings”, they highlight, *inter alia*, the child’s “right to legal or other appropriate assistance for the preparation and presentation of their case” as one of the most important procedural safeguards in not only criminal, but civil, child protection and administrative law procedures.⁹⁸ Further, they specifically recommend that children be provided with access to legal assistance and representation in their contacts with the justice system “whenever their interests are at stake”, not confining the provision of legal representation to situations where there may be a conflict between the child and their parents or another party.⁹⁹ In those situations, they take the position that children must have their own counsel and representation, in their own name, with the lawyer expressing and defending exclusively the views of the child.¹⁰⁰ They also expound on the role of the child’s lawyer, specifying that those who provide legal representation have the same obligations towards children as they would have towards adult clients while the *execution* of such obligations must be done in a manner that is consistent with the level of understanding and communication of the child.¹⁰¹ (emphasis added) These obligations include providing children with all necessary information; advising and guiding children throughout the proceedings; expressing the child’s views to the court; and being present throughout the proceedings. Non-legally, lawyers should be aware of and facilitate children’s needs for general and psychological support throughout the proceedings.¹⁰² The IAYJFM further recommends that children’s communications with their lawyers take in place in conditions that guarantee full privacy and confidentiality; that children be provided with free legal aid supported by the State; and that lawyers for children have special knowledge and training on children’s rights, as well as communicating with children at their level of understanding.¹⁰³ As is evident, the IAYJFM Guidelines were prepared with an awareness of the evolution of the legal status of children as rights-bearers, consistent with, and in some ways, notably enhancing, the procedural protections afforded by the UNCRC.

3.2. In Regional Instruments

In addition to the increasing recognition accorded to access to justice for children at the international level, regional bodies have made significant contributions by setting broad-ranging standards intended to address the various barriers children face in accessing justice processes, including legal

⁹⁷ International Association of Youth and Family Judges and Magistrates, *Guidelines on Children in Contact with the Justice System* (2017) [hereinafter IAYFJM Guidelines].

⁹⁸ *Ibid*, at 23.

⁹⁹ *Ibid*, at 27 and 29. In this way, they distinguish themselves from the European Parliament and the Council of the European Union, which indicate that a State may choose to make exceptions to the provision of legal representation in cases where such provision is not proportionate given the circumstances of the case, it being understood that the best interests of the child must be a primary consideration (*Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings*, paragraph 30 of the Preamble). The IAYFJM takes the position that no such exception should be made and that children should always be provided with legal assistance and representation whenever the interests of the child are at stake, which includes situations where courts or other bodies consider making decisions involving any deprivation of liberty, placement or separation of children from their family.

¹⁰⁰ *Ibid*, at 27 and 28.

¹⁰¹ *Ibid*, at 27.

¹⁰² *Ibid*.

¹⁰³ *Ibid*, at 27-29.

representation, and consequently, in vindicating violations of their rights. Some of these binding and non-binding instruments will be discussed in this section.

An early European instrument adopted following ratification of the UNCRC and which specifically references article 4 of the UNCRC, is the 1996 European Convention on the Exercise of Children's Rights (ECECR). The ECECR recognizes the ability of children to exercise their right to be heard either directly or indirectly through a representative, such as a lawyer, in judicial proceedings.¹⁰⁴ Article 5(b) states: "Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular [...] a separate representative [...] a lawyer". It also contemplates the possibility of the child exercising some or all the rights of a party.¹⁰⁵ Although the language could be stronger in the procedural protections it affords to facilitate the child's right to be heard, the ECECR has the advantage of being a treaty which is binding on ratifying member States.

In 2010, the Council of Europe adopted Guidelines on Child-Friendly Justice, a broad-ranging set of provisions designed to promote the rights of children, including their due process rights, in all justice processes, including civil, administrative and criminal proceedings.¹⁰⁶ Although they do not go as far as the IAYFJM Guidelines in stating that children should have the right to their own legal counsel in all judicial proceedings affecting their interests, they are quite expansive in scaffolding children's access to justice and fair trial guarantees through child-friendly adaptations. As a fundamental principle, the Guidelines articulate that the rule of law should apply fully to children as it does to adults, emphasizing that elements of due process such as the right to a fair trial, the right to legal advice, the right to access to courts and the right to appeal, should be guaranteed for children as they are for adults and should not be minimized or denied under the pretext of the child's best interests.¹⁰⁷ On the specific issue of legal representation, the Guidelines provide, *inter alia*, that:

37. Children should have the right to their own legal counsel and representation, in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties.

38. Children should have access to free legal aid, under the same or more lenient conditions as adults.

[...]

40. Children should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child.

[...]

42. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child.

¹⁰⁴ European Convention on the Exercise of Children's Rights, Strasbourg, ETS No. 160, 25 January 1996, at articles 2-6 and 9 [hereinafter ECECR].

¹⁰⁵ *Ibid*, at article 5(d).

¹⁰⁶ Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice and their explanatory memorandum*, 17 November 2010 [hereinafter Guidelines].

¹⁰⁷ Guidelines, at para. III(A)(2).

43. Adequate representation and the right to be represented independently from the parents should be guaranteed [...].¹⁰⁸

The European Convention on Human Rights and Fundamental Freedoms (ECHR) does not make explicit reference to the child's right to be heard in proceedings where her best interests are being assessed, but the European Court of Human Rights (ECtHR) has referred to the importance of these principles vis-à-vis article 8, which guarantees the right to respect for private and family life.¹⁰⁹ Also, articles 6 (the right to a fair trial) and 13 (the right to an effective remedy) may be relevant to a right to counsel argument when the child's family relationships are affected by court proceedings and she is unable to effectively participate.¹¹⁰

Article 24(1) of the Charter of Fundamental Rights of the European Union contains an adaptation of article 12 which provides that children may express their views freely and have those views taken into consideration on matters which concern them in accordance with their age and maturity.¹¹¹ It also contains the right to an effective remedy and to a fair trial, which includes the possibility for "everyone" to be "advised, defended and represented" and for legal aid to be made available insofar as it is necessary to ensure effective access to justice.¹¹² In *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, the Court of Justice of the European Union considered article 24(1), holding that where a court decides to hear a child, it must make "available to that child the legal procedures and conditions" to ensure to the child "a genuine and effective opportunity to express his or her views".¹¹³

In the Americas, the Inter-American Court of Human Rights in an Advisory Opinion on the juridical condition and human rights of the child, confirmed that children are true legal persons.¹¹⁴ According to Paulo Sérgio Pinheiro, former Rapporteur on the rights of the child of the Inter-American Commission, article 44 of the American Convention on Human Rights imposes no restrictions on the legal capacity of individuals; consequently, a child may file an individual petition even if she is not entitled to bring an action before the national courts.¹¹⁵ In its jurisprudence, the Inter-American Court has elaborated on the content of the concept of access to justice for children, including recognizing that children must have free and adequate legal counsel to represent their interests in all proceedings that could affect them.¹¹⁶

¹⁰⁸ *Ibid*, at Guidelines 37-42.

¹⁰⁹ Although typically this has occurred in the context of assessing whether the parent's participatory rights have been impermissibly affected. See, for example, *Sahin v. Germany* [GC], Application No. 30943/96 (8 July 2003), (ECtHR), at para. 47; and *Sommerfeld v. Germany* [GC], Application No. 31871/96 (8 July 2003) (ECtHR), at paras. 72-73.

¹¹⁰ In this regard, the ECtHR's decisions in the juvenile justice context may be instructive, in particular, *S.C. v. U.K.*, Application No. 6958/00, 15 June 2004 (ECtHR), at para. 29; *T. and V. v. U.K.* [GC], Application No. 24724/94, 16 December 1999 (ECtHR), at paras. 46 and 88.

¹¹¹ Article 24(1), European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02 [hereinafter EU Charter].

¹¹² Article 47, EU Charter.

¹¹³ *Joseba Andoni Aguirre Zarraga v. Simone Pelz*, Application No. C-491/10 PPU, 22 December 2010 (CJEU), at para. 66.

¹¹⁴ *Advisory Opinion on the juridical condition and human rights of the child*, Series A, No. 17, 28-08-2002 (IACtHR), at para. 28.

¹¹⁵ L. Graziani, *Access to Justice: A Fundamental Right for All Children*, in T. Liefwaard and J. Sloth-Nielsen (Eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016), at 122.

¹¹⁶ R. M. Ortiz, *Access to Justice in the Inter-American System: Standards and Challenges*, in S. Mahmoudi *et al.* (Eds.), *Child-Friendly Justice: A Quarter of a Century of the UN Convention on the Rights of the Child* (2015), at 337, citing *Case of Furlan and Family v. Argentina*, Series C. No. 246, Judgment of 31-08-2012 (IACtHR), at para. 199; and *Case of Atala Riffo and Daughters v. Chile*, Series C. No. 239, 24-02-2012 (IACtHR), at para. 199.

Article 4(2) of the African Charter on the Rights and Welfare of Children (ACRWC) affords the child the opportunity to be heard in all judicial proceedings affecting the child, either directly or through an impartial representative as a party to the proceedings. The differences in the terminology as compared to article 12 of the UNCRC are significant. First, there is an in-built recognition that conflicts in representation may negatively impact the child's right to be heard, hence the need for an impartial representative; and second, the child is automatically accorded party status, thus bestowing full participation rights relative to the adult participants in any judicial proceedings impacting the child's interests. In South Africa, article 4(2) of the ACRWC, in combination with article 12 of the UNCRC, has been broadly interpreted. With reference to both articles, the Supreme Court of Appeal of South Africa has stated that "[t]he child's right to have separate legal representation during legal proceedings [...] is thus clearly contemplated by those provisions".¹¹⁷

3.3. In National Legal Systems

In a 2016 global research project on access to justice for children, CRIN reported that a fifth of the world's children do not have the right to be heard in legal proceedings that concern them.¹¹⁸ Some 58 countries do not recognize children's right to be heard in their national laws, 84 incorporate this principle in limited circumstances, while just over 25% guarantee the right to be heard in all legal settings.¹¹⁹

States with a civil legal tradition tend to fare better, with France, Belgium and Luxembourg, for example, permitting any child capable of forming her own views to be heard directly by the court in any proceedings concerning the child.¹²⁰ Other States provide a more qualified right to be heard, limited by age or restricted to certain types of legal proceedings; for example, Israel guarantees children a right to be heard in family court proceedings, while in the Netherlands, a child under 12 has no right to be heard under the Dutch Code of Civil Procedure.¹²¹

Although most countries allow children to bring cases in their own name, they "overwhelmingly" enshrine rules that children lack independent standing and must approach the court through a representative.¹²² This may be the child's parent or a guardian *ad litem* (litigation guardian, curator *ad litem* or "next friend") who instructs a lawyer and makes decisions *on behalf of* the child on how to conduct the litigation.¹²³ In other words, most national legal systems do not assure to the child the right to participate directly as a party, even when the child is the subject of the court's decision-making, nor to instruct counsel directly, even where a likely conflict exists with one of the parties (i.e. a parent or the State), thus falling short on the implementation of many of the international and regional due process guarantees described in the preceding sections. If the rights of a party are conferred, which is typically related to the appointment of separate legal representation, it is at the discretion of the court. Moreover, despite the significant role of legal assistance and legal aid in making effective the child's

¹¹⁷ *Centre for Child Law v. Governing Body of Hoerskool Fochville*, (156/2015) [2015] ZASCA 155 (8 October 2015), at para. 20.

¹¹⁸ CRIN, *Rights Remedies & Representation: Global Report on Access to Justice for Children*, (2016), (https://archive.crin.org/sites/default/files/clin_a2j_global_report_final_1.pdf), last visited (03-02-2019), at 18 [hereinafter CRIN Global Report].

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Ibid.*; K. Van Der Zon, M. Bruning & M. Limbeek, *Can you hear me? Children's right to be heard in child protection proceedings in the Netherlands*, 7th World Congress on Family Law and Children's Rights (2017), at 3 [hereinafter Van Der Zon, *et al.*].

¹²² *Ibid.*, at 17.

¹²³ *Ibid.*

right to be heard in court processes, functioning state-funded legal aid systems are absent from 42 countries, such that 220 million children globally have no access to free legal aid for any type of court proceeding.¹²⁴ The remaining countries have some form of limited legal aid available, while in only 28 countries is legal aid available in all types of cases.¹²⁵ Legal aid for children is commonly limited to criminal law proceedings,¹²⁶ despite the “profound and often searing impact” that some family law decisions can have on children’s lives,¹²⁷ an issue that will be explored in greater detail in section 4.3.3.

Despite the limitations on hearing from children in many countries and in certain legal settings, it is more common for the views of the child to be incorporated as an element of best interests decision-making in private family law and child protection legislation.¹²⁸ With reference to the UNCRC, articles 3 and 12 are the rights that have been incorporated most frequently into domestic laws.¹²⁹ There remains, however, a significant degree of discretion as to whether and how a child will be heard in family court processes.¹³⁰ Research in five European countries in 2015 found that very few children were being heard in international child abduction cases, despite the existence of an EU regulation which requires this.¹³¹ In research conducted in 13 States in 2007, no child had the opportunity to be heard “a great deal” in family law proceedings.¹³²

Daly notes that while in some countries, children may have legal representation in child protection proceedings (even if children do not instruct their lawyers directly), this is rare in private family law proceedings.¹³³ She posits that legal representation may not be common in non-adversarial legal systems where the judge reaches a decision based on the evidence before the court, rather than advocacy by the parties.¹³⁴ It is also more common for judges to speak directly with children in civil law systems.¹³⁵

The provision of legal representation to children in several jurisdictions was examined as part of the background research for this thesis. A summary of this research is found at Appendix “B” with respect to the provision of legal representation to children in the Netherlands, the U.K. and several jurisdictions in Canada. A discussion of the various legal and non-legal methods by which children’s views are most commonly placed before the courts in family law proceedings, with country-specific examples, takes place in the next chapter.

¹²⁴ *Ibid.*, at 29.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, at para. 120.

¹²⁸ This is the case in Canada, the U.K., Australia, New Zealand and South Africa, for example. See M. Fernando, *Family Law Proceedings and the Child’s Right to Be Heard in Australia, the United Kingdom, New Zealand and Canada*, 51 *Family Court Review* 46 (2014), at 47-48 [hereinafter Fernando].

¹²⁹ Tobin 2019, at 398.

¹³⁰ Daly and Rap, at 12.

¹³¹ Daly & Rap, at 12, citing P. Beaumont, L. Walker and J. Holliday, *Not heard and not returned: the reality of article 11(8) proceedings*, 2 *International Family Law* 124 (2015).

¹³² *Ibid.*, citing N. Taylor and M. Gollop, Children’s Issues Centre, University of Otago, *Children’s participation in family law proceedings: research report for the Childwatch international children and the law study group* (2007).

¹³³ Daly, *Autonomy*, at 245. See also Parkes, at 104.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*, at 245-246.

3.4. Concluding Remarks

As this chapter demonstrates, there are a significant number of international and regional human rights standards that directly and less directly address the issue of legal representation for children in civil court processes. Relative to some of the other standards examined, General Comment No. 12 is rather weak in its endorsement of legal representation as a means of assuring to the child the right to be heard in judicial proceedings.¹³⁶ General Comment No. 14 is more explicit, identifying legal representation as a necessary procedural safeguard when a child's best interests are being formally assessed and there is a potential conflict between the parties in the decision.¹³⁷ By definition, this includes all family law proceedings, except in situations where a court proceeding has commenced but the parties have reached an agreement. In this writer's experience it is not uncommon for children to have views that do not coincide with either party, even when the adult parties agree. If the child does not have legal representation to address her concerns or explore alternative solutions, her voice may fail to be heard. General Comment No. 5 provides a clear endorsement for necessary legal assistance to facilitate children's access to the courts to pursue effective remedies.¹³⁸ Although the General Comments are "soft law", there is widespread, if not unanimous, recognition of the authoritative guidance provided by treaty bodies on the meaning of international human rights standards. For a discussion on the status of general comments, see Appendix "D".

Perhaps the strongest support for legal representation for children comes from the fair trial guarantees in the ICCPR. Both the Human Rights Committee and the High Commissioner for Human Rights have confirmed that the fair trial guarantees in the ICCPR apply equally to children and include the right to prompt access to legal assistance. The access to justice edicts from the High Commissioner and Human Rights Council are clear in articulating the right of children to their own lawyer, in their own name in proceedings where there is a potential conflict between the child and a parent.

The Council of Europe Guidelines on Child-Friendly Justice and the IAYJFM Guidelines are also quite strong in asserting children's rights to legal representation in all judicial processes. The Guidelines on Child-Friendly Justice make clear that the rule of law applies fully to children and that their fair trial and due process rights should not be denied under the pretext of the child's best interests.¹³⁹ The IAYJFM Guidelines are the most far-reaching in that they recommend that the child have access to legal assistance and representation "whenever their interests are at stake".¹⁴⁰

In summary, the combined operation of the various human rights standards provides strong support for the need for children to have independent legal representation in justice processes. Although most of the instruments are non-binding, the fair trial guarantees of the ICCPR do offer the weight of a treaty which is binding on ratifying States Parties. Moreover, fair trial and due process guarantees are also widely reflected in domestic law, as well as the common law. The picture is somewhat more grim in practice on the national level, however, with children generally lacking legal capacity to participate in legal proceedings without a litigation guardian and with the provision of legal representation in family law matters, particularly non-child protection matters, being quite limited in most jurisdictions.

¹³⁶ See section 5.2 for further discussion on GC12 and GC14.

¹³⁷ GC14, at para. 96.

¹³⁸ GC5, at para. 24.

¹³⁹ Guidelines, at para. III(A)(2).

¹⁴⁰ IAYJFM Guidelines, at 27.

4. Not All Methods of Hearing from the Child Are Created Equally

... it illustrates how far short this approach falls of recognising the autonomy of the child, even by definition a child of sufficient age and maturity to be heard. From the child's point of view, joinder as a party will be a woeful disappointment if in fact her strong desire is full participation in proceedings which so closely concern her future. If her views are still mediated by her representatives and she is unable to give instructions on evidence and submissions as they are made in court, a feeling of remaining "unheard" is still a distinct risk.¹⁴¹

4.1 Non-Legal Methods of Placing the Child's Views before the Court

The research is clear that children wish to be consulted in decision-making processes that affect them and that participation can have significant benefits for them, as well as promoting more tailored and sustainable outcomes. There is less consensus, however, on the ideal method by which children should be heard in court processes. If access to justice for children demands the legal empowerment of children, then it is clear that regardless of the modality selected, children must be informed of their legal right to be heard; given an opportunity to fully participate in the process; have a say in how they participate; have their views considered in a substantive way; and be informed of the results and how their views have been taken into account. It is through this lens that the most common methods by which children are heard in civil, and primarily family, court processes will now be examined.

4.1.1. Parents

European research suggests that persons whom children trust (parents, peers) are a key source of information about their rights and that children would prefer to have their parents assist them in accessing justice.¹⁴² Although this may be appropriate to some extent and in some contexts (i.e. having a parent present as a support person for a youth in conflict with the law), it does not bypass the need to ensure that children also receive information directly about their rights and that they are advised of their entitlement to actively participate (although, of course, there is no obligation to do so).¹⁴³ Moreover, the inherent conflict of parents acting as their child's representative in family law disputes, precludes this option. Parents may nonetheless seek to provide information to the court about their children's views, but this evidence is typically discounted by judges given concerns about reliability and a wish to discourage parents from placing inappropriate pressure on their children in an effort to gain a tactical advantage in the litigation. At the other end of the spectrum, when parents seek to shield their children from the conflict and the perceived risks of involvement in justice processes, research suggests that this can present a considerable barrier to children's participation.¹⁴⁴

¹⁴¹ Baroness Hale, 2018, at 43.

¹⁴² U. Kilkelly, *Listening to Children about Justice: Report of the Council of Europe Consultation with Children on Child-Friendly Justice* (2010), at 23, (<https://rm.coe.int/168045f81d>), last visited (25-06-2019). Other research indicates that children prefer to have direct access to sources of information other than their parents, siblings, friends and the media. See G. Douglas, M. Murch & M. Robinson, *et al.*, *Children's Perspectives and Experience of the Divorce Process*, 23 *Family Law* 373 (2001), at 376. Also, research from the European Union Agency for Fundamental Rights indicates that children in civil law proceedings do not rate support as very important; they prefer to be alone with the professionals responsible for the interviews, particularly in custody cases. European Union Agency for Fundamental Rights, *Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States* (2017), at 44.

¹⁴³ Guidelines, at para. IV(A)(3).

¹⁴⁴ *Ibid*, at 15.

4.1.2. Reports

4.1.2.1. Assessments

In many jurisdictions, evidence of the child's functioning in the family and the parents' ability to meet the child's needs will be placed before the courts via reports prepared by mental health or social work professionals. Following an investigation which typically includes some combination of meetings with the parents and child and the gathering of information from relevant third parties, the assessor will make recommendations on residence and contact arrangements based on her assessment of the child's best interests. If the child is able to articulate views, these views will usually be included in the report but are typically not a central focus of the exercise and may not factor significantly in the formulation of recommendations. Parkes has also noted concerns in the research about the accuracy and informed representation of the child's views in these reports.¹⁴⁵ In a recent systemic literature review, Kennan *et al.*, found that

[t]here is evidence that, despite procedures in place for professionals to document the views of the child when writing their reports, for example in the 'views and wishes of the child' section, this has not been very effective in documenting the child's authentic views and it does not necessarily correlate with the child's views being acted upon (4, 9, 16). These studies found that, in multiple instances, a child's views may not be reported and there is evidence that approaches adopted to record the views of the child either intentionally or unintentionally filtered their views.¹⁴⁶

Also, since the parameters of the assessment are determined by the court and/or adult parties (parenting capacity, psychological functioning, etc.), issues that are important to the child may not be adequately addressed in the reports; for example, how sibling relationships will be maintained post-separation or placement in alternative care. Although these reports are generally appreciated by the courts as an "independent" source of information relevant to the best interests determination, there is a concern that they are sometimes over-relied upon – i.e. that courts will not examine them critically and take into account any shortcomings in the assessors' expertise, methodology or the evidentiary basis for their conclusions,¹⁴⁷ let alone give due weight to the views of the child as an indispensable part of the best interests assessment. Moreover, to the extent that the reports make pronouncements on the ultimate best interests question, they may be criticized as usurping the court's function. From a practical perspective, they can take months to prepare and in jurisdictions where there is no public funding for their preparation, can be prohibitively expensive.¹⁴⁸

¹⁴⁵ Parkes, at 98-99. See also D. Kennan, B. Brady and C. Forkan, *Supporting Children's Participation in Decision Making: A Systematic Literature Review Exploring the Effectiveness of Participatory Processes*, 48 *British Journal of Social Work* 1985 (2018), at 196-197 [hereinafter Kennan, *et al.*].

