PRACTICE MADE PERFECT CLE BC

CHILDREN'S PARTICIPATION IN FAMILY JUSTICE—2011
PAPER 2.1

The Law and a Child's Right to be Heard & Have Their Views Considered

These materials were prepared by Trudi L. Brown, QC of Brown Henderson Melbye, Victoria, BC, and David C. Dundee of Paul & Company, Kamloops, BC, for the Continuing Legal Education Society of British Columbia, November 2011.

THE LAW AND A CHILD'S RIGHT TO BE HEARD & HAVE THEIR VIEWS CONSIDERED

For the November 2009 counterpart to this course, Madam Justice Donna Martinson wrote, "Hear the Child – The Legal Framework: Why Children in Canada Have the Legal Right to Be Heard." You have that paper in your materials. The purpose of this paper is to bring us up to November 2011. We will do that by noting up Justice Martinson's two most influential decisions on the subject, *LEG v. AG*, 2002 BCSC 1455 and *BJG v. DLG*, 2010 YKSC 44, and exploring certain proposed sections for the new BC *Family Law Act*, which may bear on the questions of a child's right to participate and be heard.

I. The Legal Framework in Summary

As Justice Martinson argues in her paper and in the two cases referred to above, the basic framework for the court's obligation to hear from children and have their views considered in decisions affecting them is as follows:

(a) The UN *Convention on The Rights of the Child* provides in Article 12 that, where a child wishes to and can express his or her views, they must be considered.

(b) While Canada has not directly incorporated the terms of the Convention into domestic law; nonetheless, domestic law must be interpreted as conforming to those values and principles.

(c) In most cases, the court will not be able to adequately discharge its statutory obligations to assess the best interests of the child before it without obtaining and considering that child's views.

The *Divorce Act* provides that the court must consider "only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child" (s1 6(8)). The child's participation or views are not specifically mentioned, but not precluded either.

The *Family Relations Act* does include as one of the enumerated factors the court must consider, "if appropriate, the views of the child" (s. 24(1)(b)).

The *Child, Family and Community Services Act* refers to the child's views in several sections. Section 2(b) says one of the guiding principles of the legislation is that "the child's views should be taken into account when decisions relating to a child are made." Section 3(a) says "families and children should be informed of the services available to them and encouraged to participate in decisions that affect them." Section 4(1)(f) says that where there is a reference to the best interests of the child, the child's views must be considered.

Section 67 allows the court, "having regard to the child's best interests," to exclude a child from the courtroom, admit hearsay evidence it considers reliable, and/or give any other direction regarding the child's evidence it considers just.

Section 70 enumerates the rights of children in the care of the Director, which include:

> …
> (b) to be informed about their plans of care;
> (c) to be consulted and to express their views, according to their abilities, about significant directions concerning them;
> …
> (k) to be provided with an interpreter is language or disability is a barrier to consulting with them on decisions concerning their custody or care;
> …
> (m) to privacy during discussions with a lawyer, the representative or a person employed or retained by the representative under the *Representative for Children and Youth Act*, the Ombudsperson, a member of the Legislative Assemble or a member of Parliament;
> (n) to be informed about and to be assisted in contacting the representative under the *Representative for Children and Youth Act*, or the Ombudsperson;
> (o) to be informed of their rights, and the procedures available for enforcing their rights under
> (i) this Act, or
> (ii) the *Freedom of Information and Protection of Privacy Act*.

And finally, the Act requires notice to and the involvement of children over the age of 12 in most stages of a court proceeding (ss. 34, 38, 44, and 49).

