

ACCESS TO JUSTICE FOR CHILDREN 2020: BEST INTERESTS OF THE CHILD

Handout 5.2

Practical Guide/Checklist: Implementing Child Rights Safeguards and Guarantees in Court Processes

These materials were prepared by The Honourable Donna Martinson Q.C., retired Justice of the Supreme Court of BC, and The Honourable Judge Rose Raven, Provincial Court of BC, for the Continuing Legal Education Society of British Columbia, March 2020.

© The Honourable Donna Martinson Q.C. and The Honourable Judge Rose Raven

PRACTICAL GUIDE/CHECKLIST: IMPLEMENTING CHILD RIGHTS SAFEGUARDS AND GUARANTEES IN COURT PROCESSES

Note: This Guide is Complementary to our Paper, *Implementing Children’s Participation Rights in Family Court Processes: Views of the Child and Beyond*. The Paper contains additional information and all supporting references.

SAFEGUARD ONE: PRIORITIZE COURT PROCEEDINGS AND AVOID UNNECESSARY DELAY

WITHIN THE FAMILY LAW PROCEEDING

- Use all the tools at your disposal to ensure, to the greatest extent possible, timely, cost effective proceedings.
- Consider requesting one judge for all the court proceedings, where appropriate.

IDENTIFY OTHER RELATED PROCEEDINGS (CRIMINAL, CHILD PROTECTION AND IMMIGRATION) AND COORDINATE WITH THEM

- Determine whether there are criminal, child protection, or immigration proceedings relating to the same family under:
 - s. 37(2)(j) of the *FLA* or
 - s. 16(3) and 7.8 of the new Divorce Act, when it comes into force.
- If yes,
 - Obtain relevant information including court orders
 - Consider steps to coordinate the proceedings to
 - avoid conflicting outcomes and unreasonable delay, and
 - to prevent the child from participating repeatedly.

SAFEGUARD TWO: OBTAINING THE VIEWS OF THE CHILD – WHO AND HOW

WHO – WHICH CHILDREN?

- ALL children who are capable of forming their own views, can express their views, including cases involving allegations of violence and/or alienation.
- Facilitate providing the child with information and advice about their choices and potential consequences so the child to choose whether to participate.
- In deciding capacity consider that:
 - The capacity required to be heard should be a low one – focusing primarily on cognitive capacity; other factors should generally be considered when deciding the weight to be attached to the views.
 - There is a presumption of capacity

5.2.2

- There should be no age limits and capacity must be assessed on a case by case basis.

HOW TO OBTAIN CHILDREN'S VIEWS

Methods:

- Full s. 211 *FLA* reports.
- Evaluative views of the child reports prepared by a mental health professional: s. 211(1)(b) *FLA*
- Non-evaluative views of the child reports prepared by a mental health professional or another trained person, including lawyers: ss. 37(2)(b), 202 and 224
- Facilitated through legal representation (the lawyer cannot “give evidence” about a child’s views but can state a position) based on s. 201 (generally or adding the child as a party) or s. 203, *FLA* (see also legal advice/ representation, below)
- Judicial interviews (which can be in addition to other methods – see “Judicial Interviews”, below)
- More generally s. 202, *FLA* gives the Court a broad discretion to admit hearsay and give other direction it considers appropriate about how the “child’s evidence” is received. This could include the affidavit evidence of the parties.

Choosing the Method

- Consider that the child has the right to be heard in judicial proceedings “either directly or through a representative or an appropriate body”.
- Consider the UN Committee on the Rights of the Child recommendation that
 - the child should have a choice about how to participate, and,
 - wherever possible the child must be given the opportunity to be directly heard in any proceeding and to be advised of that option
 - Take steps to ensure that proceedings are accessible and child appropriate.

Timing – When to Obtain Children’s Views

- Consider that participation should begin early in the process and should form part of the decision-making processes at Family Case Conferences, Judicial Case Conferences or other judicial settlement meetings, as well as motions and trials.
- Remember that
 - participation is a process, not a momentary act.
 - children should not be interviewed too often forensically, especially with respect to traumatic matters.

CHILDREN’S PARTICIPATION THROUGH A JUDICIAL INTERVIEW.