¹⁴⁶ D. Kennan, B. Brady and C. Forkan, *Supporting Children's Participation in Decision Making: A Systematic Literature Review Exploring the Effectiveness of Participatory Processes*, 48 *British Journal of Social Work* 1985 (2018), at 1996.

¹⁴⁷ *Kawartha-Haliburton Children's Aid Society v. M.W.*, 2019 ONCA 316, at para. 54. See also *McD. v L.* [2008] IEHC 96; Parkes, at 99; Martinson & Jackson, at 32-41; *Westerhof v. Gee Estate*, [2015] O.J. No. 1472, 2015 ONCA 206, at para. 64; *Catholic Children's Aid Society of Toronto v. R.M.*, [2017] O.J. No. 5128, 2017 ONCJ 661, at paras. 25-26.

¹⁴⁸ Fernando, at 52.

4.1.2.2. Views of the Child Reports

Another form of report that is being used with increasing frequency in family law matters in a number of Canadian jurisdictions is the Views of the Child Report (VCR).¹⁴⁹ As the name suggests, it is used to provide information about the child's views in parenting disputes. It is prepared based on one or two interviews with the child by a mental health professional (typically a social worker), or a lawyer (not acting in a representative capacity) and then shared with the court and the parties as evidence of the child's views.¹⁵⁰ VCRs are appealing because they can be prepared quickly and at a relatively low cost. A concern, however, is that they are relatively tokenistic – they allow the court and adult parties to “tick the box” of “hearing” from the child, thus fulfilling the technical requirements of article 12, without allowing the child to have meaningful participation in, and as, a *process*, as the CRC Committee suggests is necessary.¹⁵¹ Moreover, no assurances of confidentiality can be provided as report-writers may be compellable as witnesses. The issue of confidentiality is something that children have raised as a concern,¹⁵² and the Committee has identified as preferable in the context of court processes.¹⁵³

A 2017 evaluative study of a pilot project using VCRs in Ontario indicates that they were generally well-received by courts¹⁵⁴ and the participants, including the children interviewed, although four children (out of 24) raised questions about the accuracy of the reporting of their information,¹⁵⁵ and some judges have expressed concern that the report authors may also be providing their own opinions rather than just a summary of the child's views.¹⁵⁶ In 44% of cases, the VCRs appeared to be useful in facilitating settlement.¹⁵⁷ This suggests that they may have a place in the “toolbox” of options in family court matters, particularly in less complex, lower-conflict disputes.

Bala and Birnbaum, the most prolific proponents of VCRs,¹⁵⁸ acknowledge some of the limitations of these reports, as compared to other modes of participation:

They provide less information than would be found in a full custody assessment, and offer less opportunity for children to directly influence outcomes than if they were represented by counsel. Although these reports clearly provide children with an opportunity to participate in

¹⁴⁹ Also known as “Voice of the Child” or “Hear the Child” reports, depending on the jurisdiction.

¹⁵⁰ R. Birnbaum, N. Bala and J-P. Boyd, *The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?*, 30 *International Journal of Law, Policy and the Family* 158 (2016), at 158 [hereinafter Birnbaum, Bala *et al.*, Toolbox].

¹⁵¹ GC12, at para. 133.

¹⁵² R. Birnbaum, *Views of the Child Reports: Hearing Directly from Children Involved in Post-Separation Disputes*, 5 *Social Inclusion* 148 (2017), at 148 [hereinafter Birnbaum VCRs]; see also Kennan, *et al.*, at 1994.

¹⁵³ GC12, at para. 43.

¹⁵⁴ For a recent decision where a court commented favourably on VCRs as a means of hearing from the child in family law proceedings, see *Medjuck v. Medjuck*, 2019 ONSC 3254 (CanLII), at para. 25.

¹⁵⁵ Birnbaum VCRs, at 152.

¹⁵⁶ Birnbaum, Bala *et al.*, Toolbox, at 165.

¹⁵⁷ R. Birnbaum and N. Bala, *Views of the Child Reports: The Ontario Pilot Project*, 31 *International Journal of Law, Policy and The Family* 344 (2017), at 349. A later contribution by Hayes and Birnbaum (M. Hayes and R. Birnbaum, *Views of the Child Reports in Ontario: A Content Analysis of Interviews with Children*, *Journal of Divorce and Remarriage* (2019) 1, at 6) suggests that more than 70% of cases in which VCRs were used resolved. This may be due to the fact that in the earlier reporting, the remaining cases were still before the courts. This raises a question, however, as to what extent the VCRs contributed to the resolution of the cases as compared to other factors.

¹⁵⁸ See Bibliography for a selection of writings on VCRs by Bala & Birnbaum, in particular.

the justice process, from the child's perspective the nature of the participation provided may not be as empowering as meeting directly with the judge or mediator.¹⁵⁹

Despite acknowledging these limitations, Bala advocates widely for their use, even in international child abduction matters as a means of determining a child's potential objections to return under article 13 of the Hague Convention.¹⁶⁰ Caution must be urged regarding the use of VCRs in high conflict, legally complex matters such as child abduction disputes, given the profound impact these cases have on children's lives.¹⁶¹ It is suggested that to give meaning to children's *effective* participation in such proceedings, legal representation is necessary.¹⁶² Children's participation in international child abduction matters is discussed in more detail in section 5.2.

A further caution must be expressed about the widespread use of VCRs. To the extent that they represent a speedy, low-cost option for placing children's views before decision-makers, they may be politically attractive. This, however, does not absolve States, "whatever their economic circumstances", "to undertake all possible measures towards the realization of the rights of the child".¹⁶³ This includes ensuring that children are visible in government budgets and that sufficient resources are allocated to ensure that all rights, including article 12, are effectively, and not tokenistically, implemented.¹⁶⁴ As Daly has noted on the issue of State expenditures for legal aid, "it should not be a race to the bottom. Whilst legal representation is expensive, in adversarial systems it is very difficult for adults to negotiate the legal system without them. For children it may be impossible [...]".¹⁶⁵ To resort to VCRs as a less costly, more expedient alternative of placing children's views before the court may deprive them of the full protection of their interests that legal representation can provide.

4.1.3. Judicial Interviews

Article 12(2) contemplates the possibility of children being heard directly in judicial proceedings. This is confirmed by the CRC Committee in General Comment No. 12, which includes "a judge" in the list of persons who may hear the views of the child.¹⁶⁶ In civil, inquisitorial legal systems, such as those in the Netherlands and Germany, it is quite common for judges to meet with children, and children have generally reported positively about these private meetings.¹⁶⁷ It is noteworthy, however, that in the Netherlands, these meetings typically occur only once during the course of a family court proceeding

¹⁵⁹ Birnbaum, Bala, *et al.*, Toolbox, at 158.

¹⁶⁰ N. Bala and R. Birnbaum, *Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases*, 59 *Les Cahiers de Droit* 787 (2018), at 787 and 799 [hereinafter Bala & Birnbaum, Rethinking]; N. Bala on behalf of the Association of Family & Conciliation Courts, Ontario Chapter, *Brief on Bill C-78: Reforms of the Parenting Provisions of the Divorce Act* to the Senate Standing Committee on Legal and Constitutional Affairs, 27-05-2019, at 8,

(https://sencanada.ca/content/sen/committee/421/LCJC/Briefs/BriefAFCC-OC-78Bala_e.pdf), last visited (23-06-2019); N. Bala, *O.C.L. v. Balev: Not an 'Evisceration' of the Hague Convention and the International Custody Jurisdiction of the CLRA*, Family Law Summit of the Law Society of Ontario, 19-03-2019, unpublished, at 15-16.

¹⁶¹ *A.M.R.I. v. K.E.R.*, 2011 ONCA 217, at 120. See also, *Re D (A Child)* (2006), [2006] UKHL 51, at para 60.

¹⁶² *Ibid.* This view is shared by Daly who cautions against the use of VCRs, such as those used in Canada, and social reports more generally, "in place of adult support and representation for children". Daly, *Autonomy*, at 238.

¹⁶³ GC5, at para. 8.

¹⁶⁴ *Ibid.*, at paras. 12, 24 and 51.

¹⁶⁵ Daly, *Autonomy*, at 426.

¹⁶⁶ GC12, at para. 43.

¹⁶⁷ Daly & Rap, at 14.

and the meetings are quite brief, lasting approximately 20 minutes.¹⁶⁸ Under the Dutch Code of Civil Procedure, only children 12 years of age and older have the right to be heard in court proceedings. Below that age, it is at the court's discretion, and in practice, rarely occurs.¹⁶⁹ The child may write a letter to the judge to request a meeting but there is no mechanism in place to ensure the child is made aware of this option.¹⁷⁰ The judicial interviews are not used to obtain evidence for use in the case and it is made clear to the child that although the court wishes to hear her views, the judge will make the decision ("voice, not a choice"). It is questionable whether this constitutes meaningful participation and "legal empowerment" of the child in the way that human rights norms suggest is necessary, or merely constitutes *pro forma* compliance with the technical requirements of article 12.¹⁷¹

It is less common that children will meet with judges in jurisdictions with common law, adversarial systems. In the U.K., for example, judges have discretion to meet with children in proceedings that concern them and guidelines have been promulgated in this regard, but the case law indicates that such meetings will be the exception rather than the rule.¹⁷² Moreover, the guidelines emphasize that the purpose of the meeting is not to gather evidence but "to enable the child to gain some understanding of what is going on and to be reassured that the judge has understood him/her".¹⁷³ If the child's meeting with the judge has no possibility of influencing the outcome, this raises the question of the utility of the exercise, apart from formal compliance with article 12. This is particularly true in light of Daly's assertion that many children feel that the meeting is not just to talk about the court process "but to argue the strength of their wishes".¹⁷⁴

With the exception of the province of Quebec, judicial interviews are also not common in Canada, although there has been a perceptible shift in judges' willingness to use them in recent years.¹⁷⁵ Under Ontario's custody/access legislation, the *Children's Law Reform Act*, there is explicit authority for the court to interview the child to determine her views.¹⁷⁶ The *Act* provides that the interview must be recorded and that the child is entitled to be advised by and have her counsel present during the interview. Nonetheless, it remains an infrequent practice as many judges are concerned about the evidentiary implications of meeting with the child and feel they do not have the requisite skills to

¹⁶⁸ Prof. Dr. M. Bruning, professor of Child Law at Leiden Law School, NL. She is head of the Child Law Department and programme director of the Child Law LL.M. programme; see also Van Der Zon, *et al.*, at 3.

¹⁶⁹ There is a different practice for cases arising under the Hague Convention on the Civil Aspects of International Child Abduction. Judges will hear from children from the age of 6 and up and will appoint a guardian *ad litem* for children aged 3 and older.

¹⁷⁰ The possibility of indirect representation is also available in the Netherlands, through the appointment by the court of a guardian *ad litem* (a lawyer or a psychologist). The information about how children's views are heard in family law matters in the Netherlands was obtained via a presentation to the LL.M. class of the International Children's Rights programme in March 2019 by a judge of the District Court in the Hague, and from a direct communication with Prof. Dr. M. Bruning, *supra* note 167.

¹⁷¹ The decision of the Netherlands Supreme Court of 5 December 2014 suggests that the child is not yet seen as an independent rights-bearer, as the 11-year-old in that case was denied the right to access to her own case file in the context of child protection proceedings on the basis that her rights were sufficiently protected by the fact that her parent, legal guardian or guardian *ad litem* could access her file. (See T. Liefwaard and M. Bruning, *Commentary on the Judgment of the Hoge Raad of the 5th December 2014*, in K. Hollingsworth and H. Stalford and S. Gilmore (Eds.), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (2017), at 173-174.

¹⁷² Daly, *Autonomy*, at 256.

¹⁷³ *Ibid*, at 257.

¹⁷⁴ *Ibid*, at 258. See also, Baroness Hale, 2018, at 42.

¹⁷⁵ Bala, Birnbaum *et al.*, *Tookbox*, at 161. In Quebec, which is the only civil law jurisdiction in Canada, children who wish to meet with the judge have a right to do so under the Quebec Civil Code.

¹⁷⁶ Section 64, *Children's Law Reform Act*, R.S.O. 1990, c. C. 12.

interview children.¹⁷⁷ With respect to the former, judges are concerned about descending into the fact-finding arena and how this may impact on the parties' due process rights to test any evidence the court may rely on to make its determination.¹⁷⁸ There is also concern that it may not be the most child-friendly or reliable way to elicit the child's views as the child may see the experience as intimidating. Although this option certainly gives the child the opportunity to express her views directly to the decision-maker without the risk of her words being filtered or distorted by a representative,¹⁷⁹ to the extent that it is a one-off, time-limited event, there is no opportunity to establish the rapport that is often necessary for children to feel comfortable discussing personal and sometimes, difficult information about their family situations. Also, there can be no guarantee of confidentiality in common law systems given the due process rights of parties, although in some jurisdictions (for example, Israel,¹⁸⁰ which has a mixed system), confidentiality is assured.¹⁸¹ Finally, if the child's views shift over time, there may be no prospect of the court taking into account the child's evolving perspective. On the positive side, there is research to suggest that the child's presence in civil law matters may have an impact on decision-making – judges report that meeting with the child can lead to greater weight being accorded to her views.¹⁸² It is important to note that having a lawyer or other representative does not preclude the possibility of the child meeting the judge. In the Netherlands, for example, if a guardian *ad litem* is appointed, the guardian may be present when the child meets the judge. As noted, in Ontario, the legislation specifically contemplates the child's lawyer being present. Child's counsel may canvass the possibility of a direct meeting with the judge, and then facilitate such a meeting if the child so wishes, after having been advised of any potential advantages or disadvantages of doing so.¹⁸³

4.2 Legal Representation – Adult-Directed Models

Children face access to justice barriers because in many jurisdictions, they are not recognized as having legal capacity, party status or the ability to instruct counsel without a guardian *ad litem* or next friend, often a parent. When there is a conflict of interest with the parent, as is the case in many family law matters, this creates particular hurdles for children's meaningful participation in court processes. In this section, the most common methods of adult-directed legal representation, including the guardian *ad litem*, *amicus curiae* and "modified" advocate models of adult-directed legal representation will be discussed, having regard to their relative compliance with article 12 of the UNCRC and the goal of facilitating empowered child participation.

¹⁷⁷ See *L.E.G. v. A.G.*, 2002 BCSC 1455, at paras. 25-32, which summarizes the benefits and common concerns about judicial interviews.

¹⁷⁸ Baroness Hale, 2018, at 42.

¹⁷⁹ Parkes indicates that judicial interviews in family law matters New Zealand are an "invaluable" tool, mitigating to some extent children's concerns about the manner in which their views are presented to the court by their representatives (at 94).

¹⁸⁰ Daly, *Autonomy*, at 258.

¹⁸¹ This is set out in the common law, as well as professional codes of conduct in most jurisdictions. Baroness Hale has confirmed that "[t]he only person who can give the child a guarantee of confidentiality is her own lawyer. The other professionals cannot give the child that guarantee any more than the court can". (Baroness Hale, 2018, at 42).

¹⁸² Daly & Rap, at 14, citing T. Morag, D. Rivkin, Y. Sorek, *Child participation in the family courts – lessons from the Israeli governmental pilot project*, 26 *International Journal of Family Law* 1 (2012).

¹⁸³ I.e., like the Advisory Opinion of the IACtHR *on the rights and guarantees of children in the context of migration and/or in need of international protection*, OC-21/14, 19-08-2014, where the court stated that children's statements must be subject to procedural protections, including the possibility of *not* making a statement, there may be reasons to advise the child not to speak to the judge to protect her legal interests. This is, of course, common in the criminal law context.

4.2.1. Guardian *ad litem*

Article 12(2) of the UNCRC contemplates the possibility of the child being heard indirectly in judicial proceedings through a representative. The guardian *ad litem* (GAL), typically a legal, social work or mental health professional (e.g. psychologist), may fulfill this role. The CRC Committee, however, provides no guidance on the functions of a GAL and there is no consistent definition or uniform practice at the international level.¹⁸⁴ As the term “GAL” suggests, however, it is a person who is appointed as a guardian of a person’s interests in the context of litigation. Most commonly, when a GAL is appointed for a child, her primary function is to determine and report to the court either directly or through a lawyer (the “tandem model” used in the U.K.), what she considers to be in the child’s best interests, and in some jurisdictions, to also elicit and advise the court on the child’s views.

An inherent tension may exist when the views of the child and the GAL’s perception of what is in the child’s best interests do not align. This has the potential to undermine the child’s effective participation rights as envisioned by the UNCRC, replacing the child’s voice with that of the GAL. Indeed, in some jurisdictions, GALs are under no obligation to advocate the child’s wishes and at times, do not seek their views or even meet with their clients.¹⁸⁵ Also, as noted by Liefwaard, an assessment of the child’s best interests does not equate to legal representation.¹⁸⁶ The latter entails unique responsibilities to actively represent and advocate the child’s views within the context of the legal framework that the court must apply.

The lack of recognition of the child as having legal capacity in most jurisdictions, including the inability to instruct counsel without a guardian *ad litem*, presents barriers to accessing justice for children. This issue was highlighted by the appeal court in *C.M.M v. D.G.C.*, an Ontario case where the young person initiated a claim for child support against her father in her own name, without the assistance of a litigation guardian.¹⁸⁷ The youth lived with her mother who took no part in the proceedings. The Court observed that although the litigation guardian is often a parent, if a child is seeking child support, the parents, or at least one of them, is likely to be on the opposite side to the child in the application and therefore, cannot be the guardian. The Court stated that there is “a consequential access to justice issue that arises from the conclusion that a child must have a litigation guardian in order to exercise her/his rights to seek support. [...] There is [...] a legitimate concern that the requirement that a child must always have a litigation guardian in such matters may effectively disenfranchise many children from the very relief that the *Family Law Act* (and a number of other statutes) accords to them.”¹⁸⁸

In the Netherlands, a guardian *ad litem* is one way in which the child’s views may be placed before the court in family law proceedings, including matters arising under the Hague Convention on the Civil Aspects of International Child Abduction. In Hague proceedings, the GAL is a child psychologist rather than a lawyer and will typically meet with the child on two occasions. In non-Hague parenting disputes, the GAL may be a lawyer or a psychologist and will meet with the child up to five times. In addition to ascertaining the child’s views and writing a report for the court, the GAL will explain the

¹⁸⁴ Parkes, at 99; Daly, *Autonomy*, at 239.

¹⁸⁵ *Ibid.*

¹⁸⁶ Liefwaard 2019, at 14.

¹⁸⁷ *C.M.M. v. D.G.C.*, 2015 ONSC 2447 (SCJ – Divisional Court)

¹⁸⁸ *Ibid.*, at para. 24. The Court ultimately held that the youth could act on her own, be represented by a lawyer (as she was in this case) or by some other appropriate person.

proceedings to the child, as well as the decision. She may also be present if the judge meets the child, if the child requests it.¹⁸⁹

In Hague abduction proceedings, the court will invite children from the age of 6 for an interview, but a GAL may be appointed for children as young as 3 in these matters.¹⁹⁰ The purpose of the GAL's involvement is to ascertain whether the child has any objections to return and whether she is of an age and maturity at which it is appropriate to take account of her views (as per article 13(2) of the Hague Convention).¹⁹¹ A less overt purpose of the interview is to determine whether the child's views are strong enough to amount to an "objection" to return and whether the child has arrived at her views freely, without apparent manipulation or coercion by a parent. The GAL will prepare a written report for use in pre-hearing cross-border mediation with the parents, as well as the court hearing itself.¹⁹²

The GAL may accompany the child to an interview with the judge and will be present at the hearing to provide additional information and answer any question that the parties, their lawyers or the court may have. Depending on the child's age and maturity, the GAL will advise the child of the decision and also of the possibility and consequences of an appeal. According to Judge Olland, a Family Judge of the Bureau Liaison, District Court of the Hague, the GAL is "on the one hand a child confidante and on the other hand acts as an "interpreter" of the voice of the child" for the court that must decide the return application.¹⁹³ This speaks to an inherent tension in the GAL's role. Becoming a confidante suggests building a relationship of trust with the child so that she will feel comfortable openly sharing her feelings about remaining in the country in which she finds herself or returning to the country of origin. Being an "interpreter" for the child's voice suggests that those views will be filtered through the GAL's opinion as to whether the child is of sufficient age and maturity at which those views should actively inform the court's decision. In other words, it is conceivable, and likely probable, that in some cases, the GAL will provide a professional opinion that runs contrary to the child's views on the possibility of a return to the country of origin, for example, if she feels the views are insufficiently strong or have been the product of undue influence by a parent. Although the GAL may have the professional qualifications to express these opinions, it is questionable whether this amounts to empowered child participation as envisaged by article 12 of the UNCRC as the child's voice is being replaced by that of the GAL. It is clear that a significant aspect of the GAL's role is to support the court in its decision-making, rather than primarily supporting the child in achieving her preferred outcome.

It is also significant that the GAL is not legally-trained (i.e. is not a lawyer) and is only asked to report on the article 13(b) objection to return exception. The child may also have relevant perspectives on the other issues to be decided in a Hague application, i.e. habitual residence, grave risk of harm and settlement (in relation to an application commenced more than a year after wrongful removal or retention).¹⁹⁴ By appointing a GAL rather than a lawyer, the child's legal interests are not protected or

¹⁸⁹ In a presentation to the LL.M. class of the International Children's Rights programme in March 2019, a judge of the District Court in the Hague spoke about the various ways in which children's views may be placed before the court in family law matters, which include the appointment of a GAL.

¹⁹⁰ *Ibid.*

¹⁹¹ Judge A. Olland, *The voice of the child I 1980 Hague return procedures in the Netherlands*, Hague Conference on Private International Law, XXII The Judges' Newsletter on International Child Abduction (Summer-Fall 2018), at 55.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*, at 54 and 55.

¹⁹⁴ Some of the judges referred to in research conducted by Lembrechts, *et al.* also indicated that they could see a bigger role for children in return proceedings, for example, "in the determination of the place of habitation". S. Lembrechts, M. Putters & K. Van Hoorde, *Conversations between children and judges in child abduction cases in Belgium and the Netherlands*, Family and Law (2019) [hereinafter Lembrechts, *et al.*]. This has been echoed by Baroness Hale, President of the U.K. Supreme Court (see, Baroness Hale, 2018), and the Permanent Bureau of

advanced in the process, thus minimizing the extent to which her views may influence the outcome.¹⁹⁵ This is discussed further in section 4.3.2.