II. LEG v. AG, 2002 BCSC 1455

The question was whether a judge can or should interview a child in the absence of the parents' consent. The mother wanted the children interviewed; the father did not. Justice Martinson ultimately concluded that she should not interview the children, but in extensive reasons explained the court's power to do so, the circumstances where it would be appropriate, and a suggested protocol for conducting them. The case merits a full reading, but to summarize the main points here, she found:

1. The court's discretion to interview was founded both in the court's *parens patriae* jurisdiction and in its statutory duty to consider the best interests of the child (important, because otherwise the Provincial Court could not interview).
2. In considering whether to do so in individual cases, the court must consider the relevance of such evidence to the issues at trial, the reliability of the information, and the necessity of conducting the interview rather than obtaining the information in another way.
3. This can be done either toward the end of the hearing, after the court has heard enough evidence to put the child's views in context, or at the beginning, so the parties can introduce evidence to answer any concerns raised.
4. The court does not require the parents' or guardians' consent. "While a parent cannot simply veto an interview, a parent's specific reasons for withholding consent may be important to a determination of relevance, reliability, and necessity." (para. 6)
5. Three purposes of doing such an interview include obtaining the wishes of children; making sure they have a say in decisions affecting their lives; and providing the judge with information about the child.
6. While it may be preferable to have such evidence come in through an expert or *amicus curae*, the "regrettable reality" (para. 57) is that parties often lack the resources to avail themselves of such services.

The judge did accept that there were both limitations and challenges for judicial interviews. A particular judge may not have the knowledge or expertise required for certain circumstances, or certain children. Such interviews will generally not have the same procedural safeguards we maintain for most other evidence (oath; cross-examination), and there are questions about whether a record is necessary, or how it will be kept (tape; transcript; judge's or clerk's notes), or how much of the interview will be made available to the parties. But, she notes two significant differences between these proceedings and other more usual civil proceedings: most civil proceedings deal with the past, while this is trying to secure a fair result for the future; and in most civil proceedings, only the parties are affected, whereas here the court must also (even primarily) consider the interests of the child.

A. Cases that Consider LEG v. AG

1. Tonowski v. Tonowski, 2002 ABQB 1018, [2002] A.J. No. 1435

The judge cites *LEG* for the proposition that a child's expressed wishes are an important factor in custody and access matters. The parties had four children, ages 16, 15, 13, and 11. After a decade of living primarily with their mother, the two eldest decided they wanted to live with their father. Not surprisingly, the Court agreed. While the Court cautioned that care must be taken to ensure they are the true wishes of the children, it is not at all clear what "materials" the court relied on it this regard. As the application was brought by petition, they were likely in writing. In any event, the ages of the children in question were clearly the most significant factor.

2. Anderson v. Anderson, 2003 BCSC 335, [2003] B.C.J. No. 477

This was a custody case, complicated by the fact the father had recently moved out of town. He moved from Terrace to Vernon. The parties had been married 10 years and had two boys, 8 and 10. The father wanted the judge to interview the boys, citing *LEG*. The judge declined initially, and said he was reinforced in that decision after hearing the evidence at trial. He said he feared interviewing them would unnecessarily put the boys in the middle of their parents' dispute. The mother testified that the older boy said he did not know which parent to choose because he loved them both. His teacher also testified that the boy had become increasingly stressed as the trial approached. (The judge may also have been influenced by his feeling that, if he had been granted primarily residence, the father may have interfered with the mother's access.)

3. SEC v. GP, [2003] O.J. No. 2744, 41 R.F.L. (5th) 250

The father was a heavy drinker who the court found was controlling, abuse and violent and had "often terrorized his family" with his violent and irrational behaviour (para. 17). The father sought to dispel this image by subpoenaing his 13 year old daughter to testify(!) He submitted that the court should either hear her live, or conduct a private interview. The Court declined to allow either.

LEG v. AG was not cited on the question of judicial interviews, but rather, along with eight other cases,[1] for the proposition that the court has discretion whether to refuse to allow a child to testify. The Court approved the test from *Re NMH* that the court must consider (a) the child's age, (b) the child's competence to testify; (c) the likelihood of lasting damage from the experience; (d) the importance of the evidence; and (e) whether the evidence could be obtained in another way.

The daughter had testified in earlier proceedings regarding a domestic assault charge brought against the father, in which he was acquitted. A custody and access report writer testified that the daughter had been traumatized by the experience, did not want to go to court, then or now, would tend to answer to please whoever was asking, was only minimally responsive in her own interviews, and was very conflicted about her father. She missed and wanted to see him, but in a way that was safe, and not overnight. In the end, the trial judge felt having the daughter testify in the family trial would only do her further harm and would add little of value for the court.

