ALBERTA LAW REFORM INSTITUTE

HEARING FROM CHILDREN IN COURT PROCEEDINGS UNDER THE DIVORCE ACT, FAMILY LAW ACT, AND CHILD, YOUTH AND *FAMILY ENHANCEMENT ACT*

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Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

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Over the course of the project, the following people took the time to review this report in draft form and and provide input:

- Patricia Hebert KC
- Brian Kash
- Andrea Doyle
- Kirsten Wiebe
- JoAnn Quinn
- Colleen Connolly

Within ALRI, Katherine MacKenzie, Legal Counsel, carried out the initial planning for this project, as well as the research and writing of this report. Matthew Mazurek, Legal Counsel, and Sandra Petersson, Executive Director, undertook final updates for the report. Susan Emam, Research Associate, checked the footnotes. Barry Chung provided graphic support and prepared the report for publication.

As always, we appreciate the guidance and input of the ALRI Board in developing both initial and final recommendations.

Summary

The Alberta Law Reform Institute [ALRI] intends this report to help users of the family court system. ALRI's goal is to help users understand the ways in which the views of children affected by family court proceedings can be heard in Alberta.

This report does not have recommendations for change. Instead, it is meant to be a helpful resource for legal professionals and users of the family court system.

This report describes the ways in which children may participate in proceedings under the *Divorce Act*, *Family Law Act*, and the *Child, Youth and Family Enhancement Act*.

- Chapter One introduces the topic and describes the purpose of the report.

- Chapter Two describes the legal framework governing the child's right to be heard.

- Chapter Three considers how courts and parties should choose between the methods for hearing from children.

- Chapter Four provides details about the methods for hearing from children that are currently available in Alberta's family court system.

Why is it important to hear from children in family court proceedings?

A child's interests are at issue in family court proceedings. The United Nations Convention on the Rights of the Child establishes that the primary consideration in all matters or actions concerning children should be the best interests of the child. Children also have a right to be heard in all matters affecting them. Although the Convention on the Rights of the Child has not been incorporated directly into Canadian law, Canada and Alberta have taken the position that their laws, policies, and practices already comply with obligations under the Convention.

Legal rights are not the only reason to hear from children. Research shows that children want to participate without needing to take sides. Listening to the child's views puts the focus on the child, can reduce conflict, and lead to a more satisfactory outcome.

What are the ways to hear from children in court?

In Alberta, there are several ways that courts may hear children's views in family proceedings. Parties and advocates should carefully weigh the advantages and disadvantages of each method before deciding which one to use. Chapter Four describes the advantages and disadvantages of the following methods for hearing from children in Alberta:

- hearsay statements from a parent,
- hearsay statements from a third party adult,
- letter or recording created by the child,
- direct evidence from child,
- Evaluative Voice of the Child Report (Family Practice Note 7),
- Evaluation Reports (Family Practice Note 8),
- independent legal representation for the child, and
- judicial interviews.

What is the best way to hear from children in court proceedings?

There is no definitive "best way" to hear a child's views in court. Everyone involved in the proceedings must ensure that the chosen method allows for the child's meaningful participation in the process. Ultimately, the most appropriate method will depend on the circumstances of the case. More than one method may be needed to accurately ascertain the child's views and preferences.

If a child has an independent lawyer, what is the lawyer's role?

There are four possible roles for a child's lawyer. Chapter Four describes the following roles:

- amicus role,
- best interests role,
- instructional advocacy role, and
- interests and entitlements role.

Which role should counsel take?

All lawyers must follow the Law Society of Alberta's Code of Conduct. Lawyers appointed by Legal Representation for Children and Youth or Legal Aid must follow their organization's policies. The Code of Conduct, Legal Representation for Children and Youth, and Legal Aid all suggest a lawyer adopt an instructional advocacy role if the child is able to provide instructions. If a child is unable to provide instructions, a lawyer should usually adopt an interests and entitlement role.

How do we determine the child's ability to instruct?

The Law Society of Alberta's Code of Conduct and case law have set out three questions for determining whether a child has the ability to instruct counsel:

- Can the child express their wish, preference or viewpoint clearly?
- Can the child comprehend the nature of the legal question, context, and factors relevant to the decision?
- Does the child appreciate the foreseeable consequences of their wish, preference or viewpoint?