In the U.K., the GAL or CAFCASS (Children and Family Court Advisory and Support Service) will “almost invariably” have a social work background.¹⁹⁶ It is mandatory for a GAL to be appointed in child protection proceedings.¹⁹⁷ In contrast, in family law proceedings, a GAL is appointed in only a small minority of cases (approximately 4%).¹⁹⁸ The CAFCASS is guided by national standards which require ensuring that “each child has a voice”.¹⁹⁹ As noted by Daly, however, resource constraints and increased workloads have had a negative impact on the service provided to children, including the ability to represent their views. The U.K. employs the tandem model previously referred to which sees the GAL “lead[ing]” on instructing the barrister on the position to be taken in the court proceedings. As posited by Daly, this means that the GAL is “a potential obstacle between the child and legal representative” since the GAL’s primary focus is on best interests representation.²⁰⁰

The “essential paternalism” of the role was also recognized by the Court of Appeal in *Mabon v. Mabon*.²⁰¹

One of the strengths of the model from the court’s perspective is that the GAL serves as “both the voice of the child and eyes and ears of the court”.²⁰² Although it is understandable that courts would be appreciative of the independent evidence put forward by GALs, it is suggested that this places too high a burden on the child’s representative, threatening to usurp the role of the court. Adult parties also have a responsibility to adduce evidence in support of their respective positions, particularly in child protection proceedings, where the role of the State is to not to “win” but to adduce all evidence relevant to the court’s determination. Although representation is necessarily more partisan in private family law disputes, through the process of testing evidence which is at the heart of the adversarial legal model, it is likely that much of the information relevant to the child’s best interests will be elicited. If the court still feels that some aspect of the evidentiary record relating to the child’s best interests is lacking, the rules of court and the inherent *parens patriae* jurisdiction of superior courts, make it possible for the court to request such information on its own motion, for example, by requesting that a relevant person appear before the court or through a court-ordered assessment. Moreover, where parties and/or the child are represented by counsel, rules of professional conduct commonly preclude the withholding of information that may have the effect of misleading the court.²⁰³

Regardless of whether the GAL takes a pure best interests approach or also considers the presentation of the child’s views to be an integral part of her role, it is critical that the child be made aware of the limitations of the GAL’s role. The child will then at least have the necessary information,

the Hague Conference in its Draft Guide to Good Practice on Article 13(1)(b) of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (from the Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1986 Hague Child Protection Convention, October 2017, Prelim. Doc. No 3 of June 2017, at 48, (<https://assets.hcch.net/docs/0a0532b7-d580-4e53-8c25-7edab2a94284.pdf>), last visited (23-06-2019))

[hereinafter Draft Guide].

¹⁹⁵ GC12, at para. 44.

¹⁹⁶ *Mabon v. Mabon* [2005] EWCA Civ 634, at para. 25.

¹⁹⁷ Unless it is not necessary to do so in order to safeguard their interests. Section 41(6), Children Act 1989, c. 41.

¹⁹⁸ Daly, *Autonomy*, at 238-241.

¹⁹⁹ *Ibid*, at 241.

²⁰⁰ *Ibid*, at 242-243.

²⁰¹ *Mabon v. Mabon* [2005] EWCA Civ 634, at para. 28.

²⁰² *R. (R., E., J. and K.) v. CAFCASS* [2011] EWHC 1174, at para. 38, as cited by Daly, *Autonomy*, at 242.

²⁰³ See, for example, Model Code Canada, at 5.1-1(6) and 5.1-2(b),(e)-(k).

which the CRC Committee has deemed critical for “clarified” decision-making,²⁰⁴ to determine whether she is content to engage with the GAL knowing that the GAL’s views may substitute her own on the question of her interests. Moreover, the GAL must be clear with the child that she can offer no guarantee of confidentiality since the prioritization of the child’s best interests means that the GAL may feel the need to disclose information provided by the child that she deems relevant to the court’s best interests determination.

4.2.2. *Amicus Curiae*

In some jurisdictions, courts may appoint a lawyer to act as an *amicus curiae*, or “friend of the court”. Like the GAL, there is no fixed definition of the role of *amicus*²⁰⁵ although, at its most basic, it entails ensuring that relevant evidence and argument is before the court to assist the court in making an appropriate decision. The specific parameters of the role are defined by the court in a given case. In Canada, the appointment of *amicus* typically occurs when a court is concerned that relevant evidence will not be adduced, or a vulnerable person’s (adult or child’s) significant interests are at stake, or where novel or complex legal or public policy issues are being raised.²⁰⁶ When an *amicus* lawyer is appointed for a child, the lawyer may investigate the child’s circumstances and/or interview the child and place corresponding evidence before the court. An *amicus* does not, however, advocate for the child’s interests from the perspective of the child, nor provide advice to the child. There is no confidentiality attached to the child’s communications with the *amicus* lawyer. Apart from serving as a potential vehicle for the transmission of the child’s views to the court, use of an *amicus* inadequately protects the rights of children in court processes.²⁰⁷

In *J.E.S.D. v. Y.E.P.*, the Supreme Court of British Columbia declined the request of a 15-year-old youth to have a lawyer appointed to represent her interests in a parenting dispute involving an allegation of alienation by her father.²⁰⁸ The judge instead made an order appointing an *amicus* to assist the court, using its *parens patriae* jurisdiction, and ordered the provincial government to pay for the *amicus*. The British Columbia Court of Appeal determined that the judge erred in exercising his *parens patriae* jurisdiction to appoint an *amicus*. While *amici* can be appointed pursuant to the court’s power to control its own process, they should be appointed only to deal with specific and exceptional circumstances – the judge had not referred to any such circumstances.

The Court of Appeal also commented in *obiter* on the issue of legal representation and General Comment No. 14, indicating that the CRC Committee’s direction regarding the need for separate legal representation for the child as a procedural safeguard when her best interests are being assessed is not straightforward;²⁰⁹ in particular, that it is not clear what is meant by “legal representation” or a “legal representative”. The Court noted that the French version shows the ambiguity by using the term “un conseil juridique”, suggesting that the level of “representation” contemplated is “not a full right to counsel, but rather a right to have the benefit of legal advice”.²¹⁰ Applying a teleological approach to the interpretation of the UNCRC, it is difficult to imagine that the CRC Committee intended children to

²⁰⁴ GC12, at 25.

²⁰⁵ *R. v. Russel*, 2011 ONCA 303, at para. 44.

²⁰⁶ *R. v. Russel*, 2011 ONCA 303, at paras. 31-33 and 41-46; *Strobridge v. Strobridge* (1992) 10 O.R. (3d) 540, at II; *Morwald-Benevides v. Benevides*, 2015 ONCJ 532, at para. 43; *Children’s Aid Society of Toronto v. S.A.*, 2017 ONCJ 553, at paras. 60 and 63, *Catholic Children’s Aid Society of Toronto v. M.C.*, 2018 ONCJ 619, at paras. 388-394; *Coates v. Watson*, 2017 ONCJ 454, at para. 2(d).

²⁰⁷ Martinson & Tempesta, at 187.

²⁰⁸ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

²⁰⁹ GC14, at para. 96.

²¹⁰ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, at paras. 41 and 42.

have less than fulsome legal protection in judicial proceedings where their best interests are being assessed and where there is a conflict with a parent. Such an interpretation is also inconsistent with the due process guarantees afforded to all persons under the ICCPR and the other human rights standards discussed in chapter 3. Given the difference in the wording between the English and French versions of paragraph 96 of the General Comment, however, it would be helpful if the Committee provided clarification on this issue.

4.2.3. “Modified” Advocate

In a recent contribution, Bala and Birnbaum “reconceptualize” the role of counsel for the child and propose two models of legal representation, a so-called “Child’s Lawyer Instructional Advocate” and a non-instructional “Child’s Rights and Interests Advocate”.²¹¹

In the case of the “Child’s Lawyer Instructional Advocate”, the authors propose a model whereby there would be a “presumption” of instructional advocacy but with a modification to the role that would require the lawyer for the child to ensure that all evidence relevant to the child’s best interests is before the court in a contested hearing, “subject to concerns about client confidentiality”, even if that evidence runs contrary to the child’s expressed views.²¹² There are several conceptual contradictions inherent in this approach. First, it is misleading to call it an instructional advocacy model because if the child were advised that her advocate intended to present evidence that would undermine her views, it is likely that the child would object. Secondly, although the authors indicate that the child’s confidential communications should be maintained, it is difficult to reconcile this with their concurrent suggestion that the instructional advocate “should be satisfied that all significant evidence relevant to the child’s interests is before the court”.²¹³ The child may not wish some of this evidence to be placed before the court. Thirdly, the lawyer would be unable to fulfill her professional obligations to the child-client; that is, to maintain as far as reasonably possible, a normal lawyer and client relationship and to “raise fearlessly every issue, advance every argument and ask every question [...] that the lawyer thinks will help the client’s case” because she would, at the same time, be required to potentially advance evidence that runs contrary to the client’s legal interests.²¹⁴ This additional requirement that Bala and Birnbaum seek to impose fails to recognize that the lawyer’s function as advocate is necessarily partisan and that, accordingly, “the lawyer is not obliged [...] to advance matters harmful to the client’s case”.²¹⁵ Contrary to these professional obligations, they justify their proposal on the basis that “the lawyer is appointed *by the court*” and that the child is “generally not a party”.²¹⁶

The true character of the model they are espousing becomes more apparent in cases where the child, “perhaps a teenager”, is rejecting a relationship with one parent. In these instances, Bala and Birnbaum suggest that the Child’s Lawyer Instructional Advocate should “ensure that evidence of alienation and its effects is before the court, probably introduced through a mental health professional who has interviewed the child and can testify about issues related to alienation”. They go on to state that “after ensuring that all evidence will be before the court, the child’s lawyer should seriously consider seeking to withdraw from the case”.²¹⁷ Such a role is irreconcilable with the lawyer’s

²¹¹ Bala & Birnbaum, Rethinking.

²¹² Bala & Birnbaum, Rethinking, at 823.

²¹³ *Ibid*, at 825.

²¹⁴ Federation of Law Societies of Canada, Model Code of Professional Conduct, Client with Diminished Capacity, at 3.2-9 and 5.1-1, Commentary [1], (<https://flsc.ca/national-initiatives/model-code-of-professional-conduct/>), last visited, (26-06-2019), [hereinafter Model Code Canada].

²¹⁵ *Ibid*, at 5.1-1, Commentary [3].

²¹⁶ *Ibid*.

²¹⁷ *Ibid*.

professional responsibilities to the child-client and would understandably lead to a sense of betrayal and a loss of confidence in the legal system.²¹⁸

The second approach proposed by the authors, the non-instructional “Child’s Rights and Interests Advocate” model, represents a further dilution of the role of child’s counsel. It entails a full substitution of the lawyer’s perception of what is best for the child for the child’s own views not only where a child is non-verbal but “where a child is expressing some preferences, but appointed counsel believes that the child lacks capacity, or is not able to appreciate the reasonable consequences of their preferences, or that implementation of this preference would expose the child to risk of harm”.²¹⁹ Rules of professional conduct typically contemplate the possibility of breaching confidentiality in situations of imminent risk of serious physical or psychological harm;²²⁰ any lesser standard risks usurping the role of the court which has the task of weighing the child’s views against any competing factors, such as potential risk of harm, in the assessment of the child’s best interests. This does not mean that the child’s lawyer would not address any perceived risks of harm with the child and with her consent, seek to mitigate them accordingly.

Bala and Birnbaum further indicate that the lawyer adopting this role should advocate to protect the child’s rights and interests, “as articulated by relevant legislation and case law, as well as treaties and the *Charter of Rights*”, while at the same time acknowledging that lawyers adopting this approach may be limited in the extent to which they can make arguments about appropriate court decisions.²²¹ Again, this role fails to meet professional standards. It also ignores the guidance provided by the CRC Committee with respect to starting from a presumption of capacity for all children with respect to the ascertainment of their views,²²² and avoiding “an adult’s judgment of a child’s best interests” so as not to “override the obligation to respect all the child’s rights under the Convention”.²²³ As is the case with the instructional model proposed by the authors, it also violates the child’s due process/fair trial rights, which as articulated in the Council of Europe Guidelines on Child-Friendly Justice, “should not be minimised or denied under the pretext of the child’s best interests”.

It is suggested that the representational models proposed by Bala and Birnbaum are misnomers and that neither model is fully rights-compliant, nor consistent with legal representation, having regard to the lawyer’s overarching duty of loyalty to her client. In fact, both are a version of the GAL with the lawyer acting as the eyes and ears of the court rather than a vehicle for the child’s legal empowerment and meaningful participation. With the court as the true client, these models risk undermining both the child’s voice and her confidence in the legal system.²²⁴

It appears that the true thrust of the article may be to steer courts away from legal representation for children as the authors also make the unsubstantiated claim that appointing a lawyer is often not the best way to ensure children’s participation in family justice processes.²²⁵ They also point to the “relatively high cost of appointing counsel for a child (whether paid by the parents or the state)”, as

²¹⁸ Hensley, at 873. For a more fulsome discussion of a rights-based approach to addressing allegations of “parental alienation”, see Appendix “C”, at para. 1(b), *Expressing Views “Freely”*.

²¹⁹ *Ibid*, at 826.

²²⁰ Model Code Canada, at 3.3-3.

²²¹ *Ibid*.

²²² GC12, at para. 20. See also Appendix “C”, at para. 1(a), *Capacity*.

²²³ GC14, at para. 4.

²²⁴ D. Hensley, *Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner’s Perspective and a Response to Professor Bala*, 43 *Alberta Law Review* 871 (2006), at 873 [hereinafter Hensley]. See also Tobin 2019, at 429.

²²⁵ *Ibid*, at 794.

requiring “a good reason to have a lawyer appointed”. Again, this belies both the rights-based language to which the authors pay lip service in the reconceptualized representational models they endorse, and the legal obligation created under article 4 of the UNCRC for States Parties to take all appropriate legislative, administrative, and other measures for the implementation of the rights under the Convention, including the provision of child-friendly advocacy “with necessary legal and other assistance”.²²⁶

4.3. Legal Empowerment – The Child Advocate

There are a number of factors which distinguish the child advocate model of legal representation from the other legal and non-legal means by which a child’s views may be placed before the courts in family law proceedings. A critical distinction is that the role of the child advocate goes beyond merely advising the court of the child’s views. It requires the use of the lawyer’s professional competencies to ensure that the child is placed on an equal footing with the adult participants in family court proceedings in order to optimize the possibility that the child’s views will not only be heard by decision-makers, but given due weight, within the legal criteria established by national and international law. This and the other main distinctions between the child advocate model and the non-legal and adult-directed legal models of representation discussed, having regard to maximizing the child’s empowered participation, may be summarized as follows:

- The child’s lawyer is able to offer the highest degree of confidentiality to the child-client, a factor which is crucial to engendering the child’s trust. It is also central to the exchange of information with the child, including the provision of legal advice about the viability and reasonableness of the child’s position, and the exploration of the various legal options that may be available.
- The provision of a child advocate is the only mechanism by which the child’s *legal* interests can be protected; all other representatives either lack this expertise or do not have the child’s interests (the outcome that most closely aligns with the child’s views) as their primary responsibility (e.g. judges, GALs or assessors). As compared to the other methods of representation, in adversarial legal systems, only the child advocate gathers and tests evidence relevant to the child’s position and makes legal arguments in support of the child’s desired outcome. This is critical to ensuring that the child’s views are not merely heard but given due consideration by decision-makers, as required by article 12.
- By being involved throughout the legal proceedings, the child advocate is able to ensure that the child’s participation is a process rather than a momentary act. This facilitates the provision of up-to-date information to the court about the child’s evolving views or circumstances, leading to more informed decisions, particularly when proceedings do not resolve quickly. This is a distinct advantage compared to the assessment, Views of the Child Report or judicial interview modalities of child participation.
- The child advocate is the only professional that is able to effectively assess, advise on and access review or appeal mechanisms if there is reason to doubt the correctness of the decision. This may be necessary if the child’s views have been inadequately considered or explained in the judgment.

²²⁶ GC5, at para. 89.

As Tobin observes, the fact that article 12(2) of the UNCRC does not indicate that representation in court proceedings must be confined to a lawyer does not mean that it is appropriate for *anyone* to represent the child.²²⁷ The representative must be “independent and competent” if the child’s right to representation is to be effective.²²⁸ As has been discussed, the element of independence precludes parents from acting as the child’s representative in family law disputes; it also precludes social workers who work with both parents and children in the child protection context. With respect to competency, the CRC Committee has stated that the child’s representative “must have sufficient knowledge and understanding of the decision making process”.²²⁹ Practically-speaking, to be most effective, this requires that the representative have knowledge of the law when the forum is the courtroom. Lawyers’ competency is also guided by rules of professional responsibility. Furthermore, competency requires that “the child’s views are transmitted correctly to the decision-maker”.²³⁰ This means that the representative cannot substitute their own views for those of the child, thus favouring a child advocate model, rather than a best interests or modified model, of legal representation.

Having considered the factors which distinguish the child advocate model of legal representation from the other methods of placing children’s views before the family courts, suggesting the ways that it most closely aligns with the effective realization of the child’s “right to be heard”, the remaining sections of this chapter will canvass the research on children’s expectations of their representatives; the perspectives of the judiciary on independent legal representation for children and the child advocate model, in particular; and the interests at stake for children in family law matters and the due process implications.

4.3.1. Children Prefer Advocates

Empirical research demonstrates that the adoption of a child-directed advocacy approach “will leave children more satisfied with the process”²³¹ and that “[m]any children feel marginalised by “best interests” advocacy.”²³² In a contribution that explores children’s experiences of legal representation in family law matters, Birnbaum and Bala summarize their findings as follows:

The voices of these youths seem clear about what they want from their lawyers—to listen, provide information, and most significantly, to put forward their views in court. The participants wanted their lawyers to investigate their cases more fully, gather all the relevant information about their circumstances, and advocate for their views.²³³

They conclude that “for older children, lawyers should generally adopt a traditional advocacy approach, guided by the child’s express wishes and not their ‘interests’” and that the latter “‘interest-based’ approach” usurps the voice of the child as well as the role of the judge.²³⁴ A review of guardianship systems by Bilson and White reveals that in court processes, the views of children are generally a

²²⁷ Tobin 2019, at 427.

²²⁸ *Ibid.*

²²⁹ GC12, at para. 36.

²³⁰ *Ibid.*; Tobin, 2019, at 428.

²³¹ R. Birnbaum and N. Bala, *The Child’s Perspective on Legal Representation: Young Adults Report on the Their Experiences with Child Lawyers*, 25 Canadian Journal of Family Law 11 (2009) [hereinafter Birnbaum & Bala, 2009].

²³² Fernando, at 49, citing Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report no. 84 (1997), at 13.56.

²³³ Birnbaum & Bala, 2009, at 60.

²³⁴ *Ibid.* at 22.

secondary consideration to adult perceptions of their best interests; they conclude that an advocate may facilitate better representation of the child in court and is more in keeping with the UNCRC.²³⁵

A more recent review of child protection decision-making processes found indicative evidence that the use of advocates is an effective means of supporting children's participation in these processes.²³⁶ Specifically, the findings revealed that:

advocates give young people the confidence to infiltrate an adult-dominated decision-making process (5) and can help to redress the power imbalances at play (2, 3, 6). They can support the child to influence the decisions taken (5, 6, 12, 13) and facilitate feedback to be provided to the child on the outcome of the process (12). The use of advocates is also found to be effective in supporting looked after children with disabilities to have their views heard (13). Importantly, in all the studies included, children testified to the value of having an advocate.²³⁷

Other identified factors seen to impact the effectiveness of the advocate's role include: the presence of a trusting relationship with the child; two or three meetings if the relationship is to be meaningful and effective; a clear understanding of the role of the advocate and any limits on confidentiality; maintaining a focus on the views of the child rather than having a role in ensuring decisions are made in the child's best interests; and having the necessary skills to communicate with children of all ages, abilities and needs.²³⁸ As these studies suggest, effective advocacy for children avoids paternalism and entails more than merely relaying children's views to decision-makers.

4.3.2. Judicial Support for Independent Legal Representation and the Child Advocate Model

There is also judicial support from various jurisdictions for separate legal representation, and the child advocate model, in particular, for children who are the subjects of family court processes. In an early but enduring Canadian decision, *Re W.*, the Court endorses a role for the child's lawyer that places the child on an equal footing with the other parties.²³⁹ Where the child has expressed views, these views, rather than those of the child's lawyer, should determine what is conveyed to the court: "The child's advocate is the legal architect who constructs a case based on the client's views."²⁴⁰ The ability of child's counsel to participate fully - to file or call evidence and make submissions on all the evidence - was confirmed by the Ontario Court of Appeal in *Strobridge v. Strobridge*.²⁴¹ Both cases were cited with approval by the Quebec Court of Appeal in *F.(M.) c. L.(J.)*,²⁴² which compared the difference between a child advocate and a best interests advocate. The comments of Justice Rothman demonstrate how the role of a child advocate best facilitates the child's right to be heard, even in cases in which alienation may be an issue:

²³⁵ A. Bilson and S. White, *Representing Children's Views and Best-Interests in Court: An International Comparison*, 14 Child Abuse Review 220 (2005), at 236.

²³⁶ Kennan, *et al.*, at 1993-1995 and 1997. (NB – These were non-court-based processes.)

²³⁷ *Ibid.*, at 1994.

²³⁸ *Ibid.*, at 1994-1995.

²³⁹ *Re W.* (1979), 27 O.R. (2d) 314, 13 R.F.L. (2d) 381 (Ont. Prov. Ct.).

²⁴⁰ *Ibid.*

²⁴¹ *Strobridge v. Strobridge* (1994), 18 O.R. (3d) 753, 4 RFL (4th) 169 (OCA), at para. 36. See also *C.R. v. Children's Aid Society of Hamilton* (2004), 4 R.F.L. (6th) 98 (Ont. SCJ); and *L.C. v Catholic Children's Aid Society of Metropolitan Toronto* (1992), 99 D.L.R. (4th) 77 (Ont. Ct. - Gen. Div.), at paras. 33, 35.

²⁴² *F.(M.) c. L.(J.)*, 2002 CanLII 63106 (QcCA).