4. RAL v. RDR, 2006 ABQB 835, [2006] A.J. No. 1474

This case considered whether the judge would interview the parties' 13 year old daughter. It was the girl's own application, brought by her court-appointed lawyer. The father supported the application, though he wanted the interview limited to questions about her wishes, aspirations and future plans. The mother objected to any interview.

Citing *LEG*, the Court said there were three purposes to be served by such interviews: (a) obtaining the wishes of the child; (b) making sure children had a say in decisions affecting their lives; and (c) providing the judge with information about the child. In this case, the judge felt he already had ample evidence about the views of the child, both from her own lawyer and also through the court-appointed psychological counsellor who interviewed her.

The judge considered a fourth purpose for such an interview, which appeared to bother him: seeking clarification of certain important and contested incidents in the trial.

---

1 *GH and TH v. Superintendant of Family and Child Services* (1984), 44 R.F.L. (2d) 179 (B.C.C.A.); *Taberner v. Taberner* (1971), 5 R.F.L. 14 (Ont. H.C.); *Wakaluk v. Wakaluk* (1976),25 R.F.L. 292 (Sask. C.A.); *Dudman v. Dudman*, [1990] O.J. No. 3246 (P.C.); *MES v. DAS* (2001), 21 R.F.L. (5th) 400 (A.B.Q.B.); *DM v. Children's Aid Society of Hamilton-Wentworth*, [1989] O.J. No. 1283 (U.F.C.); *Re NMH*, [1984] B.C.J. No. 426 (B.C.Co.C.); *Re K*, [1982] B.C.J. No. 426 (S.C.).

Ultimately, the Court considered that the damage to the child outweighed any benefit from the interview, citing *SEC*. The psychologist had testified that the long term consequences of taking a side would ultimately damage both the child and her long term relationship with both parents.

5. Gerth v. Gerth, 2007 BCSC 488, [2007] B.C.J. No. 709

The parties were married 20 years and had five children, ages 6, 8, 11, 13, and 16. The husband sought a divorce on the grounds of adultery, and clearly had problems with the fact the wife now had a new child from this relationship. He considered her a liar, sinner and home wrecker, and openly shared those views with the children. She accused him of being an alienator. He countered that he had tried to get the children to forgive her, but that it was her conduct and her selfish attitude toward the family's welfare that prevented especially the oldest two from doing so. The Court found the children were starting to echo their father's language concerning their mother and that their being "uncomfortable" around the new baby was likely due to the father's influence as well.

Not surprisingly, the father wanted the children's wishes before the court. He suggested a custody and access report, a shorter "views of the child" report, or a judicial interview, citing *LEG*. The Court accepted the wife's arguments that (a) the children's views should be considered, but only after a period of counseling, and (b) in this case, any abbreviated form of presenting the children's views was inappropriate given the allegations of influence and the unique circumstances of the family.

6. PV v. DB, 2007 BCSC 237, [2007] B.C.J. No. 343

This case cites *LEG* in the context of whether certain hearsay evidence can be considered in gleaning the wishes or views of children, including hearsay contained in a s. 15 report. The Court said this:

> [17] Much of the evidence relied on by the defendant in this case consists of statements made by M. to other persons, particularly the defendant and professionals engaged by the defendant to counsel M. Both parties agree on the basis of authorities such as *L.E.G. v. A.G.*, 2002 BCSC 1455 at ¶ 50-56; *J.K.F. v. J.D.F.*, [1988] B.C.J. No. 278 (C.A.) (QL); *S.F.R. v. E.C.R.* (1997), 41 B.C.L.R. (3d) 239 at ¶ 42-43; *Kennedy v. Kennedy* (2006), 27 R.F.L. (6th) 118, 2006 BCSC 190 at ¶ 13-15; *D.R.H. v. British Columbia (Superintendent of Family and Child Services)* (1984), 58 B.C.L.R. 103, 41 R.F.L. (2d) 337 at ¶ 9-17; *R. v. Khan*, [1990] 2 S.C.R. 531, 59 C.C.C. (3d) 92; and *R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40, that a child's hearsay evidence may be admissible in a child custody case, provided that it is both necessary and reliable. ...
>
> [18] ... A list of the indicia of reliability of a child's hearsay statements was given by Dillon J. in *S.F.R. v. E.C.R.*, *supra*, at ¶ 43:
>
> > The indicia of reliability have been established in *R. v. Khan*, *supra*, and in the cases that have applied *R. v. Khan*. They include: timing of the statement; demeanour of the child; personality of the child; intelligence and understanding of the child; absence of motive of child to fabricate; absence of motive or bias of the person who reports the child's statement; spontaneity; statement in response to non-leading questions; absence of suggestion, manipulation, coaching, undue influence or improper influence; corroboration by real evidence; consistency over time; and statement not equally consistent with another hypothesis or alternative explanation (*R. v. Khan*, *supra*. at 547, 548; *R. v. L.T.W.* (1995), 131 Sask. R. 47 at 50; *S.(Y.) v. B.(W.)* (1993), 49 R.F.L. (3d) 429 at 434; *R. v. R.*, [1991] B.C.J. No. 791, (9 April 1991), Vancouver A892673 (B.C.S.C.) at 12; *R. v. S.(K.O.)* (1991), 63 C.C.C. (3d) 91 at 95; *R. v. D.(D.)*, [1994] N.W.T.R. 117 at 121 and 125; *R. v. Smith*, [1992] 2 S.C.R. 915 see also *Foote v. Foote*, [[1988] B.C.J. No. 278 (C.A.) (QL)] at 14).

> [19] It is now also clear that other supporting or contrary evidence may also be considered in evaluating the reliability of a hearsay statement: see the recent decision of the Supreme Court of Canada in *R. v. Khelawon*, 2006 SCC 57 at ¶ 92-100.
>
> ...
>
> [20] The facts set out in a report ordered by the court under section 15 of the *FRA* have been held to be admissible as *prima facie* evidence of the truth of those facts: see *J.M.V. v. K.E.K.*, 2005 BCSC 1735 at ¶ 65-68; *P.A.B. v. T.K.B.*, 2004 BCSC 72 at ¶ 26-36. The rationale for this position is that the court appoints a trained and impartial individual to go out and investigate the situation. Both parties are provided a copy of the report and are free to lead evidence to challenge the factual matters contained within the report.

7. Gibb v. Gibb, 2008 BCSC 966, [2008] B.C.J. No. 1382

The parties had four children, ages 10, 13, nearly 15, and one over the age of majority. This was the resumption of a three week trial after a six month hiatus. The mother wanted the three younger children to be either interviewed, or to have a "views of the child" report prepared. The father objected, saying there has been two previous custody and access reports, and their views had been adequately canvassed by other means. The judge agreed with the father, but ordered a "views of the child" report anyway. She said while the report would add little in the way of useful evidence per se, there was nonetheless "potentially something to be gained in this case by giving the children a say or a voice" (para. 8).

Justice Beames quoted from para. 20 of *LEG*:

> There are indications in empirical studies that not listening to what children have to say during divorce proceedings has had unintended negative effects. As a result of their exclusion, children complain about feeling isolated and lonely during the divorce process and many older children express anger and frustration about being left out. There is also an indication that perceived control over decisions is related to positive mental health: See J.B. Kelly, "Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice." *The Virginia Journal of Social Policy and the Law, in press*. See also J. Williams, J. (Nova Scotia Supreme Court), "If Wishes Were Horses, Then Beggars Would Ride' – Child Preferences and Custody/Access Proceedings," cited above.

The judge said that while she had to be mindful of both the potential benefit of such a report and any concerns relating to the process, particularly with a dispute as heated as this and where allegations of alienation have been made, the children should "have their say." She noted, too, that the other evidence the father referred to and the last interviews of the children were all several months to almost a year old.

8. AA v. SNA, 2009 BCSC 387, 66 R.F.L. (6th) 294

If this is not the granddaddy of parental alienation cases, it is certainly on the shortlist. In this installment, Justice Martinson terminates access by both the mother and maternal grandmother. Citing as she always does extensive research on high conflict families, she emphasizes the need for family courts to intervene early and effectively in cases of extreme alienation. When the mother used *LEG* to seek a judicial interview, Justice Martinson declined, saying the child "has been interviewed and re-interviewed" (para. 64). Given the attachment disorder, the child would be unlikely to make independent choices. The child's therapist also felt an interview would be counter-productive.