- Consider requesting/facilitating a judicial interview, in addition to or instead of other methods, particularly if the child wishes to meet with the Judge at
 - o A Family Case Conference/Judicial Case Conference; or
 - o Hearing/Trial.
- Note that the purpose of a judicial interview is NOT to gather evidence or to have a child provide information about a factual matter. Instead, it can:
 - enable children to be more involved and connected with the proceedings

5.2.3

- ensure that the judge has understood the views and feelings of the child, and
- ensure that child understands the judge's task and the nature of the court process.

SAFEGUARD THREE: ESTABLISHING RELEVANT FACTS INCLUDING THOSE RELEVANT TO THE CHILD'S VIEWS

ESTABLISHING RELEVANT FACTS

- Consider how the decision-maker, whether a judge, mediatory, arbitrator or otherwise, will obtain ALL facts necessary to determine the child's best interests, as described in domestic law and the UN Convention on the Rights of the Child.

ESTABLISHING FACTS RELEVANT TO AND SUPPORTING THE CHILD'S VIEWS

- Take steps to ensure that, during arbitrations, mediations, judicial hearings and the like, that the decision maker has the information necessary to give due weight to/take seriously the child views.

SAFEGUARD FOUR: THE NEED FOR QUALIFIED PROFESSIONALS

- When deciding whether to obtain a s. 211 FLA Parenting Assessment
 - Be clear about its purpose, given its cost, intrusive nature, and the time it takes. What does it add to what is known?
 - Determine what specific professional qualifications are required, including:
 - expertise in matters related to child and adolescent development
 - specific expertise about the nature, prevalence and potential consequences of family violence on the child's present and future safety, security and well-being.

SAFEGUARD FIVE: JUDICIAL AND OTHER DECISION MAKING (LEGAL REASONING) - INCLUDING HOW TO ASSESS THE WEIGHT TO BE ATTACHED TO A CHILD'S VIEWS

THE DECISION-MAKING PROCESS – GIVING DUE WEIGHT TO A CHILD'S VIEWS

- Consider each of these directions from the UN Committee on the Rights of the Child:
 - The views of the child must be seriously considered when the child is capable of forming their own view.
 - If the child is capable of forming her/his/their own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue.
 - Age alone cannot determine the significance of a child's views as their level of understanding are not uniformly linked to their biological age. A child's development can be affected by information, experience, environment, social and cultural expectations, and levels of support.

5.2.4

- Maturity refers to the ability to understand and assess the implications of a particular matter:
 - Maturity in the context of Article 12 is the capacity to express views on issues in a reasonable and independent manner.
 - Consider the impact on the child; the greater the impact of the outcome on the child's life, the more relevant the appropriate assessment of the maturity of that child.
- Consider the evolving capacity of the child and the direction and guidance from parents.
- Review the summary of relevant case law found in our paper. Note that:
 - If a child is forming a view in a reasonable and independent manner, the views must be considered a significant factor. (BCSC)
 - Article 12 of the Convention applies, and children's views are an important factor. They are though only one of many factors and are not determinative. (BCCA)
 - As children gain maturity their wishes become proportionately more important. (BCCA)
 - Circumstances will exist when the child's wishes do not conform to what is in his or her best interests. (BCCA)
 - Children are sometimes incapable of identifying what is in their own best interests (BCCA)

THE ACTUAL DECISION – EXPLAINED AND PROVIDED WITHOUT DELAY

- Advocate/make submissions on behalf of the child to ensure that decisions are explained, and that they state explicitly:
 - The factual circumstances regarding the child relied upon.
 - The best interests elements that have been found relevant and how they have been weighted.
 - The relevant child rights legal principles and how they have been applied.
 - The reasons, clearly stated, for the decision, if it differs from the views of the child.
- Take steps, including making submissions, to ensure that the decision is provided in a timely manner, considering the significant impact of the decision on the child's life.
- Take steps to ensure that the child is informed about the outcome, and how the child's views were taken seriously.

SAFEGUARD SIX: THE CHILD'S RIGHT TO HAVE THE DECISION REVIEWED FOR CORRECTNESS AND APPEALED IF APPROPRIATE

- Take steps to ensure that the child
 - knows about the right to appeal,
 - is given advice about the likelihood of success
- Consider that the UN Committee on the Rights of the Child states appeal/review procedures should be accessible to the child or the child's representative.