In my respectful view, if a child is sufficiently mature to express himself on a vital question such as custody or access by his parents, then he has the right to be heard on that question and the right to have his wishes fairly put in evidence before the court.²⁴³

In *Re R.A.*, a child protection matter, the Yukon Territorial Court emphasized the role of the child advocate in representing the voice and independent interests of the child, even for younger children. The Court further stressed the need for such representation throughout the proceedings:

Rights of a Child: [...]

A child may seek an outcome different from what their parents or the department may seek. To deny a child the capacity of an independent voice in proceedings set to determine their best interests violates the fundamental principles of justice. Section 7 protections cannot wait until a child is old enough to advise counsel. Child advocates can raise issues on behalf of young children that neither the department nor parent raise. In order for the court to fully assess the best interests of children, child advocates will be necessary in all phases of child protection hearings, and especially in permanent hearings. As the ink begins to set early in child protection proceedings, the need for a separate voice for a child begins when the status of a child in temporary care is being considered. A child's rights and interests are different and need to be separately protected [...].²⁴⁴

In a U.K. decision, the Court of Appeal in *Mabon v. Mabon* considered the removal of a GAL in favour of separate legal representation for three teenage boys in the context of residence/contact proceedings.²⁴⁵ As previously noted, the Court identified the inherent paternalism in the U.K. tandem model of representation in light of the GAL's primary objective to advocate the welfare of children, which may conflict with the child's wishes. Citing article 12 of the UNCRC and article 8 of the ECHR, as well as a need for a "keener appreciation of the autonomy of the child and the child's consequential right to participate in decision-making processes that fundamentally affect his family life", the Court granted the boys' appeal.²⁴⁶

A number of South African family law cases have recognized the need for separate legal representation for children. The Constitution of the Republic of South Africa, 1996, provides that children affected by civil proceedings have a right to legal representation at State expense if "substantial injustice would otherwise result".²⁴⁷ Although this is arguably a narrower iteration of the right to participate than that contained in article 12 of the UNCRC, its advantage comes from specifically recognizing the need for *legal* representation and for state funding for same if the threshold of substantial injustice is met. In *Soller NO v. G.*, the Court considered the need for the assignment of a separate legal representative for a 15-year-old youth in a custody variation application, as distinct from the involvement of the Family Advocate, who would report and make recommendations on the best interests of the child.²⁴⁸ The Court held that s. 28(1)(h) of the Constitution requires a lawyer who will use their particular skills and expertise to advocate for the child:

²⁴³ *Ibid*, at para. 35.

²⁴⁴ *Re R.A.*, 2002 YKTC 28, at paras. 167-168.

²⁴⁵ *Mabon v. Mabon* [2005] EWCA Civ 634.

²⁴⁶ *Ibid*, at paras. 26 and 26.

²⁴⁷ Section 28(1)(h), Constitution of the Republic of South Africa, 1996, 10 December 1996.

²⁴⁸ *Soller NO v. G.*, 2003 (5) SA 430 (W).

Neutrality is not the virtue desired but rather the ability to take the side of the child and act as his or her agent or ambassador. In short, a child in civil proceedings, where substantial injustice would otherwise result, must be given a voice. Such voice is exercised through the legal practitioner.²⁴⁹

In *Ex parte Van Niekerk: In re Van Niekerk v. Van Niekerk*, a case involving an access application where the children did not wish to see their father, the Court again considered s. 28(1)(h) of the Constitution and determined that a legal representative, rather than a curator *ad litem* should be appointed.²⁵⁰ The Court observed that the parents accused each other for the attitudes of the children but that the children “so far, have not had an opportunity to state their views or to have their interests independently put before the court”.²⁵¹ The Court also considered the fact that unless the children were joined as parties, they would not be able to appeal against an adverse order.²⁵²

In *Rosen v. Havenga*, the Court, referring to article 12 of the UNCRC, appointed a legal representative and added the child as a party in her parents’ divorce proceedings, thus allowing her to apply for a restraining order against the defendant.²⁵³ As noted by Sloth-Nielsen, this demonstrates that “more than hearing the child’s voice, the child’s interests became directly protected in the legal process”.²⁵⁴

In a more recent South African case, *Centre for Child Law v. Governing Body of Hoerskool Fochville*, the Supreme Court of Appeal stated that “a useful starting point is an appreciation that the right of children to representation separate from their parents flows from their right to participate in all matters that affect them. That is a right which is widely recognised in international law and forms part of South African law”.²⁵⁵ The Court elaborated that section 28(1)(h) of the Constitution is activated not only when a child is party to proceedings, but whenever she is affected by litigation: “The child is then entitled, not merely to be heard, but to be afforded the envisaged legal representation at state expense”.²⁵⁶

Sloth-Nielsen observes that the shift towards the appointment of legal representatives in South African case law signifies that “[c]hildren’s participation rights in accordance with art 12(2) of the CRC and s 28(1)(h) of the Constitution have now formally entered the judicial sphere”.²⁵⁷ The subsequent coming into force of the Children’s Act 38 of 2005 in South Africa has further strengthened children’s participatory rights at the domestic level by, *inter alia*, entrenching every child’s right “to bring, and be assisted in bringing a matter to court” and by providing for the possibility of legal representation for children in all care, contact and guardianship proceedings.²⁵⁸ In the context of Hague abduction proceedings, the provision of a legal representative for the child is mandatory.²⁵⁹

²⁴⁹ *Ibid*, as cited in J. Sloth-Nielsen, Realising Children’s Rights to Legal Representation and to be Heard in Judicial Proceedings: An Update, 24 South African Journal on Human Rights 495 (2008), at 503-504 [hereinafter Sloth-Nielsen].

²⁵⁰ *Ex parte Van Niekerk: In re Van Niekerk v. Van Niekerk* [2005] JOL 14218 (T).

²⁵¹ *Ibid*, at para. 6.

²⁵² *Ibid*, at para. 8.

²⁵³ *Rosen v. Havenga* (2006) 4 All SA 199 (C).

²⁵⁴ Sloth-Nielsen, at 505.

²⁵⁵ *Centre for Child Law v. Governing Body of Hoerskool Fochville*, (156/2015) [2015] ZASCA 155 (8 October 2015), at para. 22.

²⁵⁶ *Ibid*.

²⁵⁷ Sloth-Nielsen, at 503.

²⁵⁸ Sections 10, 14, 29(6) and 55, South Africa: Act No. 38 of 2005, Children’s Act, 19 June 2006 [hereinafter Children’s Act 28]

²⁵⁹ Section 279, Children’s Act 38.

In cases arising under the Hague Convention, the need for children to have independent legal representation via a child advocate is acute given the significant impact these decisions have on children's lives – the country where they will live and have their best interests determined – as well as the legally complex nature of these proceedings. This is particularly evident when considering the policy thrust of the Convention, namely the presumption that abduction is contrary to the best interests of children *as a class*. In other words, the best interests of *individual* children before the courts may be, and arguably have been, sacrificed for the greater good of generally deterring parents from abduction, as well as comity between States.²⁶⁰

Although recognition of party status in private family law proceedings, and the need for non-GAL representation for children in the U.K. remains relatively rare,²⁶¹ there has been some positive judicial recognition of the need for separate legal representation in cases under the Hague Convention. In *Ciccone v. Ritchie (No 1)*, the U.K. High Court granted the 15-year-old youth's application to be joined as a party in a case where he opposed his mother's application to have him returned to the U.S.²⁶² The Court recognized the youth's

very clear wish [...] to contribute actively as a party to the decision making process that will have a fundamental effect on his future, as opposed to passively through the medium of a report setting out his wishes and feelings. Rocco wishes to be able to argue his position positively and to be able to respond to the arguments [...]²⁶³

The Court went on to elaborate on the other benefits of allowing the youth to be joined as a party, including the fact that it would provide a positive opportunity to obtain a "moving picture" of the youth's position to be articulated to the court by his legal representatives on the basis of the instructions that he had given his solicitor, one that could be seen as a dynamic and more nuanced picture of his position, views and feeling in response to the arguments of his parents, than the "still photograph" provided in a CAFCASS report.²⁶⁴ As such it would "add significantly to the court's understanding of the issues" to have the child as a party.²⁶⁵

Re L.C. was an international child abduction matter where the U.K. Supreme Court granted an appeal allowing the oldest child, T., to be joined as a party.²⁶⁶ Lord Wilson stressed, however, that this should not occur routinely, despite recognizing that T. had a standpoint incapable of being represented by either of the adult parties, a feature common to many family law disputes.²⁶⁷ He further indicated that a grant of party status to a child leaves the court with a wide discretion to determine the extent of the role which she should play in the proceedings.²⁶⁸ Baroness Hale has expressed concern regarding Lord Wilson's dicta, observing "how far short this approach falls of recognizing the autonomy of the child, even by definition a child of sufficient age and maturity to be heard" and that "joinder as a party will be a woeful disappointment if in fact her strong desire is full participation in proceedings which so closely concern her future. [...] If [...] she is unable to give instructions on evidence and submissions as they are made in court, a feeling of remaining "unheard" is still a distinct risk".²⁶⁹

²⁶⁰ *Balev v. Baggott*, 2016 ONCA 680, at paras. 82-83.

²⁶¹ Daly, *Autonomy*, at 274.

²⁶² *Ciccone v. Ritchie (No 1)* [2016] EWHC 608 (Fam).

²⁶³ *Ibid*, at para. 51.

²⁶⁴ *Ibid*, at para. 65.

²⁶⁵ *Ibid*.

²⁶⁶ *Re L.C.* [2014] UKSC 1 [hereinafter *Re L.C.*].

²⁶⁷ *Ibid*, at paras. 49 and 53.

²⁶⁸ *Ibid*, at para. 55.

²⁶⁹ Baroness Hale, 2018, at 43.

Baroness Hale makes a similar comment regarding the U.K. House of Lords decision of *Re D*.²⁷⁰ She observes that the standard practice of receiving a report from the CAFCASS Officer (GAL) in Hague abduction proceedings does not allow the child to engage in the proceedings herself, nor can the officer advocate the child's views or respond to evidence or submissions,²⁷¹ highlighting, in essence, why children require separate legal representation.

The frequent inconsistency in the jurisprudence regarding the interpretation of key concepts, including those relating to what constitutes a valid objection to return, also augers in favour of separate legal representation for the child. As Baroness Hale has commented in relation to this exception:

An adult on learning of the threshold test would be likely to present his evidence accordingly. If he did not want return to the State of habitual residence, he would be likely to frame this in terms of an objection. But we want to hear unaffected evidence about a child's wishes and feelings in her own words. Children will not necessarily use the language of objection or preference or mere unhappiness with the precision required by courts interpreting Article 13. But very often a judge's refusal to return a child will be based on a strict analysis of the language used.²⁷²

Concerns about courts' narrow interpretation of the objection defence and the lack of legal representation for children in these cases has been echoed by other commentators. For example, Henaghan has stated:

Unfortunately, the child objection defence does not appropriately recognise the child's views. In particular, it does not enable children to express their wider views, it gives judges too much discretion to discount children's views, and it does not require that lawyers be appointed to represent children.²⁷³

The strict interpretation of the "objections" defence was also identified in a recent article by Lembrechts, *et al.* which reported on research examining the hearing of children in Dutch and Belgian courts in cases of international child abduction. In only 16% of the Dutch cases in which children were heard was the return refused based on the opposition of the child.²⁷⁴ Notably, the research also revealed that determining whether the child's refusal is a "preference" or an "objection" is an additional challenge for the judges. As noted by the authors, this is also a distinction which is difficult for children to comprehend, calling for "additional interpretation and explanation, more so because the validity of the distinction between preference and objection is disputed in the literature".²⁷⁵ This highlights the need for legal representation for the child in order to explain the legal test to the child in a way that the child can understand and to explore any objections the child may have in a manner that takes into account the disputed legal interpretation of this issue. At the hearing, the lawyer would then urge an informed interpretation of the child's view in light of the case law.

²⁷⁰ *In re D* [2006] UKHL 51.

²⁷¹ Baroness Hale, 2018, at 41.

²⁷² Baroness Hale, 2018, at 43.

²⁷³ M. Henaghan, *The voice of the child in international child abduction cases – Do judges have a hearing problem?*, Hague Conference on Private International Law, XXII The Judges' Newsletter on International Child Abduction (Summer-Fall 2018), at 14.

²⁷⁴ S. Lembrechts, M. Putters & K. Van Hoorde, *Conversations between children and judges in child abduction cases in Belgium and the Netherlands*, Family and Law (2019), at 7 [hereinafter Lembrechts, *et al.*].

²⁷⁵ *Ibid*, at 7.

The inconsistent interpretation of other key concepts in the case law, including the central issue of habitual residence, also demonstrates the need for legal representation for children to ensure the law is construed in a manner consistent with their interests.²⁷⁶ INCADAT, the case law database maintained by the Hague Conference, confirms that “[t]he interpretation of the central concept of habitual residence (Preamble, Art. 3, Art. 4) has proved increasingly problematic in recent years with divergent interpretations emerging in different jurisdictions”.²⁷⁷ This is reflected in the jurisprudence of the U.K. and Canada where there has been a shift in the interpretation of habitual residence from an inquiry centered on parental intention to a more child-focused analysis which considers “the place which reflects some degree of integration by the child in a social and family environment”.²⁷⁸ Counsel for the children brought forward the appeal in the Canadian case, highlighting another procedural safeguard associated with separate representation for children.

As has been suggested, legal representation is critical to ensuring that children’s views are properly interpreted within a legal framework which is not always clearly or consistently applied in the case law. As this section has highlighted, the child’s perspective may be relevant not only to a potential objection to return but to a number of the other issues that courts must decide in Hague abduction applications, including the habitual residence of the child, the existence of a grave risk or harm or intolerable situation upon return, and the settlement of the child in cases where the application is not initiated within a year of the child’s wrongful removal or retention. This perspective has been endorsed by both Baroness Hale and the Permanent Bureau of the Hague Conference, with the latter encouraging courts to take account of the views of the child in relation to exceptions other than the objection to return, including those related to grave risk/intolerable situation under article 13(1)(b), “and other matters relevant to the case (e.g., determinations of habitual residence)”.²⁷⁹

In a case where the child’s objections to return, the circumstances relating to her settlement in the receiving country and factors relating to grave risk of harm were central to the court’s determinations, the court emphasized the need for procedural protections, including legal representation for the child. The Court of Appeal for Ontario in *A.M.R.I. v. K.E.R.*, considered an appeal from a return decision regarding a 14-year-old youth who had been found to be a Convention refugee on the basis of abuse by her mother.²⁸⁰ The child had not been represented, nor notified of the mother’s return application under the Hague Convention. In allowing the appeal from the return order, the Court of Appeal noted the “profound and often searing impact” that an order of return under the Hague Convention will have on the affected child.²⁸¹ The Court held that where the proposed return engages the child’s s. 7 *Charter* rights (life, liberty and security of the person), meaningful procedural protections must be afforded to the child, including the right to legal representation:

²⁷⁶ For another example, see the decision in *Neulinger and Shuruk v. Switzerland* [GC], Application No. 41615/07, 6 July 2010. The backlash from that decision as a result of the ECtHR’s endorsement of what was perceived as a broad best interests analysis, contrary to the policy and terms of the Convention, led to the Court modifying its interpretation in *X. v. Latvia* [GC], Application No. 27853/09, 26 November 2013.

²⁷⁷ INCADAT, (<https://www.incadat.com/en/convention/case-law-analysis>), last visited (27-06-2019).

²⁷⁸ *A. v. A. (Children: Custody: Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2013] UKSC 60, at para. 54; *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, at para. 68.

²⁷⁹ Baroness Hale, 2018, at 44. Draft Guide, at 48. See also, *Re L.C. (Children)*, at para. 87D; Martinson, *Children’s Legal Rights to be Heard in Cross Border Parental Child Abduction Cases*, Cross Border Child Custody Disputes – Judicial Networking and Direct Judicial Communication, Judicial Officers Pre-Institute, Association of Family and Conciliation Courts (2014) (unpublished).

²⁸⁰ *A.M.R.I. v. K.E.R.*, 2011 ONCA 417.

²⁸¹ *Ibid*, at para. 120.

In our view, these include the right to (1) receive notice of the application; (2) receive adequate disclosure of the case for an order of return; (3) a reasonable opportunity to respond to that case; (4) a reasonable opportunity to have his or her views on the merits of the application considered in accordance with the child's age and level of maturity; and (5) the right to representation.²⁸²

In *Borisovs v. Kubiles*, the court followed the reasoning in *A.M.R.I. v. K.E.R.*²⁸³ Both the 8-year-old child and her mother had been found to be Convention refugees on the basis of domestic violence by the father. The court considered the significance of legal representation for the child, confirming the importance of due process guarantees as a fundamental human right:

The investigation by the Office of the Children's Lawyer was an efficient expedient. By virtue of this investigation, not only was the child able to put her views and preferences before the Court, but the applicant was afforded an additional means by which his position could be advanced in the proceeding. The report of the Children's Lawyer [...] also provided, through interviews with the child, evidence of the child's "views on the merits of the application considered in accordance with the child's age and level of maturity." It was imperative, given the child's age, that the Court receive independent submissions on her behalf. In light of the complex considerations arising from the forced return of a refugee child to her country of origin, these are not frivolous reasons for delay. As the court of Appeal observed in *A.M.R.I. v. K.E.R.*, where there are serious credibility issues in Hague applications, "Expediency will never trump fundamental human rights."²⁸⁴

4.3.3. The Interests at Stake / Due Process

As the cases in the preceding section demonstrate, the interests at stake for children in many family law matters, both public and private, are of the highest order. The decisions made may fundamentally affect children's relationships with their parents and other family members, as well as the countries and communities in which they live. In the child protection context, State action interfering with the parent-child relationship has been found to engage both the parent and child's rights to liberty²⁸⁵

²⁸² *Ibid*, at para. 120.

²⁸³ *Borisovs v. Kubiles*, 2013 ONCJ 85, at para. 54.

²⁸⁴ *Ibid*, at para. 53.

²⁸⁵ According to Elrod, in the U.S., "[t]he child has a "liberty" interest at stake in dependency proceedings, or any time the government (through a judicial officer) makes a custody order". (L. D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 Pace Law Review 869 (2007), at 886, [hereinafter Elrod]). Although the U.S. Supreme Court has not yet found a due process right to counsel in child protection or custody disputes, State courts have done so in a number of some cases. (Elrod, at 886-887.) For example, in a 2005 decision, a federal district court in Georgia found that children involved in child protection proceedings have a constitutional right to counsel, stating:

It is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake The Court finds that children have fundamental liberty interests at stake in deprivation and TPR [termination of parental rights] proceedings. These include a child's interest in his or her own safety, healthy, and well-being, as well as an interest in maintaining the integrity of the family unit and in having a relationship with his or her biological parent [...]
(Kenny A. *ex rel*/Winn v. Perdue, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005, at 1359-1360.) (Elrod, at 887.)

and/or security of the person,²⁸⁶ the latter encompassing both a person's physical and psychological integrity.²⁸⁷ Similarly, decisions under the Hague Abduction Convention have been held to have a "potentially life-altering effect on all interested parties", including the child.²⁸⁸ Decisions in contentious custody/access matters can similarly have significant impacts on children, particularly if court orders are imposed against the child's will.²⁸⁹ Police enforcement provisions, for example, may impact not only on the child's sphere of personal autonomy and choice, but her physical integrity to the extent that coercive measures may be used. It is suggested that to deny a child the ability to participate fully in proceedings which so directly affect her interests violates not only her right to be heard, but the fundamental principles of justice.²⁹⁰ Given the profound impact of these determinations on children's lives, "courts must be vigilant in ensuring procedural fairness for all concerned", which may include the need for state-funded legal representation.²⁹¹

In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, a child protection matter in which the State was granted custody of the appellant mother's three children for a six-month period, the Supreme Court of Canada ruled that the New Brunswick government was under a constitutional obligation to provide the mother with state-funded counsel.²⁹² The Court found that "[f]ew state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well"²⁹³ and held that

Without the benefit of counsel, the appellant would not have been able to participate effectively at the hearing, creating an unacceptable risk of error in determining the children's best interests and thereby threatening to violate both the appellant's and her children's s. 7 right to security of the person.²⁹⁴

Given the fact that it is the child's best interests that are at the core of the court's determination and the acknowledged impact of the decision on the child's right to security of person, as well as the fact that the child's views and interests may not align directly with either those of the parent or the State, there is no principled reason why the child would not be entitled to independent, state-funded legal representation as well.²⁹⁵

Legal representation ensures that the views of children are not only heard but taken seriously by decision-makers. As noted by the European Commission in its 2015 Policy Brief on *Children's Involvement in Criminal, Civil and Administrative Judicial Proceedings in the 28 Member States of the*

²⁸⁶ *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46 (SCC), at para. 76, [hereinafter *G.(J.)*]; *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 (SCC), at paras. 12-14 and 97; *Newfoundland and Labrador (Manager of Child, Youth and Family Services) v. J.T.*, 2015 NLCA 55, at paras. 8-10.

²⁸⁷ *G.(J.)*, at paras. 60-61, and 76.

²⁸⁸ *A.M.R.I. v. K.E.R.*, 2011 ONCA 417, at para. 128 [hereinafter *A.M.R.I.*].

²⁸⁹ Elrod, at 886.

²⁹⁰ *A.M.R.I.*, at para. 120; *Re R.A.*, 2002 YKTC 28, at paras. 167-168.

²⁹¹ *A.M.R.I.*, at paras. 120 and 128; *New Brunswick (Minister of Health and Community Services) v.G.(J.)*, [1999] 3 S.C.R. 46 (SCC). See also, Martinson & Tempesta, at 196 and Elrod, at 886.

²⁹² *New Brunswick (Minister of Health and Community Services) v.G.(J.)*, [1999] 3 S.C.R. 46 (SCC). In determining whether a parent will be able to participate effectively in the hearing and whether state-funded counsel is necessary, the court must consider the seriousness of the interests, the complexity of the proceedings, and the characteristics of the parent affected.

²⁹³ *Ibid*, at para. 76.

²⁹⁴ *Ibid*, at para. 81.

²⁹⁵ This view is shared, at least in part, by Bala and Birnbaum with respect to mature children in cases where the State is a party, such as child welfare proceedings. See Bala & Birnbaum, *Rethinking*, at 792-793.