9. Beatty v. Schatz, 2009 BCSC 707, 69 R.F.L. (6th) 77

This is another case decided by Justice Martinson. The father had brought his 11 year old son from Ireland to Canada, and refused to return him. He said the child did not want to return and that both the provisions of the *Hague Convention on the Civil Aspects of International Child Abduction* and the UN *Convention on the Rights of the Child* require the court to consider the child's wishes. The mother replied that the child had been wrongfully retained, that the exceptions in the *Hague Convention* were narrow (grave risk of harm), that there was a heavy onus on the father to prove them, that even if proven the court still had a discretion to return, and that the court in Ireland had already appointed an expert who had started interviewing the child.

Justice Martinson, citing *LEG*, agreed that normally children should "have a voice." At trial, whether here or in Ireland, the child's wishes would indeed be important factors. She said, however, the *Hague Convention* considerations were somewhat different. Article 13 says "that the Court may, not must, refuse to order the return of the child if the Court finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of the child's views" (para. 35). The concept of maturity includes the ability to make independent decisions, not influenced unduly by either parent.

The judge felt she could determine the child's wishes well enough through an interview, but would need an expert to help her determine the maturity of the child. She ordered a "views of the child" report.

10. Ward v. Swan, [2009] O.J. No. 2107, 71 R.F.L. (6th) 384

Here, a grandmother moved to have the court interview two children, to test whether their views and preferences were realistic or had been manipulated. It is not clear from the decision what the children's ages were. They did have a children's lawyer, who supported the application, and the children had been interviewed by a judge once before. The grandmother's lawyer said the only way to resolve the matter based on the evidence to that point was for the judge to explore certain events with one child in particular. The judge declined to do so.

He said judicial interviews were a matter of discretion, citing *Uldrian v. Uldrian andl Uldrian* (1988), 14 R.F.L. (3d) 26 (Ont. C.A.). He also referred to *Hamilton v. Hamilton* (1989), 20 R.F.L. (3d) 152 (Sask. C.A.) and *LEG*. The judge ruled it was "not proper to use the judicial interview process in order to contest evidence that may be disputed" (para. 24). The prejudice far outweighed any probative value. He also felt the children had been "excessively" involved in the litigation thus far (para. 25).

11. MCC v. MBC, 2009 BCSC 1758, [2009] B.C.J. No. 2553

This case involves the use of Ministry of Children and Family Development files as evidence of the children's wishes. The Court found that, in and of themselves, the comments attributed to the children were double hearsay. File notes expressed no opinions the court could recognize. Furthermore, as hearsay, they did not meet the tests of necessity or reliability. The Court contrasted this with the situation in *Moreau v. Moreau* (1997), 46 B.C.L.R. (3d) 178 (S.C.), where an experienced and careful social worker was allowed to testify as to what a child told her in a structured, non-leading interview.

In the alternative, the Court was asked to order a "views of the child" report for one of the children, age 13. The Court refused, saying the child had not demonstrated a level of maturity that would cause his wishes to be determinative. While noting that the child had indicated a preference to spend time with his father, the Court also noted that the child had spent lengthy periods without contact and without incident, his behaviour had improved while in a shared arrangement, and that the court was not going to entertain a reduction or elimination of time with the child's father in any event.

12. Kisana v. Canada (Minister of Citizenship and Immigration), 2009 FCA 189

This case considered the adequacy of an immigration officer's interview with a child when considering whether to grant a permanent visa on humanitarian grounds. In discussing the issue the Court said this:

> 66 … Canadian law has long recognized the special needs of children and acknowledged that sensitivity is required when they are interviewed or examined in the context of family and criminal proceedings (see for example *L.E.G. v. A.G.*, 2002 BCSC 1455 at paragraphs 25-26; *R. v. L.T.H.*, 2008 SCC 49 at paragraph 3; *R. v. J. (J.T.)*, [1990] 2 S.C.R. 755 at 766). While I would not suggest that the same protections given to a child being interrogated by a police officer must be provided in an immigration office, it is clear that a child should not be treated the same as an adult in a call-in interview that will seriously affect his or her interests.
>
> 67 Nor is this to say that an immigration officer is expected to be a child psychologist or a social worker. However, in my view the officer must keep in mind the linguistic, cognitive and emotional differences between children and adults when conducting an interview. In many ways, this is a matter of common sense. It can be presumed that children will be nervous at a call-in interview and may not be very forthcoming. A child confronted with pointed, closed-ended questions will likely give simple "yes" or "no" responses and not make efforts to volunteer any additional information. He or she may be reluctant to ask for clarification if a question is not understood. Younger children may not be capable of comprehending the nature of the interview at all.

III. BJG v. DLG, 2010 YKSC 44, 89 R.F.L. (6th) 103

Once again, the question was whether the court should hear from the child in question, and once again the decision was no. Nonetheless, Madam Justice Martinson took the opportunity to make some of the strongest statements yet about the court's duty to hear from children and to consider their views, when they wish and are able to express them.

> [3] The *Convention* … says that children who are capable of forming their own views have the legal right to express those views in all matters affecting them, including judicial proceedings. In addition, it provides that they have the legal right to have those views given due weight in accordance with their age and maturity. There is no ambiguity in the language used. The *Convention* is very clear; *all* children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation.

She repeats at length the legal framework set forth earlier in her 2009 paper and makes the following additional points:

> 1. Most children want to be involved and heard.
>
> 2. 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 …" (para. 21)
>
> 3. Receiving children's input early can reduce conflict. (para. 22)[2]

---

2 In an unrelated case, *Jarjour v. Brooks* (1999), 3 R.F.L. (5th) 91 (Man. Q.B.), the Court said, "I find an assessment may assist in avoiding an escalation of the dispute between these parents. Secondly, and more importantly, I find that the assessment is necessary to allow the parties to understand the needs of the children and the need for cooperation." (para. 17)

> 4. Excluding children and adolescents can have both immediate and long term adverse consequences for them.

She sums it up this way:

> [47] More than just lip service must be paid to children's legal rights to be heard. Because of the importance of children's participation to the quality of the decision and to their short and long term best interests, the participation must be meaningful; children should:
>
> 1. be informed, at the beginning of the process, of their legal rights to be heard;
>
> 2. be given the opportunity to fully participate early and throughout the process, including being involved in judicial family case conferences, settlement conferences, and court hearings or trials;
>
> 3. have a say in the manner in which they participate so that they do so in a way that works effectively for them;
>
> 4. have their views considered in a substantive way; and
>
> 5. be informed of both the result reached and the way in which their views have been taken into account.

A. Cases that Consider BLG

1. New Brunswick (Minister of Social Development) v. CNC, 2011 NBQB 64, [2011] N.B.J. No. 53

This is a child protection case. There were three children, ages 12, 11, and 2. The mother had diminished parental capacity and the children themselves had several challenges. As the Court put it, they had "very high needs" and would tax the capacity of most parents (para 14). But the children wanted to live with their mother. A "voice of the child" assessor had interviewed the older children and provided this clear report. The question was what to do with that fact. The Court cited *BLG* for the proposition that children's views are but one factor to consider:

> … They are twelve and eleven years old—but not really. Their cognitive functioning is much below that. They are not able to see the future. As the Court views it, they can only see what going back to their mother would mean to them now—their mother's affection, much more freedom and very much less responsibility. You could not blame them. The Court notes, as well, that the children worry about their mother. (para. 56)

2. Jarvis v. Landry, 2011 NSSC 116, [2011] N.S.J. No. 150

The mother applied for both a custody and access report as well as a "children's wish report" for twin seven year old girls. The judge granted the first but not the second. He acknowledged that children had a right to be heard, but said that right was not absolute. "Children must be capable of forming their own views." (para. 17) In this case, the parties were not agreed that they had this capacity, and the age of the girls and the lack of evidence from the mother that they did left the judge unable to conclude that a children's wish report was appropriate.