SAFEGUARD SEVEN: KEEPING GOVERNMENTS ACCOUNTABLE TO MAKE DECISIONS IN CHILDREN'S BEST INTERESTS

- Be aware that a child rights approach requires governments to do Child Rights Impact Assessments, with input from children, for all government decisions, including budget decisions.
- Consider advocating:
 - Broadly, for increased funding to ensure that all child rights under the Convention are realized
 - When appropriate for increased government funding for independent legal representation for a child.

SAFEGUARD EIGHT – MAKING SURE THAT CHILDREN HAVE ALL APPROPRIATE LEGAL REPRESENTATION WHEN THEIR BEST INTERESTS ARE BEING FORMALLY ASSESSED BY COURTS

PURPOSE OF LEGAL REPRESENTATION FOR CHILDREN

Legal Information

- Consider the following legal information which would benefit children in court processes:
 - their legal rights generally;
 - their rights to participate and the choices available;
 - the way the court processes work; and
 - the role of the judge.

Legal Advice

- Consider the following benefits of a lawyer providing legal advice relevant to the child's specific circumstances. The advice could include
 - Considering the child's views and advising on how they will be taken into account
 - Advising the child about options for presenting their views and the merits of each in the child's circumstances
 - Exploring relevant facts generally and those supporting the child's views,
 - Advising the child generally on potential court processes, including settlement discussions, and potential outcomes, including the advantages and disadvantages of each.

Legal Representation in Court Proceedings

- Consider that if the lawyer providing information and advice outside the court process cannot participate in settlement discussion or contested hearings/trials, the child's rights identified by that advice cannot be implemented.
- Consider the following benefits a lawyer can provide to a child, consistent with a child rights approach to their best interests:
 - A lawyer can be very helpful in facilitating a resolution during settlement discussions of all kinds.

5.2.6

- At a contested hearing/trial the lawyer can participate on the child's behalf:
 - in the presentation and testing of evidence;
 - with respect to s. 211 parenting assessments: (a) in the decision about whether one is necessary; (b) if it is, the qualifications of the expert and the method used; (c) its admissibility; and (d) the appropriateness of a critique report;
 - in guarding against unreasonable delay; and
 - by advancing and protecting children's rights during final submissions, including
 - submissions on the relevant law,
 - how the child's views are weighed, and
 - the weight to be given to the parenting assessment in the context of all of the evidence.
- Once the court's decision is provided, a lawyer can also:
 - explain the decision to the child;
 - review the ultimate decision for correctness;
 - recommend appealing the decision if appropriate; and
 - conduct the appeal.

HOW TO INVOLVE A LAWYER IN COURT PROCEEDINGS

- Consider that B.C. courts can order that a child have legal counsel based on ss. 201 or s. 203 of the *Family Law Act*. Consider the following benefits and challenges with respect to each:

S. 203 FLA

- Section 203(1) gives the court authority to appoint a lawyer to represent the interests of a child in the proceeding if the court is satisfied that (a) 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 (b) it is necessary to protect in the best interests of the child.
- The right provided by the legislature under this section is limited and has been narrowly applied by the B.C. Supreme Court, supported by the B.C.C.A.
- Arguably it is intended to allow the appointment of a lawyer at the judge's initiative when the Court feels a case meets this narrow test.

S. 201(2)(b) FLA

- There is an emerging view that s. 201(2)(b) can be used to provide the child with participation rights including independent legal representation.
- Section 201(1) states that a child has the capacity to make, conduct or defend a proceeding under the Act without a litigation guardian if the child is 16 years or older, a spouse or a parent. Subsection 2 states that there is nothing in the section which prevents a court if the court considers it appropriate, from:

5.2.7

(b) allowing a child who is not described in subsection 1 [that is, a child under the age of 16] to make, conduct or defend a proceeding under this act without a litigation guardian.

- Therefore, subject to the judge's discretion:
 - A child has the right to be involved in making, conducting or defending ANY family law proceeding, which includes those relating to guardianship, parenting arrangements, contact, child support and parental cross-border child abduction.
 - The right is not limited to specific issues within a proceeding but applies to all issues.
 - As a participant in the proceedings the child is entitled to independent legal representation.