EU, “[p]roviding children with effective access to a lawyer acts as a fundamental safeguard against violations of their rights during the judicial process and supports them to fully understand and follow the proceedings”.²⁹⁶ The ECtHR has not been as explicit, however, in establishing a right to legal representation for children in family law matters, although it has held that article 6 of the ECHR (right to a fair trial) may compel States to provide legal representation when such assistance is indispensable for effective access to the courts.²⁹⁷ Relevant factors in this assessment include the importance of what is at stake for the applicant, the complexity of the relevant law or procedure, and the applicant’s capacity to represent herself effectively.²⁹⁸ In the case of children, these factors clearly auger in favour of legal representation. Without such specialized assistance, children are denied “equality of arms”, a factor that is particularly relevant in adversarial legal systems to ensure a “fair balance” among the parties. Equality of arms demands that each party be given a reasonable opportunity to present their case, including the evidence and legal arguments relevant to their position, under conditions that do not place them at a substantial disadvantage vis-à-vis the other parties.²⁹⁹ The ECtHR has also established that a party’s right to present their case “can only be seen to be effective if the observations are actually “heard”, that is to say, duly considered by the trial court”.³⁰⁰ This is directly relevant to the imperative contained in article 12(1) of the UNCRC. A child’s lawyer is in a position to not only ensure that the child’s views are duly considered by the court through the presentation of evidence and legal submissions, but through access to an appeals process if the court falls short in this regard.

The ECtHR has interpreted article 8 (right to respect for private and family life) to include a positive obligation on States to secure to their citizens the right to effective respect for their physical and psychological integrity.³⁰¹ As was determined in *Airey v. Ireland*, this obligation may require the adoption of specific measures, including the provision of an effective and accessible means of protecting the right to respect for private and family life.³⁰² In that case, the applicant was unable to seek recognition in law of her *de facto* separation from her husband due to the prohibitive cost of litigation, leading to a failure to respect her right to family life contrary to article 8.³⁰³ The Court also concluded that the applicant’s article 6 right to a fair trial had been violated in that she would not be able to present her case effectively before the Irish High Court without the assistance of a lawyer.³⁰⁴ As a result, the Court held that article 6 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for effective access to the courts.³⁰⁵ The potential applicability of this decision to children who are directly impacted by family law disputes is evident. As Kilkelly points out, however, the Court has never been asked by a child applicant whether article 8 requires that she be heard in a judicial proceeding at the national level.³⁰⁶ Instead, this right has been interpreted with reference to the procedural rights of *parents* to be sufficiently involved in

²⁹⁶ N. Kennan and U. Kilkelly, *Children’s involvement in criminal, civil and administrative judicial proceedings in the 28 Member States of the EU. Policy Brief* (2015), at 16.

²⁹⁷ *Airey v. Ireland*, Application No. 6289/73, 9 October 1979 (ECtHR), at para. 26 [hereinafter *Airey*].

²⁹⁸ ECHR, Guide on Article 6 of the European Convention on Human Rights: Right to a fair trial (civil limb) (2019), at para. 125.

²⁹⁹ *Ibid*, at paras. 327-328.

³⁰⁰ *Ibid*, at para. 268; *Donadze v. Georgia*, Application No. 74644/01, 7 June 2006 (ECtHR), at para. 35.

³⁰¹ ECHR, Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence (2019), at para. 65.

³⁰² *Airey*, at para. 33.

³⁰³ *Ibid*.

³⁰⁴ *Ibid*, at para. 25.

³⁰⁵ *Ibid*, at para. 26.

³⁰⁶ U. Kilkelly, *The CRC in Litigation under the ECHR*, in T. Liefwaard and J. Doek J. (Eds.), *Litigating the Rights of the Child* (2015), at 199 [hereinafter *Kilkelly, Litigation*].
Kilkelly, at 199.

court processes relating to care and contact with their children. For example, the decisions in *Sahin v. Germany*, *Sommerfeld v. Germany* and *C. v. Finland* revolve around the children's views as a factor in the custody/access decisions of the national courts, with the applicant fathers in each of the three cases asserting that the manner in which their children's views were or were not considered by the domestic courts impacted on their ability to effectively protect their article 8 rights in the court processes.³⁰⁷ These cases suggest that there would be little justification for failing to accord to the subject child basic procedural guarantees to ensure that her views are duly considered by national courts in family law decisions, given that it is the child's rights, including her right to respect for private and family life, that are most directly impacted

Support for this proposition may be found in the court's decisions in the juvenile justice context. In *T. and V. v. U.K.*, a high-profile case regarding the trial of two eleven-year-old boys charged with the murder of a two-year-old boy, the ECtHR considered for the first time "whether procedures which are generally considered to safeguard the rights of adults on trial, such as publicity, should be abrogated in respect of children in order to promote their understanding and participation".³⁰⁸ The Court concluded that the intense public scrutiny surrounding the trial precluded the applicants from communicating effectively with their counsel.³⁰⁹ This made it impossible for them to participate effectively in the trial against them, resulting in a denial of their article 6(1) right to a fair hearing.³¹⁰ Kilkelly notes that although article 12 of the UNCRC was not mentioned in the ECtHR's decisions, "the judgments are fully informed by the concept of effective participation that underpins this principle of the CRC".³¹¹ She elaborates that the case reinforces that the right to a fair trial is a core right of children, too, and that steps must be taken to make this right effective for children.³¹² The ECtHR revisited the concept of "effective participation" in *S.C. v. U.K.*, which involved the criminal trial of an eleven-year-old boy.³¹³ In this case, the Court highlighted the child's right to legal representation under article 6(3)(c) of the ECHR as crucial to assisting the child in having a "broad understanding of the nature of the trial process and what is at stake for him or her".³¹⁴ It is suggested that despite the fact that article 6 contains no reference to legal assistance in the civil law context, the Court's reasoning in *S.C.* may be relevant to the child who is the subject of a family law proceeding; that is, given the particular vulnerabilities of children relative to adults, the combined application of articles 8 and 6 of the ECHR - the right to "effective participation" in proceedings in which a child's right to family life is directly in issue - may require the provision of state-funded legal representation to the child.

The need for legal representation has been more widely and explicitly endorsed in both the UNCRC and other international and domestic legal instruments in the criminal law context,³¹⁵ due in large part to the liberty interests at stake. However, as has been noted, the interests at stake for children in both public and private family law matters are often equally compelling, necessitating comparable due process guarantees.³¹⁶ The need for these protections, as noted in chapter 3, is also echoed by the Committee on the Rights of the Child in General Comments 5 and 14,³¹⁷ and is part of the fair trial

³⁰⁷ *Sahin v. Germany* [GC], Application No. 30943/96 (8 July 2003), (ECtHR); *Sommerfeld v. Germany* [GC], Application No. 31871/96 (8 July 2003) (ECtHR); *C. v. Finland*, Application No. 18249/02, 9 May 2006 (ECtHR).

³⁰⁸ *T. and V. v. U.K.* [GC], Application No. 24724/94, 16 December 1999 (ECtHR), at para. 83.

³⁰⁹ *Ibid.*, at para. 88.

³¹⁰ *Ibid.*, at para. 89.

³¹¹ Kilkelly, *Litigation*, at 205.

³¹² *Ibid.*

³¹³ *S.C. v. U.K.*, Application No. 6958/00, 15 June 2004 (ECtHR).

³¹⁴ *Ibid.*, at para. 29.

³¹⁵ See, for example, articles 37(d) and 40(2)(b)(ii) and (iii) of UNCRC, article 14(3)(b) and (d) of the ICCPR and section 10(b) of the *Canadian Charter of Rights and Freedoms*.

³¹⁶ *A.M.R.I.*, at para. 120.

³¹⁷ GC5, at para. 24 and GC14, at para. 96.

guarantees of article 14 of the ICCPR, which the High Commissioner for Human Rights has confirmed also apply to children in proceedings relating to their care, custody and protection.³¹⁸ The Council of Europe Guidelines on Child-Friendly Justice similarly emphasize that the rule of law and due process protections such as the right to a fair trial and legal advice should be guaranteed for children as they are for adults.³¹⁹

The provision of state-funded legal representation is a critical aspect of ensuring that children can effectively exercise their right to be heard in family law proceedings. Despite the fundamental role of legal assistance and legal aid in actualizing this right, CRIN, as previously indicated, reports that functioning state-funded legal aid systems are completely absent from 42 countries worldwide, with the remaining countries having only limited legal aid available.³²⁰ In Canada, the unmet need for legal services has been widely acknowledged despite the fact that legal representation in the family justice system has been identified as a significant element of access to justice.³²¹ In a 2013 report, *Meaningful Change for Family Justice: Beyond Wise Words*, the Action Committee on Access to Justice in Civil and Family Matters identified the particular impact on children:

The majority of family cases involve children, who are vulnerable, usually unrepresented non-parties who seldom participate directly in the process. Yet their interests are central to the conflict and protecting and promoting their best interests is the paramount objective. Both the process by which family issues are resolved and the substantive resolution of those issues can have significant consequences for the long term well being of children.³²²

The accessibility of state-funded legal services has been further impacted in the province of Ontario by a recent 30% reduction in funding for legal aid.³²³ As research in the area of refugee law demonstrates, the lack of legal representation can dramatically reduce positive outcomes for those affected: refugee claimants were successful in 57% of cases where they were represented by lawyers, compared to a 15% success rate for unrepresented claimants.³²⁴ Navigating the complexities of the legal system without a lawyer is a challenge for adults; for children, it is virtually impossible.

Addressing similar concerns regarding a reduction in funding for legal aid in the U.K., the Bach Commission issued a report in 2017 recommending a restoration of “access to justice as a fundamental public entitlement, equivalent to that of education or healthcare”.³²⁵ The Commission proposed the need for statutory recognition of “the right to justice” and the establishment of a new right to reasonable, affordable legal assistance.³²⁶ Referencing children’s participatory rights under article 12 of the UNCRC, the Commission’s recommendations include the need for government-funded legal representation in “all law concerning children”.³²⁷

³¹⁸ OHCHR Access to Justice Report, at paras. 4 and 12.

³¹⁹ Guidelines, at para. III(A)(2).

³²⁰ CRIN Global Report, at 29.

³²¹ Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters, Final Report: *Meaningful Change for Family Justice: Beyond Wise Words* (2013), (<https://www.cfcj-fcj.org/sites/default/files/docs/2013/Report%20of%20the%20Family%20Law%20WG%20Meaningful%20Change%20April%202013.pdf>), last visited (26-06-2019), at 19.

³²² *Ibid*, at 16.

³²³ K. Goldthorpe, *Access to justice without access to funding: legal aid cuts*, The Lawyer’s Daily, 6 May 2019.

³²⁴ S. Rehaag, *The Role of Counsel in Canada’s Refugee Determination System: An Empirical Assessment*, 49 Osgoode Hall Law Journal 71 (2011).

³²⁵ Bach Commission, *The Right to Justice: The Final Report of the Bach Commission* (2017), at 5-7.

³²⁶ *Ibid*, at 7.

³²⁷ *Ibid*, at 31.

The CRC Committee has emphasized that implementation of the general principles of the Convention, including article 12, cannot be dependent on resources.³²⁸ The limitation on the implementation of economic, social and cultural rights “to the maximum extent of available resources” (i.e. progressive implementation) under article 4 does not apply to civil and political rights, including the child’s rights under article 12. Therefore, the failure to adequately fund a legal aid system that would allow children to consistently have access to legal representation in matters where their interests are directly affected runs contrary not only to the interpretive principles espoused by the Committee in its General Comments, but to article 4 of the Convention.

To the extent that national legal aid systems provide funding for adult parties in court processes to the exclusion of children whose interests are directly impacted by such processes, this may constitute impermissible discrimination under article 2 of the UNCRC on the basis of age, as well as violating rights to non-discrimination and equality before the law under other international and domestic human rights regimes.³²⁹ Although an adequately-funded legal aid system for all participants is preferable, given the particular disadvantages suffered by children in the ability to realize their rights in adult-oriented justice systems, it may be appropriate, as posited by Daly “to have children represented even where adults are not”.³³⁰ In light of the interests at stake for children in many family law matters, to deny a child the ability to have her views and legal interests independently represented in these proceedings by competent counsel not only violates the spirit of article 12, it is contrary to the principles of due process and fundamental justice.

4.3.4. Concluding Remarks

As the discussion in the preceding section suggests, given the interests at stake, due process guarantees are necessary to ensure that the child’s rights are not overlooked or undermined in contested family court proceedings where the child is frequently not a party. The CRC Committee has identified legal representation as one of eight “strict” procedural safeguards that must be put in place when the child’s best interests are being assessed in formal decision-making processes.³³¹ Six other safeguards identified by the Committee that are relevant to family court processes are: ensuring the right of the child to express her own views; establishing relevant facts; avoiding delays in decision-making; using qualified professionals; ensuring appropriate “legal reasoning” by the courts; and facilitating mechanisms to review or revise decisions.³³² The child advocate is uniquely positioned to ensure compliance with each of these safeguards. Some of these factors have already been considered in this chapter; for a more fulsome discussion of how the child advocate facilitates implementation of all of these safeguards, see Appendix “C” on *The Role of the Child Advocate*.

In summary, the child advocate model of legal representation aligns most closely with the combined operation of the human rights principles espoused by the UNCRC as elucidated in the General Comments, including the above-noted procedural safeguards; the due process guarantees applicable to all persons under the ICCPR, as well those flowing from regional and domestic instruments; the access to justice for children pronouncements of the OHCHR; and the various guidelines on child-friendly/child-focused justice, most notably those issued by the Council of Europe and the IAYJFM.³³³ It has also been recognized by the courts in a number of significant decisions and accords with what

³²⁸ Article 4, UNCRC; GC5, at para. 6; Implementation Handbook, at 160.

³²⁹ See s. 3.1.2. for the equality before the law guarantees contained in the UDHR and ICCPR; see also section 15 of the *Canadian Charter of Rights and Freedoms*.

³³⁰ Daly, *Autonomy*, at 246.

³³¹ GC14, at para. 96.

³³² GC14, at paras. 85-99.

³³³ See chapter 3 for these sources.

children want from their representatives. In short, relative to the other mechanisms discussed, this form of legal representation best facilitates the child's meaningful and empowered participation in a forum in which she would otherwise be at a significant disadvantage relative to the adult parties.

5. Conclusion

*So long as the forum is the courtroom, the child's lawyer should represent his or her young client in a way which reflects equal participation with the other parties in this forum.*³³⁴

5.1. Legal Representation as a Critical Aspect of the Realization of the Child's Right to Be Heard

Article 12 of the UNCRC is based on the principle that participation is a fundamental human right. As such, "[i]t enables us to demand rights".³³⁵ In the context of judicial processes where a child's interests are directly affected, the child requires a qualified legal representative to assist her in asserting her rights. Just as one would not go to an auto mechanic to treat a physical ailment, it is insufficient to have the assistance of a non-legally trained support person when the setting is a judicial proceeding. It is similarly inadequate to have a legal representative who views their role as including the advancement of a position based on what they perceive to be in the child's best interests, even if this contravenes the child's expressed views. This usurps the role of the court and more significantly, risks silencing the child.

Article 12 assures to the child the right to be heard and to have due weight given to her views in accordance with her age and maturity in all matters affecting her. This thesis has demonstrated that legal representation is a critical aspect of the realization of the child's right to be heard in family law proceedings where her best interests are the primary consideration. Although this does not preclude the possibility of the child expressing her views directly to the decision-maker or through the involvement of another representative should the child want this, as long as the context is a judicial proceeding, the child is also entitled to an instructional advocate to ensure that her views are not merely heard, but have the potential to influence outcomes, within the legal framework of decisions which so profoundly affect her life. This achieves not only effective realization of article 12 of the CRC, but facilitates substantive and procedural equality for the child in relation to the adult parties who are able to advocate their own legal positions or have lawyers who do this on their behalf. This is particularly important given that it is the child's best interests that are the focus of the inquiry and where, as is the case in *all* family law matters, there is a conflict between the interests of the child and at least one of the parties to the proceedings.³³⁶

As discussed in section 4.3.3., to give effect to children's meaningful participation in family court processes, States Parties must allocate sufficient resources to ensure children have access to legal representation. As noted by Daly, reductions in legal aid funding in many countries have negatively impacted on children's access to legal support and "[a]rguments have been made that far from being based in necessity, these cuts have been ideological in nature".³³⁷ This is inconsistent with States Parties' implementation obligations under article 4 of the UNCRC, which include facilitating children's access to the courts with necessary legal assistance.³³⁸ Care must also be taken not to unduly burden courts with concerns regarding available resources when exercising their discretion to appoint lawyers

³³⁴ *Ibid*, at para. 6.

³³⁵ Freeman, 2007, at 5.

³³⁶ GC14, at para. 96.

³³⁷ Daly, *Autonomy*, at 229.

³³⁸ GC5, at para. 24.

for children: “it is the function of judges to apply the law, not to serve as a gatekeeper for public resources”.³³⁹ Adequate funding for family law matters must be seen as a priority given the centrality of children’s interests and the heightened vulnerabilities of children relative to adults in proceedings that are frequently complex and have far-reaching implications for children’s lives and well-being.

Decision-makers must also guard against protectionist notions that it is best to keep children out of adult conflicts. This fails to recognize that children have lived these conflicts and are keenly aware of what is at stake for them, as well as the significant body of research that confirms the benefits of children’s participation and the harms of not participating in matters which directly affect them.³⁴⁰ Also, extensive support for children’s empowered legal participation as an access to justice issue is found in the many international and regional human rights standards discussed in chapter 3, albeit with much of the most explicit support contained in non-binding instruments. Nonetheless, article 12 of the UNCRC is clear that every child has a right to be heard in all judicial proceedings affecting her, and rights to due process enshrined in international and domestic instruments that are legally-binding, as well as the common law, support the conclusion that the right to legal representation is essential to ensure that both the child’s voice *and* legal interests are advanced and protected in family court processes, particularly in adversarial legal systems.

It is also important to ensure that the child-lawyer relationship is not compromised by the dilution of the lawyer’s role. Again, the research is clear that children want assurances of confidentiality in their communications with their representatives in the context of court processes.³⁴¹ For the most part, only lawyers can guarantee such confidentiality, a factor which is critical in building trust with a child and establishing a rapport.³⁴² Research also shows that children want their legal representatives to advocate actively for their views, not what they think is best for them.³⁴³ Respect for children and their autonomy interests, as well as their expertise in their own lives, must guide the model of representation afforded to them, accompanied by necessary information, rather than adult perceptions of what is best for them. Adults, both parents and the courts, have vested interests in the processes and/or outcomes; for judges, this relates to having a source of reliable information to assist them in their determinations.

Fulfilling our human rights obligations to children, rather than serving adult interests, should inform decisions regarding legal representation for children in family law processes. Although direct communication with the court, assessments and Views of the Child Reports may have a place in some cases, and may be available in addition to the provision of a child advocate, they are not an adequate substitute for legal representation. As long as the courtroom is the forum, children require legal representation to ensure that their views are not only heard, but given due weight throughout the judicial process, and that their legal interests are protected. As previously noted, the issue of resources should not be “a race to the bottom”³⁴⁴ – inadequate public funding should not mean that children’s rights are not respected. As those most directly impacted by adult decision-making when their best interests are in issue, children require an equal footing in the proceedings, and resources must be allocated in State budgets for this purpose, failing which governments may face legal challenges for failing to guarantee basic rights. Children need to know that they have trusted, skilled allies with undivided loyalties to them in court processes where their best interests are being

³³⁹ Daly, *Autonomy*, at 233.

³⁴⁰ See section 2.3.

³⁴¹ See sections 4.1.2.2. and 4.3.1.

³⁴² *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 (leave to appeal to SCC dismissed, 28-03-2019), at paras. 70, 71, 73-75.

³⁴³ See section 4.3.1.

³⁴⁴ Daly, *Autonomy*, at 426.

determined. It is only in this way that children can truly be respected as independent rights-holders empowered to participate in fundamental decisions about their own lives, as contemplated by article 12 of the UNCRC.

5.2. Recommendations

5.2.1. General Comments: Moving Forward

Some commentators focus on the fact that article 12(2) of the UNCRC does not specify the need for a *legal* representative when the child is heard indirectly in a judicial proceeding. It is suggested that this is an unduly narrow interpretation. Although the child should be free to decide if and how she wishes to exercise her right to be heard based on full information, the absence of the word “legal” before representative should not absolve States Parties from the obligation to give the child the option to exercise the right to be heard through a lawyer, particularly in common law jurisdictions. As noted in this thesis, the provision of legal representation may be the only way to ensure that the child’s right to effectively participate is safeguarded. As has also been noted, the Committee has rejected an interpretation of the qualification of hearing from the child “in a manner consistent with the procedural rules of international law” as restricting the enjoyment of this fundamental right.³⁴⁵

Also, although General Comment No. 14 is quite clear on the need for “appropriate legal representation” for the child when her best interests are to be formally assessed by courts, it does not specify what is meant by “appropriate” or what the role of the legal representative should be. Also, the direction that the child should be provided with a legal representative, “in addition to a guardian or representative of his or her views” is somewhat unclear. This writer interprets it to mean that the child requires a lawyer who will advocate for the child’s views, in addition to a non-legal representative who may also be advocating for the child’s views, to ensure that the child has the benefit of a representative who is familiar with the law given that the contested best interests assessment is occurring in a judicial setting. It could arguably be interpreted as meaning that the legal representative should advocate for the child’s best interests, since the child already has a guardian or representative of her views, although this interpretation seems less plausible. Moreover, the qualification on the need for a legal representative “when there is a potential conflict between the parties in the decision” is somewhat misleading. It suggests that there may not be a need for legal representation if there is no potential conflict. If a matter is before the court, by definition there is a conflict between the parties; certainly, this is the case in all family law matters. It would be clearer if the General Comment simply stated that the child requires a lawyer in any court proceeding involving the determination of her best interests. Also, given the apparent discrepancy between the English and French versions of “legal representative” highlighted by the British Columbia Court of Appeal in *J.E.S.D. v. Y.E.P.*, clarification on the correct interpretation of the term would be helpful.³⁴⁶ This could perhaps occur in the context of the Committee’s next Concluding Observations to Canada.³⁴⁷

In fact, it would be preferable if the need for legal representation were more clearly articulated in General Comment No. 12 and if it encompassed a right to legal representation “whenever the child’s interests are at stake”, similar to the IAYJFM Guidelines.³⁴⁸ General Comment No. 12 is weaker in its articulation of the need for legal representation, indicating that the child may be represented in a judicial proceeding by “the parent, a lawyer or another person (*inter alia*, a social worker)” although it does recognize that there are risks of a conflict of interest between a child and their most obvious

³⁴⁵ GC12, at para. 38.