3. Law v. Law, 2011 ONSC 2140, [2011] O.J. No. 1737

The parties separated in March of 2005 and shortly after drafted up a separation agreement from a self-help kit. They agreed to joint custody of their son Jason, age eleven. The agreement did not take. During the trial, the judge invited the parties to present independent evidence as to their son's wishes

and preferences. They declined, leaving Justice Gordon to say this: "In the result, an eleven year old child has been denied the opportunity to participate in resolving issues of obvious importance to him. The court cannot determine parenting issues in these circumstances." (para. 4)

The Court said the law in this area was "well settled," citing *BLG* (para. 51). The judge said he did not understand why they could not consider Jordan's views and preferences and come up with a better parenting plan (para. 57). In the result, the Court declined to make an order and directed the parties to come up with a way to present this evidence.

4. LOT v. SLM, 2011 NBQB 216, [2011] N.B.J. No. 263

The parties had three children, ages 12, 17, and 23. The trial concerned the youngest. The parties had joint custody, with the mother having primary residence. Then, the mother planned to move with her new partner to Saskatchewan. The father got interim custody, and it was up for review at the trial. The child was interviewed by a "voice of the child" assessor, who reported that the child clearly wished to remain in New Brunswick, was not as happy with his time in Saskatchewan as he had hoped, and did wish to maintain a positive relationship with his mother and see her three or four times a year.

An updated voice of the child report was obtained for the trial. It noted no material change in the child's views about where he wished to live. Indeed, he had a deep desire that his mother return to New Brunswick, so that he could spend equal time with each parent there. The assessor also noted anxiety over what the child perceived as a "loyalty problem" in having to choose one parent over the other (para. 5).

Citing *BLG*, the court stated that the child's capacity will be relevant to how the court assesses the relevance of his views, and the weight to be given them. Noting that the mother considered her son to be intelligent well rounded and a "deep thinker," (para. 54) the judge said this and the boy's age made his views deserving of great weight. Not surprisingly, he ordered day to day care to remain with the father.

IV. The Proposed New Family Law Act

As yet, we do not have a draft of the final legislation. It will probably differ in some instances from what was proposed in the White Paper released in July 2010. Nonetheless, there are certain to be sections that will reinforce the idea that children's views must be considered. They include the significant change in wording from the existing s. 24(1)(b) of the *Family Relations Act*. No longer will the court consider the views of the child only "if appropriate." Now, the court must consider those views unless it would be inappropriate, turning the analysis on its head (s. 43(3)(b)(ii)).

The White Paper also echoes the language in the objects to the new Supreme Court Family Rules (SCFR 1-3). Section 162(1)(d) proposes that in all court proceedings where the interests of a child are affected, the court must (i) protect the child against family violence, (ii) consider the impact the conduct of the proceedings may have on the child, and (iii) encourage the parties to consider the best interests of the child and to minimize the effect of the parties' conflict on the child. This opens the door to reports or interviews, including judicial interviews, which explore not just the views or preferences of the child, but also the child's experience of the process. It also calls on the creativity of both bench and bar to not only obtain and consider children's views and experiences, but also to craft a process that is sensitive to that experience and reduces conflict.

This is one of the hopes for the proposed conduct orders, which will now specifically empower courts to order to engage in ADR, or to order counseling for both children and the parties themselves (s. 181). The White Paper also proposes more flexible approaches to access enforcement and family violence.

Section 166 will allow the court to appoint a children's lawyer, and to allocate the cost of such among the parties. Sections 6 through 9 deal with the appointment and powers of parenting coordinators.