³⁴⁶ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

³⁴⁷ The scheduling of the date for Canada’s review is pending.

³⁴⁸ IAYJFM Guidelines, at 27.

representative, a parent.³⁴⁹ Although this formulation may be consistent with the child's wishes in a given case, it fails to recognize that the child may be at a significant disadvantage if she is not represented by a lawyer in a court proceeding, particularly in a jurisdiction with an adversarial legal system. The failure to specify the need for a lawyer may reflect the different considerations in countries with different legal traditions, such as inquisitorial systems, where the child is more likely to have an opportunity to meet directly with the judge and where active advocacy by the parties is not a feature of court proceedings in the way that it is in adversarial legal systems. Although this is a relevant consideration, the need for legal representation for children in civil law jurisdictions should not be lightly discounted for the reasons articulated in this thesis; for example, in the context of (but not limited to) Hague abduction proceedings.

General Comment No. 12 does encourage States Parties to "comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one's own files".³⁵⁰ This can be seen to provide stronger support for the right to a lawyer in proceedings where the child's rights are implicated but it is suggested that the Committee may wish to consider following the lead of the OHCHR and issuing a general comment dedicated to access to justice for children in civil court proceedings.³⁵¹ Given the plethora of international and regional human rights instruments that address the issue of legal representation for children, as well as access to justice for children and child-friendly justice more generally, it would be helpful to have a document that consolidates and seeks to harmonize, to the extent possible, all the norms, with article 12 as the frame of reference. The general comment could articulate the different considerations in common law and civil law systems and provide guidance on the appropriate role of the legal representative in each system. Issues relating to legal standing and party status, as well as the full range of due process rights could also be articulated.

It may, in fact, be more effective to focus on legal representation as a procedural guarantee / due process right necessary for a fair trial given children's particular vulnerabilities and the fact that it is their interests that are at the heart of the courts' determinations in family law proceedings. This may prove easier than trying to achieve consensus on "reading in" a right to legal representation in article 12(2).

5.2.2. Participation Triage

A further recommendation arising from this thesis is the need for States to establish a triage mechanism for children. Although this thesis maintains that legal representation is necessary for the effective realization of the child's right to be heard in family law proceedings, it has been acknowledged that it is the child's right to determine how and if she wishes to participate in the court process. Ideally, a range of options such as those considered in this thesis should be made available to the child. When a family law proceeding is commenced, the child would be invited to meet with a family court professional, possibly a lawyer, who would explain the various participation options and then facilitate the child's preferred method of participation. The professional could also assist in making referrals to other appropriate services (e.g. mediation, counselling, etc.) and direct the child to other sources of information (e.g. on-line resources). States would need to invest in training for the

³⁴⁹ GC12, at para. 36.

³⁵⁰ *Ibid*, at para. 38.

³⁵¹ Human Rights Council, Report of the United Nations High Commissioner for Human Rights: Access to justice for children, UN Doc. A/HRC/25/35 (2013); Human Rights Council, Right of the child: access to justice, UN Doc. A/HRC/25/L.10 (2014).

triage professionals and dedicate adequate resources for the triage functions, including the establishment of a qualified network of service-providers, such as lawyers for children.

5.3. Areas for Further Research

There are a number of possible areas for further research that flow from this thesis. Its scope was limited to whether legal representation is a critical aspect of the child's right to be heard in family law proceedings where the child's best interests are the primary focus. There are other areas of law where children may require legal representation to facilitate their effective participation, whether or not their best interests are the focus of the court's analysis. One such area is the immigration and refugee law context. Due to the particular vulnerabilities of migrant and asylum-seeking children, it may be necessary to provide them with heightened procedural safeguards, including independent legal representation, given the serious, and potentially life-threatening, consequences of negative decisions. It may also be important that such representation be made available to the child from the time she arrives in the country of destination, before making statements to immigration officials that may subsequently be used to impugn her credibility at an immigration or refugee hearing, and continue to be available to her until her status has been resolved and/or all avenues of appeal or judicial review have been exhausted. It may be particularly inadequate to have a non-legal representative for the child where she is an unaccompanied or separated minor, where she is the principal applicant in a refugee claim or where there may be a conflict with a parent, for example, in cases of domestic violence, where the parent's representation of the child may have the effect of silencing her. All of these issues could be further explored.

Another area of potential research would be the right to legal representation flowing from article 12 for child victims and witnesses. As neither parties nor subjects of court proceedings, the extent to which their rights to empowered participation are facilitated could be explored, having regard to the adequacy of existing international and regional standards.

The research for this thesis has revealed that the issue of legal representation for children in common law and civil law systems raises a number of different considerations. This writer is from a common law jurisdiction and is therefore, more familiar with the adversarial legal system. Children meet with judges more frequently in civil law systems but less commonly have separate legal representation. It would be interesting to explore the extent to which children have legal representation in civil law jurisdictions, how lawyers ensure that the child's views are heard and given due weight, and to what extent children's views affect the outcomes.

Finally, in many jurisdictions, there is a significant push towards alternative dispute resolution (ADR) in family law matters. This raises questions about what procedural safeguards are in place to ensure children's meaningful participation in ADR processes. Article 3 of the UNCRC indicates that the best interests of the child are a primary consideration in all actions concerning children undertaken, *inter alia*, by courts of law. The CRC Committee has defined "courts of law" to include ADR processes.³⁵² This means that the call for legal representation for the child contained in General Comment No. 14 applies to the ADR context as well.³⁵³ What is not clear, is the extent to which legal representation is, in fact, provided to children in ADR processes, and what other mechanisms, if any, are used to ensure that children's views are duly considered in these processes. Given that these are private processes, the extent to which due process guarantees are implemented for children would be a research question to explore. Questions have also been raised about the push towards mediation as part of the

³⁵² GC14, at para. 27.

³⁵³ *Ibid*, at para. 96.

agenda to limit access to legal aid in family law disputes.³⁵⁴ Again, this raises questions about children's visibility and respect for their rights in these processes, a rich topic for further research.

³⁵⁴ Daly, *Autonomy*, at 430.

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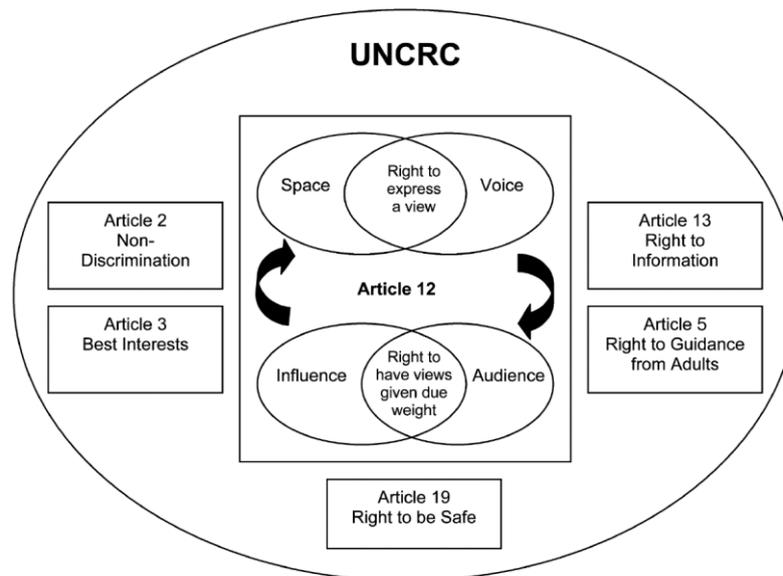
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Appendix “A”

A “Legal” Adaptation of Lundy’s Model of Child Participation³⁵⁵



Conceptualizing Article 12³⁵⁶

The diagram illustrates the four steps conceptualized by Lundy for the realization of the child’s right to be heard. Adapted by this writer to the context of legal representation for the child, they include:

- **Space:** children must be provided with the opportunity to express a view.³⁵⁷ States must facilitate the conditions that allow children to do this. In the context of court proceedings, this means advising children of their right to have their views considered by the decision-maker and the options available for this to occur, including the provision of legal representation and what this entails. If legal representation is the method of participation selected, States must provide adequate funding for same. The space must also be safe and inclusive.³⁵⁸ A significant advantage of legal representation as the method of participation by which the child’s views may be supported in court processes, is the assurance of confidentiality the lawyer can provide, an important safeguard supported by the CRC Committee,³⁵⁹ to enable the child to speak freely without “fear of rebuke or reprisal”³⁶⁰ by others, including parents.³⁶¹ It also allows for candid discussion of all legal options with the child and their potential viability.
- **Voice:** children must be facilitated to express their view.³⁶² Lawyers must meet with the child in an encouraging, child-friendly environment and adapt their communication to the child’s

³⁵⁵ L. Lundy, *Voice is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child*, 33 *British Educational Research Journal* 927 (2007), at 932 [hereinafter Lundy].

³⁵⁶ The model contemplates that once the child is informed of the extent of influence on a particular decision, the process may begin again (Lundy, at 933).

³⁵⁷ *Ibid*, at 933.

³⁵⁸ *Ibid*, at 934.

³⁵⁹ GC12, at para. 43.

³⁶⁰ Lundy, at 934.

³⁶¹ *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 (leave to appeal to the Supreme Court of Canada dismissed, 28-03-2019), at paras. 70-72.

³⁶² *Ibid*, at 933 and 935.

level of understanding. This may include explaining court documents or assessments in a manner commensurate with the child's age, language, maturity, cognitive development and any special needs the child may have. The child's social and cultural context and past experiences of trauma must also be considered, consistent with the principles of non-discrimination encompassed by article 2 of the UNCRC. Lawyers for children may require specialized training to learn how to communicate effectively with their child-clients, including understanding the visual and behavioural cues of younger clients, or may require the assistance of a mental health or social work professional to do so.

- **Audience:** the views must be listened to.³⁶³ Lawyers can ensure that children's views are effectively communicated *and* considered by decision-makers in court processes.
- **Influence:** the view must be acted upon, as appropriate, and the reasons for the decision taken must be communicated to the child.³⁶⁴ Article 12 requires that children's views be given "due weight". This implies a right to influence the decision, not just to be heard. The lawyer must initially determine the child's capacity to form a view, with no starting presumption of incapacity,³⁶⁵ and be prepared to adduce evidence with respect to the child's age and maturity to ensure that appropriate weight is accorded to her views. By advancing and testing evidence and making legal arguments in court processes, lawyers can ensure that decision-makers give adequate consideration to all the statutory considerations relevant to the child's preferred outcome. They can also assist the child in accessing review/appeal mechanisms if this does not occur.

³⁶³ Lundy, at 933 and 937.

³⁶⁴ *Ibid*, at 933.

³⁶⁵ This is consistent with the Committee's direction at GC12, para. 20, although clearly directed to States Parties rather than private actors. The issue of capacity will be discussed further in section 5.1.

Appendix “B”

Summary of Legal Representation in National Legal Systems: Netherlands, U.K. and Canada

Netherlands

In the civil law context, persons under the age of 18 lack legal capacity in the Netherlands.³⁶⁶ A child must be represented by her legal guardian (usually a parent) when bringing a matter to court. An exception exists with respect to children in alternative care who are placed in secure treatment settings. In these cases, children are independent parties to the proceedings and have legal representation.³⁶⁷ Children less commonly have legal representation in other family law matters. In all family law proceedings, including child protection proceedings, children are seen as interested, but not independent, parties.³⁶⁸ Under the Dutch Code of Civil Procedure, children 12 years of age and older have the right to express their views in civil law proceedings, if they are not intellectually incapable of doing so.³⁶⁹ The court is obliged to invite children who are 12 or older to be heard in matters affecting them. Children under the age of 12 have no such right; they may request an audience with the judge but whether the request is granted is in the court's discretion.³⁷⁰ A guardian *ad litem* (GAL) may be assigned to the child in some cases, particularly those arising under the Hague Abduction Convention. The GAL may be a lawyer or psychologist. In Hague abduction matters, a psychologist is assigned. This is discussed further in section 4.2.1 of the thesis.

U.K.

In the U.K., the general rule is that a child cannot make an application or be joined as a party to a proceeding unless she has a guardian appointed to do so on her behalf.³⁷¹ The Children Act 1989 provides for the mandatory appointment of a guardian *ad litem* in child protection proceedings to safeguard the child's interests.³⁷² In contrast, the child will have a guardian in only approximately 4% of private family law cases.³⁷³ In theory, the GAL must appoint a solicitor for the child who then retains a barrister, but in practice, it is the GAL who instructs the solicitor.³⁷⁴ The GAL is typically a social work professional whose primary objective is to present to the court what she considers to be in the child's best interests, although the child's views should also be presented. The U.K.'s “tandem model” of representation has been praised but has also been described as “essentially paternalistic” since “at its heart lies the conflict between advancing the welfare of the child and upholding the child's freedom of expression and participation”.³⁷⁵ The Family Procedure Rules provide an exception to the

³⁶⁶ CRIN, Netherlands: Access to Justice for Children (2014), (https://archive.crin.org/sites/default/files/netherlands_access_to_justice-updatedoct2015.pdf), last visited (06-07-2019).

³⁶⁷ *Ibid.*

³⁶⁸ K. Van Der Zon, M. Bruning & M. Limbeek, *Can you hear me? Children's right to be heard in child protection proceedings in the Netherlands*, 7th World Congress on Family Law and Children's Rights (2017), at 3.

³⁶⁹ *Ibid.*; Article 809, Dutch Code of Civil Procedure.

³⁷⁰ *Ibid.*

³⁷¹ Section 41(1)-(2), Children Act 1989, c. 41.

³⁷² Unless it is not necessary to do so in order to safeguard their interests. *Ibid.*, at section 41(6); A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (2018), at 240 [hereinafter Daly, *Autonomy*].

³⁷³ Daly, *Autonomy*, at 240-241.

³⁷⁴ A. Parkes, *Children and International Human Rights Law: The Right of the Child to be Heard* (2013), at 107-108.

³⁷⁵ *Mabon v. Mabon* [2005] EWCA Civ 634, at paras. 25 and 28.

appointment of a GAL; the child may apply to be joined as a party and to independently instruct a solicitor with the court's permission, or if the solicitor considers the child is capable of providing instructions in the proceedings.³⁷⁶ On application, the issue of joinder is determined on the basis of the best interests of the child.³⁷⁷ A Practice Direction relating to the issue of joinder is quite restrictive, however, indicating, *inter alia*, that it is a step which should be taken only in cases which involve an issue of significant difficulty.³⁷⁸ Cases where such applications have been considered, as well as the role of the GAL, are examined in chapter 4 of the thesis. There exists the possibility for the judge to meet with the child but the use of judicial interviews is quite circumscribed in the U.K. This is discussed in more detail in section 4.1.3. of the thesis.

Canada

The availability of independent legal representation for children in family law matters in Canada varies depending on the jurisdiction. Canada is a federal State and constitutional authority for non-divorce-related family law matters falls under provincial-territorial heads of power. Consequently, different custody/access and child protection legislation exists in each province and territory and may or may not provide for the possibility of legal representation for children. Assessments/reports for use in family law proceedings are generally available in all jurisdictions (although public funding for same may not be). Judges may also interview children and although there has been a greater willingness to do so in recent years, it remains a relatively infrequent practice.

In the province of Ontario, the legal status of the child depends on the nature of the proceedings. In civil litigation, the *Rules of Civil Procedure* of Ontario provide that unless the court or a statute provides otherwise, a proceeding shall be commenced or defended by a litigation guardian on behalf of a party "under a disability", which includes a minor.³⁷⁹ Different rules apply to family law matters, including child protection proceedings. Children who are the subjects of child protection proceedings or private family law matters are not parties, but under the *Family Law Rules*, the court may authorize a lawyer (as distinct from a litigation guardian) to represent the child, and then the child has the rights of a party.³⁸⁰ Following a 2015 appellate decision, *C.M.M. v. D.G.C.*, which clarified the interpretation of "special party" under the *Family Law Rules* (exempting a child from the definition), a child may act on her own, be represented by a lawyer, or some other appropriate person in custody, access, child protection, adoption or child support cases.³⁸¹

In custody/access matters, the court may request the appointment of a lawyer for a child under the *Courts of Justice Act*.³⁸² The referral is sent to the Office of the Children's Lawyer (OCL), an independent publicly-funded office within Ontario's Ministry of the Attorney General. The OCL has discretion to decide whether or not to provide services in these cases. If accepted, the OCL may appoint a lawyer for a child or assign a clinical investigator to prepare a report for the court with recommendations on all matters concerning custody of and access to the child. In child protection matters, the court may direct the appointment of independent legal representation for the child pursuant to the *Child, Youth and Family Services Act, 2017 (CYFSA)*.³⁸³ The OCL accepts all referrals from the court in child protection matters and will assign a lawyer for the child. Under the

³⁷⁶ Rule 16.6, Family Procedure Rules 2010, SI 2010 No. 2955 (L.17).

³⁷⁷ *Ibid*, at Rule 16.2(1).

³⁷⁸ Practice Direction 16A – Family Proceedings: Representation of Children.

³⁷⁹ Rule 7.01(1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

³⁸⁰ Unless the court orders otherwise. Rule 4(7), *Family Law Rules*, O. Reg. 114/99 [hereinafter FLR].

³⁸¹ *C.M.M. v. D.G.C.*, 2015 ONSC (SCJ – Divisional Court), at para. 26.

³⁸² Section 89(3.1), *Courts of Justice Act*, R.S.O. 1990, c. C.43.

³⁸³ Section 78, *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sched. 1 [hereinafter CYFSA].

CYFSA, the court must consider the issue of legal representation “as soon as practicable” following the commencement of a child protection proceeding to determine whether legal representation is “desirable to protect the child’s interests”.³⁸⁴ There are prescribed circumstances in which it will be deemed desirable to appoint counsel for the child, including when a difference exists between the views of the child and those of a parent or children’s aid society.³⁸⁵ Minor parents and children placed in secure treatment facilities have an automatic entitlement to legal representation.³⁸⁶ Children 7 years of age and older who are the subject of an adoption application must also receive independent legal advice in regard to their consent to adoption.³⁸⁷ The OCL also receives all notices relating to openness (post-adoption contact) orders and provides legal representation to children in these cases.³⁸⁸

Independent of the issue of legal representation, a child 12 years of age or older who is the subject of a child protection proceeding is entitled to receive notice of the proceeding and to be present at the hearing, unless the court is satisfied that being present at the hearing would cause the child emotional harm.³⁸⁹ Conversely, a child younger than 12 who is the subject of a child protection proceeding is not entitled to receive notice of the proceeding or to be present at the hearing unless the court is satisfied that the child is capable of understanding the hearing; and will not suffer emotional harm by being present at the hearing.³⁹⁰ In practice, it is rare for children to receive notice or attend a proceeding until an order for legal representation has been made.

As noted in the preceding paragraph(s), the OCL provides independent legal representation for children when the court directs legal representation in child protection proceedings and has the discretion to do so in custody/access matters.³⁹¹ The OCL is the most expansive publicly-funded child representation program in Canada.³⁹² In private family law and child protection proceedings, the OCL provides a mechanism for children of all ages, including young children, to be heard and to have their views advocated in judicial proceedings. Once appointed, the OCL has full power to act for the child as though she were a party to the proceeding.³⁹³ In the course of representing a child, OCL counsel will not only meet with the child-client as needed, but will meet with the child’s parents and obtain information from relevant third parties. A clinician (social worker) may be assigned to assist the lawyer in placing evidence before the court relevant to the child’s position, including her expressed views. The relationship between the lawyer and the child is a solicitor-client one and the child’s confidences

³⁸⁴ *Ibid*, at section 78(2)(a).

³⁸⁵ *Ibid*, at section 78(4).

³⁸⁶ *Ibid*, at section 78(5) and 161(6).

³⁸⁷ *Ibid*, at section 180(7).

³⁸⁸ *Ibid*, at sections 210 and 211.

³⁸⁹ *Ibid*, at section 79(4).

³⁹⁰ *Ibid*, at section 79(5).

³⁹¹ Given the mandatory appointment of counsel in child protection cases, the discretion to provide services in custody/access matters is largely dependent on resources.

³⁹² Office of the Children’s Lawyer, (<https://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/>), last visited (27-06-2019). In addition to providing legal representation to children in family law matters, the OCL delivers legal services to children in certain property rights matters (civil litigation and estates matters). The OCL has approximately 25 staff lawyers and retains the services of approximately 400 private lawyers across the province of Ontario who provide representation to children under the oversight of the OCL in the family law context. The OCL also has approximately 10 clinical supervisors who supervise over 280 fee-for-service clinicians in private practice in preparing reports for the courts or assisting lawyers in custody/access and child protection proceedings. Specialized and ongoing professional development is provided to both lawyers and clinicians.

³⁹³ Rule 4(7), FLR and section 79(6), CYFSA; see also, Office of the Children’s Lawyer Forms, specifically, Child Protection Order (Form OCL-004) and Custody/Access Order (Form OCL-005), (<http://ontariocourtforms.on.ca/en/office-of-the-childrens-lawyer-forms/>), last visited (27-06-2019).

are maintained in accordance with the professional obligations applicable to all lawyers. In addition to representing the child in the court proceedings, child's counsel will actively pursue settlement options consistent with the child's interests. OCL counsel will also initiate and participate in appeal proceedings taken in regard to the child.

Below is a more limited overview of the legal representation programs offered in other Canadian provinces and territories:³⁹⁴

The province of Alberta offers child legal representation through the Office of the Child and Youth Advocate (OCYA) (child protection),³⁹⁵ Legal Aid Alberta (custody/access and parenting),³⁹⁶ and the Children's Legal & Educational Resource Centre (CLERC) (all civil law matters, excluding child protection).³⁹⁷ The OCYA recruits and supports a roster of lawyers in private practice for its Legal Representation for Children and Youth program (LRCY).³⁹⁸ LRCY lawyers are presumptively required to take an instructional advocacy role; however, if a lawyer thinks that a child lacks capacity to give instructions, the lawyer may adopt a "best interests" guardian or an *amicus curiae* role.³⁹⁹

Government-funded child legal representation is also available in Saskatchewan in child protection matters.⁴⁰⁰ The Office of the Public Guardian and Trustee appoints counsel from a roster of trained lawyers upon receipt of a court order or a referral by a child or young person, a child protection worker, a family member or someone who knows the child. Lawyers will generally take instructions from the client and will present their views or concerns during negotiations, mediations or court proceedings.

The North West Territories has an Office of the Children's Lawyer providing child legal representation in custody/access and child protection matters.⁴⁰¹ The Office has one staff lawyer and a roster of trained and supervised lawyers in private practice.⁴⁰²

The province of British Columbia (B.C.) has recently established a Child and Youth Legal Centre which provides direct legal services to children and youth in B.C. in the areas of family law and child protection. It currently staffs three full-time lawyers and is in the process of developing a province-wide roster of other lawyers. Although the establishment of the Centre represents a positive development, funding is limited and concerns remain about the lack of resources for empowered child participation in B.C. The possibility of a child having independent legal representation in parenting disputes in B.C. is also limited by its restrictively-worded family law legislation. A court may only appoint a lawyer to represent the interests of the child in a proceeding under the *Family Law Act* if the court is satisfied that "the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and it is necessary to protect the best

³⁹⁴ For more information about legal representation of children across Canada, see D. Lovinsky and J. Gagné, *Legal Representation of Children in Canada*, Presented to The Family, Children and Youth Section, Department of Justice Canada, (2015), <https://www.justice.gc.ca/eng/rp-pr/other-autre/lrc-rje/lrc-rje.pdf>, last visited, (27-06-2019); see also N. Bala and R. Birnbaum, *Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases*, 59 *Les Cahiers de Droit* 787 (2018), at 800-809 [hereinafter Bala & Birnbaum, *Rethinking*].

³⁹⁵ Office of the Child and Youth Advocate Alberta, (<http://www.ocya.alberta.ca/>), last visited (27-06-2019).

³⁹⁶ Legal Aid Alberta, (<http://www.legalaid.ab.ca/Pages/default.aspx>), last visited (27-06-2019).

³⁹⁷ CLERC, <http://youthlaw.ca/>, (last visited (27-06-2019)).

³⁹⁸ Bala & Birnbaum, *Rethinking*, at 805.

³⁹⁹ *Ibid.*

⁴⁰⁰ Legal Aid Saskatchewan, (<http://www.legalaid.sk.ca/>), last visited (27-06-2019).

⁴⁰¹ Children's Lawyer, Department of Justice, Government of the Northwest Territories (<https://www.justice.gov.nt.ca/en/childrens-lawyer/>), last visited (27-06-2019).

⁴⁰² Bala & Birnbaum, at 809.

interests of the child".⁴⁰³ Lawyers for children are rarely appointed under this section given the strict criteria even in cases that many would characterize as "high conflict". Even if the judge decides to appoint a lawyer, the court is encouraged to allocate the costs among the parties. This expectation is unrealistic for most parents before the courts and arguably deflects State responsibility for providing legal representation to children.⁴⁰⁴ In a recent decision, the British Columbia Court of Appeal rejected this interpretation, indicating that the Family Law Act provision requires parents to pay for counsel for their children.⁴⁰⁵ The Court also held that judges in British Columbia have no inherent *parens patriae* jurisdiction to order the government to pay for lawyers for children in family cases.⁴⁰⁶

Quebec is the only province in Canada with a civil legal system. Under the Quebec Civil Code, children must be heard by the court in any case where their interests are affected, if they have the ability to express themselves.⁴⁰⁷ Quebec courts may order that a child be provided with legal representation in both family and child protection cases. Although a significant number of lawyers in Quebec provide representation to children, there is no oversight institution with a responsibility to recruit, train or supervise them.⁴⁰⁸ Lawyers representing children in Quebec are expected to take an instructional advocacy role.⁴⁰⁹

As these examples demonstrate, although the possibility of legal representation for children in family law matters exists in Canada, the availability and extent of these services is determined by location, as well as the nature of the proceeding. It is more likely that children will have state-funded legal representation in child protection matters. It is far less common for children to be represented in private family law disputes.

⁴⁰³ Section 203(1), *Family Law Act*, [SBC 2011] c. 25.

⁴⁰⁴ D. Martinson and C. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 31 *Canadian Journal of Family Law* 151 (2018), at 195.

⁴⁰⁵ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Article 34, *Civil Code of Québec*, CCQ-1991.

⁴⁰⁸ Bala & Birnbaum, *Rethinking*, at 806.

⁴⁰⁹ *F.(M.) c. L.(J.)*, 2002 CanLII 63106 (QcCA).

Appendix “C”

Empowered Participation: The Role of the Child Advocate

Role of the Child Advocate

The child advocate model of legal representation aligns most closely with article 12 of the UNCRC and the principles espoused by the CRC Committee by facilitating the child’s meaningful and empowered participation in a forum in which her interests are the central focus. Procedural safeguards are necessary to ensure that the child’s rights are not overlooked or undermined in contested family court proceedings where the child is frequently not a party. The CRC Committee has identified eight procedural safeguards when a child’s best interests are being assessed by courts or equivalent bodies.⁴¹⁰ In addition to legal representation, the following six safeguards identified by the Committee are particularly relevant to family court processes: (1) ensuring the right of the child to express her own views; (2) establishing relevant facts; (3) avoiding delays in decision-making; (4) using qualified professionals; (5) ensuring appropriate “legal reasoning” by the courts; and (6) facilitating mechanisms to review or revise decisions.⁴¹¹ The role of the child advocate in ensuring the effective realization of each of these safeguards will now be examined:

1. ‘Obtaining’ the Child’s Views

Communicating with children to facilitate meaningful child participation in court processes includes informing children about how decisions are made and discussing possible sustainable solutions and services. This encompasses advising the child of the viability of her expressed preferences and discussing alternative options if the child’s desired outcome is unlikely. The child must be advised of the role of counsel and the confidentiality that attaches to the solicitor-client relationship, as well as any limitations thereto.⁴¹² Confidentiality is one of the key distinguishing features of the child advocate’s role as compared to other methods of representation, and consistent with the research discussed in the body of the thesis,⁴¹³ may prove essential to the child’s willingness to express her views freely without fear of reprisal.⁴¹⁴

Participation facilitated by legal representation includes recognition that participation is a process, not a momentary act. This also distinguishes legal representation from some of the other methods of

⁴¹⁰ Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, UN Doc. CRC/C/GC/14 (2013), at paras. 85-99 [hereinafter GC14].

⁴¹¹ *Ibid.*

⁴¹² Under Canada’s Model Code of Conduct:

3.3-3 A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Federation of Law Societies of Canada, *Model Code of Professional Conduct*, (<https://flsc.ca/wp-content/uploads/2018/03/Model-Code-as-amended-March-2017-Final.pdf>), last visited (26-06-2019) [hereinafter Model Code of Conduct].

⁴¹³ The CRC Committee also confirms this. See Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC/12 (2009), at para. 43 [hereinafter GC12].

⁴¹⁴ The UN Guidelines for the Alternative Care of Children also highlight the need for a child in care to have “a person of trust in whom they may confide in total confidentiality”. UN General Assembly, *Guidelines for the Alternative Care of Children*, UN Doc. A/RES/64/142 (2010), at para. 98.

participation discussed. Meeting with the child on more than one occasion is necessary to establish a rapport with the child and to keep her apprised of developments and decision-making points in the case.

Participation must also be voluntary; it is a right, not an obligation.⁴¹⁵ In family law disputes, children may not wish to express a view regarding a proposed living or visiting arrangement due to feelings of affection for both parents, divided loyalties and/or fear of negative repercussions. In these instances, options to facilitate an outcome consistent with the child's preferences should be canvassed, short of attributing a particular view to the child; for example, through the introduction of other evidence. If the child maintains a preference not to participate, however, and is content to allow decision-making to occur without her input with the implications of this having been explained to the child, her views must be respected. Ideally, the mechanism by which a child's participation is effected should be child-informed, i.e. having regard to the child's preferred method of participation based on the child's knowledge of the conditions under which she will be asked to express her views and an understanding of the implications of the various options. Practically, civil court processes are ill-equipped to canvass such options.

The CRC Committee recommends a five-step implementation process to facilitate the *hearing* of the child: (i) preparation, including being informed of the right to be heard and the process to be followed at the hearing; (ii) the hearing, the context of which must be enabling and encouraging; (iii) assessment of capacity; (iv) being informed about the weight given to the views of the child; and (v) complaints, remedies, and redress when the child's right to be heard and to have her views given due weight is violated, including access to an appeals process in the context of judicial proceedings.⁴¹⁶

The Committee also suggests nine basic requirements for the implementation of the right to be heard to avoid tokenism. Participation processes must be: (i) transparent and informative - children must be provided with full, accessible information about their participation rights; (ii) voluntary; (iii) respectful; (iv) relevant to children's lives; (v) child-friendly; (vi) inclusive; (vii) supported by appropriately trained adults; (viii) safe and sensitive to risk - children must be aware of their right to be protected from harm, including any harm that may result from the expression of their views, and where to get help, if needed; and (ix) accountable - a commitment to follow-up and evaluation is essential.⁴¹⁷

Having regard to the above-noted factors, two issues that are frequently raised in family court proceedings regarding the "hearing" of the child are the child's capacity to express views or "instruct" counsel and the voluntariness of her views. Both impact on the weight that decision-makers will place on the child's views and must be addressed by the child advocate to ensure effective implementation of the child's right to be heard. These two issues will be discussed in turn before returning to the procedural safeguards necessary to ensure the proper assessment of the child's best interests.

a) Capacity

One of the significant barriers to children's participation in civil court processes is their presumed incapacity. This is reflected in restrictive laws relating to children's standing in court proceedings, resulting in an inability for children to participate as parties, even in family law proceedings where their interests are directly in issue, or to initiate proceedings in their own name in connection with violations of their rights.

⁴¹⁵ GC12, at para. 22.

⁴¹⁶ *Ibid*, at paras. 40–47.

⁴¹⁷ *Ibid*, at para. 134.

As was discussed in chapter 2, presumptions about children's incapacity are frequently based on outdated notions about the nature of childhood and child development that have informed the evolution of legal principles relating to children; that is, that there is a universal way of looking at how children mature - a one-size-fits-all approach - which is frequently tied to their age.⁴¹⁸ This assumption has been replaced by a new paradigm which views children and their capacity through a modern lens.⁴¹⁹ It is different in four main ways: first, universalism is replaced with diversity so that the child's experience of childhood is recognized within a cultural context; second, the child is viewed as a human "being" in the world now, which makes children's rights a feature of their present, and not their future, place in society; third, the child is recognized as a competent "meaning-maker" at any age, so that understandings of the child are not based on adult assumptions but rather engagement with the individual child; and fourth, the child is seen as a participating actor in his or her own right, making children valid contributors in shaping the social world of which they are part.⁴²⁰

A lack of recognition of this current paradigm of child development is evident in decisions to exclude or limit children's participation and in practice, perceived incapacity is often cited as a reason to preclude legal representation or to avoid hearing from the child at all. This challenge has been highlighted by Elrod:

The difficulty with client-directed representation always gets back to the capacity issue and the fact that some children, infants and preverbal, lack it; some children, who arguably have capacity, lack judgment. However, just because the child lacks the maturity to consider all of the implications of a custody determination does not mean that their voice should be silenced.⁴²¹

Related to Elrod's point, it has been argued that children should not be held to a higher standard than adults, who often do not exhibit the traits of higher functioning that is expected of children. As observed by Freeman,

Even small children can show a preference, and most children can 'understand' a situation. Many can 'understand' disclosed information, and many can give reasons, though we might not be convinced by them. But how many adults get any further? Most of the adult population cannot think rationally or think in such a way as to maximise benefit or minimise loss or reach a reasoned decision. If rights were to hinge on competence at any of the higher levels depicted here, few would have them.⁴²²

The CRC Committee adopts this view and refers to research which "shows that the child is able to form views from the youngest age, even when she may be unable to express them verbally".⁴²³ As a

⁴¹⁸ D. Martinson and C. Tempesta, *Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation*, 31 Canadian Journal of Family Law 151 (2018), at 163 [hereinafter Martinson & Tempesta], citing S. McNamee, A. Pomfret, P. Ryan, S. Frankel and R. Birnbaum, Canadian Bar Association, Child Rights Toolkit, *Life, Survival and Development*, (<http://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Life,-Survival-and-Development>), last visited (26-6-2019).

⁴¹⁹ *Ibid.*

⁴²⁰ *Ibid.*

⁴²¹ L. D. Elrod, *Client-Directed Lawyers for Children: It is the "Right" Thing to Do*, 27 Pace Law Review 869 (2007), at 912 [hereinafter Elrod].

⁴²² M. Freeman, *Why It Remains Important to Take Children's Rights Seriously*, 15 International Journal of Children's Rights 5 (2007), at 14. See also A. Daly, *Children, Autonomy and the Courts: Beyond the Right to Be Heard* (2018), at 151 [hereinafter Daly, *Autonomy*].

⁴²³ GC12, at para. 21. Research which substantiates this point includes: P. Alderson, J. Hawthorne and M. Killen, *The participation rights of premature babies*, 13 International Journal of Children's Rights 31 (2005); and P.

result, “full implementation of Article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting [...]”⁴²⁴ In family law matters, this therefore necessitates meeting even with young children to ascertain their “views”. Observing the child in the care of each parent or in alternative care arrangements can provide invaluable information about the child’s wishes, preferences, affinities and comfort levels with caregivers.

The direction provided by the Committee indicates that a child’s capacity must be assessed individually with no age limitation and no starting presumption of incapacity.⁴²⁵ Capacity has been quite simply interpreted to mean cognitive capacity to form views and communicate them: *B.J.G. v. D.L.G.*⁴²⁶ Codes of Professional Conduct, such as the Model Code in Canada, typically support such an interpretation, indicating that when a client’s ability to make decisions “is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship”.⁴²⁷

Although it is easier to rationalize child-directed representation for a child who is able to cogently articulate views, it does not mean that younger or non-verbal children are not entitled to, or cannot, have *legal* representation to protect their interests. The child advocate’s role must be adapted accordingly. The lawyer must still learn as much as possible about her client by meeting with the child and gathering information about the child’s family and activities, as well as any particular needs the child may have (see Establishment of Facts below). As Elrod explains, “[i]n all cases, the lawyer will develop a theory of the case based upon the individual child”.⁴²⁸ Like the child who is able to express views, the child advocate will present and test evidence and make legal arguments. In other words, *all* children “deserve the same quality of representation that adult clients receive, taking into consideration the unique circumstances of the child”.⁴²⁹ This is exemplified in *Kenora-Patricia Child and Family Services v. M.(A.)*, a highly-contested child protection case involving a non-verbal 12-year-old child with autism, where the court recognized the importance of independent legal representation in order to protect the child’s interests:

In so far as her Charter rights may be affected, H.M. has counsel who may raise constitutional claims on her behalf, if the circumstances justify doing so. This case illustrates the appropriateness of representation for non-verbal children, [...], despite their inability to give instructions. It is absolutely essential, in my view, that H.M. be represented in this case.⁴³⁰

The American Bar Association Standards echo this approach, recommending that lawyers advocate for the client’s *legal* interests when the child is unable to direct the representation.⁴³¹ (emphasis added) Elrod also points to the *UNLV Recommendations* which recommend gathering information about the child from a wide variety of sources “in order to arrive at or to advocate for a decision the child would make if she or he were capable”.⁴³² In other words, even for a child who is deemed to lack capacity,

Alderson, K. Sutcliffe and K. Curtis, *Children as partners with adults in their medical care*, 91 Arch. Dis. Child 300 (2006).

⁴²⁴ GC12, at para. 21.

⁴²⁵ GC12, at paras. 20-21.

⁴²⁶ *B.J.G. v. D.L.G.*, 2010 YKSC 44.

⁴²⁷ Model Code Canada, at 3.2-9.

⁴²⁸ Elrod, at 915.

⁴²⁹ *Ibid*, at 916.

⁴³⁰ *Kenora-Patricia Child and Family Services v. M.(A.)*, 2003 CanLII 54147 (OCJ), at para. 48.

⁴³¹ Elrod, at 916.

⁴³² *Ibid*, at 917.

the role of the child's representative in court proceedings is not to advance a position based on the lawyer's personal views about what is in the child's best interests, but to take a principled approach based on the evidence⁴³³ and to arrive at a position that, to the extent possible, maximizes respect for the child's rights and the decision the child would make if she were capable.

b) Expressing Views "Freely"

Under article 12, the child has the right to express her views "freely". This entails the ability of the child to share her views voluntarily, including the right to determine whether or not to exercise the right to be heard. "Freely" also means that the child must not be manipulated or subjected to undue influence or pressure.⁴³⁴

In contested family law disputes, it is quite common for allegations of "parental alienation" to be made. The term is used to describe a wide range of rejecting behaviours towards a parent by a child, ostensibly induced by the words and actions of the other parent.⁴³⁵ Although separating parents do sometimes engage in this type of behaviour and must be actively discouraged from doing so, these allegations have the potential to minimize and even silence the voice of the child in these cases, often causing great distress to the child.⁴³⁶ Daly describes the "corrosive suffering" of children feeling powerless to influence decisions affecting them and the "trajectory of suffering" which research indicates many children experience in such circumstances.⁴³⁷ Moreover, the therapeutic interventions forced on children in some cases to address alleged alienation are concerning, arguably violating their liberty and security of the person interests.⁴³⁸

In this writer's experience, raising the specter of alienation serves to diminish the perspectives of children and a more nuanced examination of the complexities of child-parent relationships both pre- and post-separation. Frequently, there are a number of factors which contribute to the issue, ranging from a child's natural affinity for one parent to realistic estrangement from the other parent due to abusive or other less-than-ideal parenting behaviours. The fact that there is no single explanation for why children resist contact with a parent post-separation is borne out in the research. Janet Johnston

⁴³³ *C.R. v. Children's Aid Society of Hamilton*, [2004] O.J. No. 1251, (S.C.J. – Fam. Ct.), at para. 30. See also, *Re W.*, [1979] 27 O.R. (2d) 314, 13 R.F.L. (2d) 381 (Ont. Prov. Ct.), where Justice Abella, as she then was, stated:

Although there should be no minimum age below which a child's wishes should be ignored -- so long as the child is old enough to express them, they should be considered -- I feel that where a child does not or cannot express wishes, the role of the child's lawyer should be to protect the client/child's interests. In the absence of clear instructions, protecting the client's interests can clearly involve presenting the lawyer's perception of what would best protect the child's interests. In this latter role of promulgating the infant client's best interests, the lawyer would attempt to guarantee that all the evidence the Court needs to make a disposition which accommodates the child's best interests is before the Court, is complete, and is accurate.

⁴³⁴ GC12, at para. 22

⁴³⁵ Although research does not support that the "alienating" parent is primarily responsible for a child's estrangement, as will be discussed.

⁴³⁶ Daly, *Autonomy*, at 358; see also *Balev v. Baggott*, 2015 ONSC 5383, at paras. 103 and 104; overturned on appeal in *Office of the Children's Lawyer v. Balev*, 2018 SCC 16; and *Factum of the Appellant* dated 14-08-2017, at para. 30, (https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37250/FM010_Appellant_Office-of-the-Children's-Lawyer.pdf), last visited (23-06-2019).

⁴³⁷ Daly, *Autonomy*, at 358, citing L.M. Brown and C. Gilligan, *Meeting at the Crossroads* (1992) and K. Kaltenborn, *Children's and Young People's Experiences in Various Residential Arrangements: A Longitudinal Study to Evaluate Criteria for Custody and Residence Decision Making*, 31 *British Journal of Social Work* 81 (2001). See also J. Johnston, *Children of Divorce who Reject a Parent and Refuse Visitation: Recent Research and Social Policy Implications for the Alienated Child*, 38 *Family Law Quarterly* 757 (2005).

⁴³⁸ See, for example, *Children's Aid Society of Peel Region v. F.(K.J.)*, 2009 ONCJ 198, at para. 16.

indicates that the “best explanation is a multi-factor systemic view of the phenomena”.⁴³⁹ Similarly, Fortin’s research with separated children as adults does not support the contention that children are unduly influenced by the resident parent,⁴⁴⁰ and the work of May and Smart suggests that children are often aware of parents’ attempts to manipulate them.⁴⁴¹ Moreover, the research indicates that the number of cases of genuine “alienation” are rare.⁴⁴²

It is also important to note that claims of parental alienation as a “syndrome” have been largely discredited and there is no clinical recognition of the phenomenon as such.⁴⁴³ However, the World Health Organization (WHO) recently adopted a revised edition of the International Classification of Diseases which includes the *index* term, “parental alienation”.⁴⁴⁴ A search of this terms leads to the classification “Caregiver-child relationship problem” which is defined as “[s]ubstantial and sustained dissatisfaction within a caregiver-child relationship associated with significant disturbance in functioning”.⁴⁴⁵ This move by the WHO has been controversial, with a number of experts worldwide expressing concern that there is little empirical basis for the decision and that, insofar as children are concerned, it risks, *inter alia*: silencing children (and women) such that evidence of family violence and negative parenting is not presented; deflecting attention from scrutiny of child risk in family violence cases; deflecting attention from research that demonstrates child resistance to contact and child harm are better explained by factors other than those proposed by parental alienation theory; and ignoring emerging evidence that parental alienation “remedies” are harming many children.⁴⁴⁶

⁴³⁹ J. Johnston, paper presented at the 4th World Congress on Family Law and Children’s Rights, 20-23 March 2005, Cape Town, South Africa, as cited in Henaghan, at 129.

⁴⁴⁰ J. Fortin, J. Hunt and L. Scanlan, *Taking a Longer View of Contact: The Perspectives of Young Adults who Experienced Parental Separation in their Youth* (2012), at 246; and V. May and C. Smart, *Silence in Court?: Hearing Children in Residence and Contact Disputes*, 16 *Child & Family Law Quarterly* 305 (2004), at 315, as cited in Daly, *Autonomy*, at 376.

⁴⁴¹ V. May and C. Smart, *Silence in Court?: Hearing Children in Residence and Contact Disputes*, 16 *Child & Family Law Quarterly* 305 (2004), at 315, as cited in Daly, *Autonomy*, at 376.

⁴⁴² J. Cashmore and P. Parkinson, *Children’s Participation in Family Law Disputes: The Views of Children, Parents, Lawyers, Counsellors*, 82 *Family Matters* 15 (2009), at 20.

⁴⁴³ Daly, *Autonomy*, at 308.