V. Conclusion

As has been seen, the case law is not perfectly consistent. Nonetheless, it is possible to draw certain lessons. They include:

1. There is a growing trend in both case law and legislation to consider children's views.
2. Interviewing children can be valuable in (a) obtaining their wishes; (b) making sure children have a say in decisions affecting their lives; and (c) providing the parties and/or the judge with information about the child (*LEG*).
3. A further purpose for interviewing children is suggested by the new Supreme Court Family Rules and s. 162(1)(d) of the proposed *Family Law Act* to ascertain how the proceeding is affecting them.
4. Involving children and considering their views early can reduce conflict and promote settlement, in or out of court (*BLG*).
5. There are a growing number of ways by which childrens' views can be obtained. Which method is chosen will be determined by the circumstances of the case, the age and maturity of the child in question, and the availability of resources.
6. The least preferred method is to have the child testify, and the court has discretion to prevent the child from taking the stand. The criteria for the court to consider are: (a) the child's age, (b) the child's competence to testify; (c) the likelihood of lasting damage from the experience; (d) the importance of the evidence; and (e) whether the evidence could be obtained in another way (*SEC*).
7. The most preferred method has been having an expert or some other trained professional interview the child. But there is some tension in the case law regarding professional assessments, as discussed in *Gerth* and *Jarvis*. In *Gerth*, the father argued that there was a low threshold for granting s. 15 reports and that they were "routinely granted," citing *Szymczak v. Hunter*, 2005 BCSC 1314 and *Gupta v. Gupta*, 2001 BCSC 649. In *Jarvis*, the Court relied on *Farmakoulos v. McInnis*, 1996 CanLII 5447 (N.S.S.C.) for the proposition that professional assessments should not be ordered "as a matter of course." Rather, the burden falls on the applicant to show that an opinion is required or that there is a need for the type of information that such an assessment produces, which would not be available through other means. In *Beatty*, Justice Martinson felt she needed an expert report, to help determine whether the child had the requisite "maturity" for his wishes to be considered.
8. It may be that as other less expensive options evolve, such as our "hear the child" interviews, the more formal s. 15 report may become more circumscribed in its use, along the lines of *Farmakoulos*, *Beatty* and *Gert*—where an expert opinion is required. After all, if the primary purpose is to give the child a voice, or allow the judge to get a better sense of the child, then an expert assessment will often be overkill.
9. Having a non expert report the child's views, however, is still hearsay, and must pass the tests of necessity and reliability. Notes in MCFD files, in and of themselves, do not pass the test. The sworn testimony of a social worker or other professional may, provided the court is satisfied that the views were obtained in a way that was both sensitive to the child and procedurally fair (neutral, non-leading) (*MCC*). The testimony of friends, family, or the parties themselves, will attract the most scrutiny, both as to admissibility and weight.
10. Judicial interviews lie within the discretion of the judge. The court will consider the (a) relevance of such evidence to the issues at trial, (b) the reliability of the information, and (c) the necessity of conducting the interview rather than obtaining the information in another way (*LEG*).

11. There is a fair degree of judicial reluctance to interview children where the purpose appears to be to test their true feelings,[3] or to settle some contested issue of fact in the trial (*RAL*; *Ward*).[4]

12. Judicial interviews or other reports often will not be ordered where the court has ample evidence of the children's views already, through earlier reports or interviews, or if the child has a court appointed advocate (*AA*; *Ward*).

13. But interviews are not merely an evidentiary consideration. The court should also consider the value of allowing a child to feel that he or she has a proper role and a "voice" in the process, whether that voice can be gleaned by other means or not (*LEG*; *Gibb*; *Law*).

14. The advent of the new Supreme Court Family Rules and the proposed *Family Law Act* invite creativity both (a) in the manner by which children's views can be ascertained and considered in family matters, and (b) in the manner by which proceedings can be crafted to promote cooperation and minimize conflict.

15. Establishing clear protocols for interviewing children, including judicial interviews, will become increasingly important as we try to serve the two separate and sometimes conflicting goals of both involving and protecting children.

---

3 This will not be helpful where a s. 15 report or some other assessment has been done. By contrast, a judicial interview might be very helpful if the only evidence of the children's views come from lay persons or the parties themselves.

4 See also *New Brunswick (minister of Heath and Community Services) v. RMM*, [1993] N.B.J. No. 572 (N.B.C.A.), where a judge heard a child in chambers, did not let the mother know what was said, and then proceeded to cross-examine her on several particulars. The Court of Appeal set the judgment aside on the basis of procedural fairness, and set strict guidelines for what a judge must do if they wish to use a child interview for such purposes (record it, provide transcript to other side, etc.)—[with thanks to Suzanne Williams].