⁴⁴⁴ World Health Organization (WHO), *International Classification of Diseases 11th Revision (ICD-11)*, (<https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/547677013>), last visited (26-06-2019). The ICD-11 does not come into force until January 2022.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Concerned Family Law Academics, Family Violence Experts, Family Violence Research Institutes, Child Development and Child Abuse Experts, Children’s Rights Networks and Associations, *Collective Memo of Concern to: World Health Organization RE: Inclusion of “Parental Alienation” as a “Caregiver-child relationship problem” Code QE52.0 in the International Classification of Diseases 11th Revision (ICD-11)*, (17-06-2019), <http://www.learningtoendabuse.ca/collective-memo-of-concern-to-WHO-about-parental-alienation.html>. See also Platform of United Nations and regional independent mechanisms on violence against women and women’s rights, *Intimate partner violence against women is an essential factor in the determination of child custody, say women’s rights experts*, 31-05-2019, (https://www.coe.int/en/web/istanbul-convention/newsroom/-/asset_publisher/anInZ5mw6yX/content/intimate-partner-violence-against-women-is-an-essential-factor-in-the-determination-of-child-custody-say-women-s-rights-experts?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fen%2Fweb%2Fistanbul-convention%2Fnewsroom%3Fp_p_id%3D101_INSTANCE_anInZ5mw6yX%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-1%26p_p_col_count%3D2), last visited (26-06-2019).

The popular preoccupation with this issue is reflected in the case law, a phenomena that Daly has observed is particularly apparent when judges disagree with children's views.⁴⁴⁷ To pay more than lip service to children's rights to meaningful participation, it is suggested that decision-makers must be cautious not to automatically discount a child's views when concerns about parental manipulation are raised. As Daly notes, "[t]o divide children's views into "manipulated" and "their own" fails to recognize the relational nature of experiences and decision-making".⁴⁴⁸ We are all, to some extent, influenced by those around us.⁴⁴⁹ An approach which considers the extent to which the child's views are rooted in reality, or *might reasonably be perceived as such by the child*, is preferable, as it considers the situation from the child's perspective. Rejecting the substance of a child's reasons where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child's views will be harmful, is unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to her views.⁴⁵⁰ The child advocate must hear and work with each client's particular reality and ensure that the court is made aware of that reality and the reasons for it.⁴⁵¹ Anything less would leave the child unheard in the proceedings.

2. Establishment of Facts

Facts and information relevant to a particular case must be obtained by the child advocate.⁴⁵² This includes interviewing the child's parents and others who are in close contact with the child on a regular basis or who provide relevant services (schools, medical professionals, foster parents, etc.). The Committee states that facts and information relevant to a particular case must be obtained by well-trained professionals to establish the elements necessary for the best-interests assessment.⁴⁵³ A child rights approach includes obtaining evidence that supports the child's views and considering how any concerns identified in the information gathered may be mitigated. Critical to the implementation of this safeguard in the legal context is the need to assess potential evidence for admissibility and reliability.

3. Ensuring Timely Processes

Children may be negatively impacted by delays in court processes. Ensuring timely processes is particularly important in family law cases, and decisions regarding residence and contact arrangements, alternative care placements, and abduction and relocation issues must be "prioritized and completed in the shortest time possible". The Committee has emphasized the negative impact of delay on children:

The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible.⁴⁵⁴

⁴⁴⁷ Daly, *Autonomy*, at 309, citing: *K. (Children)* [2016] EWCA 99, at para. 5; and *H (Children)* [2014] EWCA Civ. 733, at paras. 72 and 75.

⁴⁴⁸ Daly, *Autonomy*, at 376.

⁴⁴⁹ *Ibid.*, at 47 and 376. See also, Henaghan, at 119; and Martinson & Tempesta, at 167.

⁴⁵⁰ R. Schuz, *The Hague Child Abduction Convention: A Critical Analysis* (2013), at 330, 332 and 334 [hereinafter Schuz]; Martinson & Tempesta, at 168.

⁴⁵¹ The Quebec Court of Appeal in *F.(M.) v. L.(J.)*, 2002 CanLII 63106, held that the role of the lawyer is to represent the child's views, even where the lawyer believes those views are the result of alienation.

⁴⁵² GC14, at para. 92.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*, at para. 93.

Lawyers for children are well-placed to ensure that decisions are made in the shortest time possible by promoting active case management, ideally by specialized judges, invoking court rules aimed at preventing frivolous or vexatious court applications and unreasonable delay, and actively pursuing settlement options consistent with the child's position.

4. Qualified Professionals

One of the critical aspects of the provision of legal representation to the child is the specialized knowledge of the law that the child advocate utilizes to ensure that the child's views are duly recognized. The Committee confirms that the assessment of the consequences of various options on the child must be based on knowledge, including in the area of the law.⁴⁵⁵ This is perhaps the most significant distinction between the child advocate's role and the other methods by which the child's views may be placed before the courts. The lawyer uses her specialized legal knowledge to ensure that the child's substantive rights, and procedural legal entitlements are not only superficially acknowledged, but optimized.

The child advocate's role also entails ensuring that the child is adequately supported throughout the court process and connected to necessary services (for example, counselling), and that evidence regarding her views and other relevant circumstances is properly placed before the court, having regard to evidentiary considerations and the procedural rules of national law. For example, children may be precluded from providing direct testimony in civil law proceedings, requiring lawyers to address issues regarding the admission of hearsay evidence.⁴⁵⁶ Also, since age and maturity considerations qualify the weight to be given to children's views, lawyers must address these issues in their representations to the court. For these reasons, it may be necessary for the child advocate to engage the assistance of a qualified social work or mental health professional to properly adduce evidence of the child's views in the court process, and in the case of non-verbal children or children with special needs, to assist in determining the child's "views" and related interests.

In this context, it is important to distinguish between professionals who are engaged "externally" – i.e. at the urging of the court, the adult parties, or even the child advocate, to assess and report on some aspect of the child's functioning (for example, a psychoeducational assessment), and professionals who may be engaged to assist the child advocate in her *legal representation* of the child. In the latter scenario, the confidentiality that attaches to the solicitor-client relationship should extend to the social work or mental health professional assisting the lawyer.⁴⁵⁷ If the lawyer is required by evidentiary standards to place the child's views before the court through a third party (as is the case in Ontario), or requires assistance in ascertaining the child's views due to the child's special needs, for example, the child should not be prejudiced by these circumstances and lose the benefit of a confidential relationship with her legal representative. The importance of this confidential relationship and the heightened protection that should be afforded to children having regard to their best interests and right to privacy, was addressed by the Court of Appeal for Ontario in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*:

The protection of the relationship between the Children's Lawyer and her child clients is of central importance to the legal system as a whole. It is a relationship based on confidentiality

⁴⁵⁵ GC14, at para. 95.

⁴⁵⁶ Also, the child's lawyer may be precluded from being both counsel and witness in regard to the child's views and other information gathered relevant to the child's interests. For Canadian cases to this effect, see *Strobridge v. Strobridge*, 18 O.R. (3d) 753 (OCA), at para. 36; *Strobridge v. Strobridge*, 10 O.R. (3d) 540 (OCJ – Gen. Div.), at pp. 17-18; and *R.M. v. J.S.*, 2013 ABCA 441, at paras. 28-29.

⁴⁵⁷ *Catholic Children's Aid Society of Toronto v. S.S.B.*, 2013 ONSC 4560, at para. 21.

that extends beyond solicitor-client privilege and requires a *heightened* degree of protection by the courts. As I will explain, the *United Nations Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (the “*Convention*”), to which Canada is a signatory, requires that children be afforded special safeguards, care and legal protection by the courts on all matters involving their best interests, including privacy.⁴⁵⁸

5. Legal Reasoning

Best interests decisions are complex. Although they are the central focus of decisions relating to children in the family law context, judges are also tasked with balancing the rights and interests of the child and the adult parties, against the backdrop of substantive and interpretative principles contained in national constitutions, other domestic laws and international legal instruments, such as the UNCRRC. Children’s views may not be determinative of the outcomes; however, article 12 requires that children must not only be heard, but taken seriously (i.e. due weight). Lawyers for parents have the opportunity to make legal submissions at all stages of family law cases and even self-represented litigants have the opportunity to plead their case before a judge. Due process requires that children not be denied this aspect of fundamental justice.

Judges must make findings of fact, often involving assessments of credibility - one of the most challenging aspects of decision-making. Lawyers have an important role to play in ensuring, through their advocacy, that the ultimate decision is based on informed impartiality. This is particularly true in cases alleging family violence and parental alienation. Decisions based on paternalistic assumptions that maximum contact with both parents is always in the child’s best interests and reliance on myths and stereotypes about children and their credibility must be carefully guarded against.⁴⁵⁹

Judges must also apply “legal reasoning” and any decision concerning a child must be “motivated, justified and explained.”⁴⁶⁰ That justification should state explicitly the factual circumstances regarding the child; what elements have been found relevant in the best interests assessment and the content of those elements in the particular case; and how they have been weighed to determine the child’s best interests. If the decision differs from the child’s views, the reasons for that divergence should be clearly stated, explaining why other considerations outweighed the child’s views.⁴⁶¹ Again, lawyers have a significant role to play in ensuring that courts consider all factual and legal issues relevant to the child’s position.

The child advocate has a responsibility to explain the court’s reasoning to the child, particularly where the decision does not reflect the child’s views, in a way that is suited to the child’s level of understanding. The lawyer must ensure that the child is kept apprised of the outcomes of all judicial processes affecting the child’s interests. Timely sharing of decisions in the family law context is particularly important given the significant impact on the child of any ordered changes in residence and contact arrangements, access to services (e.g. counselling), school, travel or other activities.

⁴⁵⁸ *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559 (leave to appeal to the Supreme Court of Canada dismissed, 28-03-2019), at para. 51.

⁴⁵⁹ For a commentary which includes an examination of some of these stereotypes with reference to both women and children, see D. Martinson and M. Jackson, *Family Violence and Evolving Judicial Roles: Judges as Equality Guardians in Family Law Cases*, (2017) 30 Canadian Journal of Family Law 11 (2017), at 34.

⁴⁶⁰ GC14, at para. 97.

⁴⁶¹ *Ibid.*

6. Mechanisms to Review or Revise Decisions

A key safeguard identified by the CRC Committee is the existence of a mechanism to review or revise decisions. This procedural legal safeguard is particularly important in decisions in the family law context because of the significant impact these decisions have on children's lives. A critical aspect of legal representation is not only to explain the decision to the child, but also to provide an evaluation of its legal correctness, and the possibility of an appeal, if necessary. When decisions requiring an assessment of the child's best interests are being made, the failure to consider the child's views or to give due weight to those views in accordance with the child's age and maturity may be seen to constitute reviewable error.⁴⁶²

Child advocates must be conscious of the need to revise decisions as children's circumstances evolve over time,⁴⁶³ or to "try out" particular arrangements before committing to a final resolution in some cases. Domestic legislation should reflect the ability to review previous decisions based on a material change in the child's circumstances that may impact on the child's best interests. In Ontario, there is jurisprudential support for the proposition that a change in the child's views may support such a review.⁴⁶⁴ This is consistent with a rights-based approach which considers the evolution of children's capacities and increasing abilities to express their views and exercise agency over time.

Summary

As this analysis indicates, there are a number of factors which distinguish the role of the child advocate from the other legal and non-legal means by which a child's views may be placed before the courts in family law proceedings. It is these distinctions which make the provision of legal representation critical to the effective realization of the child's "right to be heard" as contemplated by article 12 of the UNCRC. Specifically:

- It is the child's lawyer who is able to offer the highest degree of confidentiality to the child-client, a factor which is crucial to engendering the child's trust. It is also central to the exchange of information with the child, including the provision of legal advice about the viability and reasonableness of the child's position, and the exploration of the various legal options that may be available.
- The provision of a child advocate is the only mechanism by which the child's *legal* interests can be protected; all other representatives either lack this expertise or do not have the child's interests (the outcome that most closely aligns with the child's views) as their primary responsibility (e.g. judges, GALs or assessors). As compared to the other methods of representation, in adversarial legal systems, only the child advocate can galvanize and test evidence relevant to the child's position and make legal arguments in support of the child's desired outcome. This is critical to ensuring that the child's views are not merely heard but given due consideration by the decision-maker, as required by article 12.

⁴⁶² G. Lansdown, *Every Child's Right to Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No. 12* (UNICEF/Save the Children) (2011), at 64.

⁴⁶³ On the issue of a reasonable change in child's views over time, see, Baroness Hale of Richmond (President of the Supreme Court of the United Kingdom), *Child Abduction from the Child's Point of View*, XXII The Judges' Newsletter on International Child Protection 40 (Summer-Fall 2018), at 44.

⁴⁶⁴ *Fraser v. Logan*, 2012 ONSC 40, at paras. 61 and 66; *aff'd in Fraser v Logan*, 2013 ONCA 93, at para 2; and *Petsnick v. Parsons*, 2016 ONSC 1203, at para. 27.

- By being involved throughout the legal proceedings, the child advocate is able to ensure that the child's participation is a process rather than a momentary act. This facilitates the provision of up-to-date information to the court about the child's evolving views or circumstances, leading to more informed decisions, particularly when proceedings do not resolve quickly. This is a distinct advantage compared to the assessment, Views of the Child Report or judicial interview modalities of child participation.
- The child advocate is the only professional that is able to effectively access review or appeal mechanisms if there is reason to doubt the correctness of the decision. This may be necessary if the child's views have been inadequately considered or explained in the judgment.

Appendix “D”

The Status of General Comments

As a treaty, the UNCRC imposes binding obligations on ratifying States Parties. Ratification entails acceptance of the need to implement the UNCRC domestically,⁴⁶⁵ as well as compliance with the monitoring and reporting requirements set out at articles 43 and 44 of the Convention. Article 43 establishes and provides authority to the CRC Committee, an international body of experts elected by States Parties to oversee States’ implementation efforts of the obligations undertaken in the Convention.⁴⁶⁶ It is suggested that the authority consensually conferred by States Parties to the Committee through the ratification process creates a strong, if not legally-binding, obligation to heed the direction provided by the Committee in its General Comments.⁴⁶⁷ General Comments are issued with a view to clarifying the normative contents of specific rights under the UNCRC, as well as offering guidance about practical measures of implementation. The Office of the High Commissioner for Human Rights has stated that

[t]he treaty body system has made a significant contribution to the promotion and protection of human rights, with treaty bodies providing *authoritative guidance* on the meaning of international human rights standard, the application of treaties and the steps States parties should take to ensure full implementation of human rights [...]⁴⁶⁸ (emphasis added)

It has been argued that it is “inherent in the supervisory powers of treaty committees that they possess a degree of “hard” interpretive power’ in expounding general comments, ‘without which...treaty committees would be unable to fulfil their primary enforcement function’.⁴⁶⁹ Moreover, no State Party has ever raised a formal objection to the competence of a treaty body to issue general comments, suggesting that the ability to do so is accepted by States.⁴⁷⁰ It has also been argued that, absent objection, the content of general comments may constitute “subsequent practice” under article 31(3)(b) of the Vienna Convention.⁴⁷¹ Certainly, it is clear that treaties must be interpreted in good faith in light of their objects and purpose,⁴⁷² a task which the Committee is uniquely qualified to carry out, given its expertise, as well as the practical experience it derives from monitoring States Parties’ compliance

⁴⁶⁵ Article 4, UNCRC.

⁴⁶⁶ Articles 43 and 44, UNCRC.

⁴⁶⁷ Under article 45 of the UNCRC, the Committee may facilitate the provision of technical advice or assistance to States Parties and may make suggestions and recommendations based on information received pursuant to articles 44 and 45. This is recognized as the basis for the Committee’s authority to issue general comments.

⁴⁶⁸ Office of the High Commissioner for Human Rights, Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body: Report by the Secretariat, UN Doc. HRI/MC/2006/2 (2006).

⁴⁶⁹ P. Gerber J. Kyriakakis and K. O’Byrne, *General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children’s Rights: What is its Standing, Meaning and Effect?*, 14 *Melbourne Journal of International Law* 93 (2013), at 98-99, [hereinafter Gerber, et al.], citing D. Otto, “*Gender Comment: Why Does the UN Committee on Economic, Social and Cultural Rights Need a General Comment on Women?*”, 14 *Canadian Journal of Women and the Law* 1 (2002), at 13 [hereinafter Otto]; see also International Law Association (ILA) Interim Report on the Impact of the Work of the United Nations Human Rights Treaty Bodies on National Courts and Tribunals (2002), at para. 29; ILA Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies (2004), at para. 15; and H. Keller and L. Grover, *General Comments of the Human Rights Committee and Their Legitimacy*, in H. Keller and G. Ulfstein (Eds.), *UN Human Rights Treaty Bodies: Law and Legitimacy* (2012), 127-128 [hereinafter Keller & Grover], at 127-128.

⁴⁷⁰ Keller & Grover, at 127.

⁴⁷¹ Keller & Grover at 130-131 and 181. States have the opportunity to raise objections in the General Assembly where the Committee presents an annual report on its work, including General Comments.

⁴⁷² Article 31(1), VCLT.

with the Convention through the reporting process and the adjudication of communications under the Third Optional Protocol.

Some commentators have focused on the non-binding nature of general comments⁴⁷³ and have sought to downplay the role of the Committee. For example, Bala and Birnbaum narrowly describe the Committee as an “advisory body”, ignoring its function under the Convention to oversee States Parties’ compliance efforts, as well as to adjudicate complaints under the Third Optional Protocol.⁴⁷⁴ Specifically, the authors suggest that Canadian courts are not bound to follow the Committee’s “argu[ment]” that a child requires legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies, citing two Canadian court decisions for this proposition.⁴⁷⁵ Although one case indeed takes a restrictive approach to the interpretive value of general comments, this is in the face of a narrow domestic statutory provision which leaves little room for an interpretation consistent with the direction provided by the Committee in its General Comment.⁴⁷⁶ The Court also acknowledges that while the General Comments “are not authoritative, they can shed light on the correct interpretation of the articles of the *UNCRC*.”⁴⁷⁷ The other case cited by the authors is a Supreme Court of Canada decision in which the Court did, in fact, rely on the output of treaty bodies to support its reasoning.⁴⁷⁸

General comments have, in fact, been referred to and relied upon by a number of international, regional and domestic tribunals in their decisions. Internationally, they have been cited to establish propositions of law by the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples’ Rights, international criminal tribunals and UN treaty bodies in their adjudicative capacities.⁴⁷⁹ These organizations have largely treated general comments as authoritative.⁴⁸⁰ General comments have also been referenced in domestic decisions around the world, although the weight placed on them in this context has been less consistent.⁴⁸¹ In

⁴⁷³ N. Bala and R. Birnbaum, *Rethinking the Role of Lawyers for Children: Child Representation in Canadian Family Relationship Cases*, 59 *Les Cahiers de Droit* 787 (2018), at note 9 [Bala & Birnbaum, *Rethinking*]; Keller & Grover, at 118; M. Couzens, *CRC Dialogues: Does the Committee on the Rights of the Child ‘Speak’ to the National Courts?*, in T. Liefwaard and J. Sloth-Nielsen (Eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016), at 106-107 [hereinafter Couzens].

⁴⁷⁴ Bala & Birnbaum, *Rethinking*, at note 9.

Canada has not yet ratified the Third Optional Protocol on a communications procedure.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, at paras. 43.

Canada is a dualist country, requiring incorporation of international treaties in domestic law to have binding effect. With few exceptions, the *UNCRC* has not been incorporated into domestic statutes. Although courts must prefer interpretations of domestic law that are consistent with Canada’s international treaty obligations, to the extent of any inconsistency, the provisions of domestic law prevail.

⁴⁷⁷ *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, at para. 38.

⁴⁷⁸ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, at paras. 33, 186-188. Writing for the majority, Chief Justice McLachlin relied on reports of the Human Rights Committee. In a strong dissent, Justice Arbour referenced the *CRC* Committee’s Concluding Observations to Canada, to support a child-focused approach to the interpretation of the defence to the use of reasonable force in the *Canadian Criminal Code*.

⁴⁷⁹ Gerber, *et al.*, at 102;

⁴⁸⁰ *Ibid.*

⁴⁸¹ Gerber, *et al.*, at 103; Couzens, at 105. See, for example, *Mustafic c.s. v. The Netherlands*, 5 July 2011 (Case No. 200.020.173/01) (Hague Court of Appeal); *Z.H. (Tanzania) (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)* 2014 ZACC 13, at paras. 22, 27 and 37; *J v. National Director of Public Prosecutions and Another* (CCT 114/13) [2014] ZACC 13, at para. 45; *Divito v. Canada*, 2013 SCC 47, at paras. 26-27; and *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, at para. 462; *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, at paras. 38-45.

support of the use of general comments by domestic courts, it may be argued that general comments may be considered as supplementary means of interpretation under article 32 of the Vienna Convention.⁴⁸²

A restrictive perspective on the role and output of treaty bodies ignores the fact that general comments make an important contribution to the interpretation of international law, with “iterative and persuasive”, if not “hard-line positive force”.⁴⁸³ They play a substantive legal role in the elaboration of standards and may influence the formation of future custom in international law.⁴⁸⁴ A number of commentators, including a former judge of the International Court of Justice, have referred to the significant weight of general comments, suggesting that they are now often thought of as “quasi-judicial”,⁴⁸⁵ carrying “considerable legal weight”,⁴⁸⁶ and have become “important instruments in the lawmaking process of treaty committees, independent of the reporting system”.⁴⁸⁷

The legal content of its General Comments assists the Committee in applying objective standards for monitoring implementation of the Convention and promoting compliance by States Parties by elaborating and clarifying the scope, content and interaction of rights. This is a core function of the Committee, and one which States Parties have legally authorized the Committee to undertake through the ratification process. It is also a function that is undertaken carefully, often over a period of years following extensive consultations.⁴⁸⁸ It is therefore suggested that it is appropriate to give considerable weight to the direction offered by the Committee in the interpretation of children’s rights under the Convention.

⁴⁸² Article 32, VCLT.

⁴⁸³ Gerber, *et al.*, at 100.

⁴⁸⁴ *Ibid.*, at 105 and 106.

⁴⁸⁵ Gerber, *et al.*, at 99, citing Otto.

⁴⁸⁶ Gerber, *et al.*, at 100, citing M. C. R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1998), at 91.

⁴⁸⁷ Gerber, *et al.*, at 99-100, citing T. Buergenthal, *The UN Human Rights Committee*, 5 *Max Planck Yearbook of United Nations Law* 341 (2001), at 387; Keller & Grover, at 129.

⁴⁸⁸ Frequently, the CRC Committee has issued General Comments following Days of General Discussion, biennial meetings scheduled to generate a deeper understanding of the contents and implications of the Convention as they relate to specific articles or themes. Government representatives, NGOs, UN bodies, as well as individual experts and children are encouraged to participate and may make written submissions. The Committee subsequently issues a summary of the discussions and recommendations.

(<https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2018.aspx>) last visited 26-06-2019.