The lawyer's role may change throughout the proceeding. A lawyer must inform the court of their role and inform the court if they determine they must change their role.

Table of Abbreviations

CASE LAW

BJG	*BJG v DLG,* 2010 YKSC 44
Puszczak	*Puszczak v Puszczak*, 2005 ABCA 426.
SK	*SK v DG*, 2022 ABQB 425

COMMENTARY

Bala & Frohlich	Nicholas Bala & Krista Frohlich KC, "Parenting Law in Alberta: The Lawyer's Role in High Conflict & Family Violence Cases, the Alberta Parenting Plan Guide & Shared Parenting, and Child Participation" (Paper delivered at LESA's Refresher 2023: Family Law, 4-7 May 2023)
Bala & Hebert	Nicholas Bala & Patricia Hebert, *Views, Perspectives and Experiences of Children in Family Cases*, Queen's Law Research Paper Series (Kingston: Queen's University Faculty of Law, 2016)
Code of Conduct	Law Society of Alberta, *Code of Conduct*, (Alberta: Law Society of Alberta, 2024)
Doyle & Keller	Andrea Doyle & Jeff Keller, "Hearing the Voice of the Child in Family Proceedings" (Paper delivered at LESA's Custody and Access 2018, Edmonton, 6 March 2018)
MacDonald & Ostwald	Jessica A. MacDonald & Krysta H. Ostwald, "Hearing the Voice of the Child in Arbitration" (Paper delivered at LESA's 52nd Annual Refresher: Family Law, 5-7 May 2019)
UN General Comment	UNCRC, General Comment No. 12 (2009): The right of the child to be heard, 51st Sess, adopted 20 July 2009, UN Doc CRC/C/GC/12

GOVERNMENT DOCUMENTS

Bala & Houston	Canada, Department of Justice, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada*, Serving Canadians, by Nicholas Bala & Claire Houston, (Ottawa: DOJ, 2015)
Bill C-92	*An Act Respecting First Nations, Inuit and Métis Children, Youth and Families,* SC 2019, c 24, s 9(1)
Family Practice Note 7	Court of King's Bench of Alberta, *King's Bench Family Law Practice Note 7 – Interventions*, (Alberta: 2019)
Family Practice Note 8	Court of King's Bench of Alberta, *King's Bench Family Law Practice Note 8 – Child Custody Parenting Evaluation,* (Alberta: 2019)

LEGISLATION

Alberta Evidence Act	*Alberta Evidence Act*, RSA 2000, c A-18
Canada Evidence Act	*Canada Evidence Act*, RSC 1985, c C-5
Child and Youth Advocate Act	*Child and Youth Advocate Act, SA 2011, c C-11.5*
Child, Youth and Family Enhancement Act	*Child, Youth and Family Enhancement Act*, RSA 2000, c C-12
Divorce Act	Divorce Act, RSC 1985, c 3 (2nd Supp)
Family Law Act	*Family Law Act*, SA 2003, c F-4.5
Protection of Children Abusing Drugs Act	*Protection of Children Abusing Drugs Act*, SA 2005, c P-27.5
Protection of Sexually Exploited Children Act	*Protection of Sexually Exploited Children Act*, RSA 2000, c P-30.3

CHAPTER 1
Introduction

A. Children's Participation in Family Court Proceedings

[1] Historically, children have not been involved in family court decisions or proceedings affecting them because it was assumed that they lacked the capacity to participate. With respect to private family law disputes specifically, it was believed that:

- children require protection from parental conflict,
- exclusion from post-separation decision-making will insulate children from the turmoil of their parents' relationship breakdown, and
- parents know their children best, so their views are already adequately represented by their parents.[1]

[2] Now, it is accepted that children have participation rights and their meaningful participation can actually "protect them during a time when family breakdown puts them at risk."[2] In fact, not only do children have a legal right to be heard but research shows that they want to be active participants in decisions that affect their lives. However, they do not want to be asked to take sides and they understand the difference between providing input and making the final decision (a voice not a choice).[3]

[3] In general, children will have better outcomes if they feel their views have been heard.[4] Their participation in family reconfiguration decisions increases their ability to adapt to a new normal after separation or protection proceedings, while simultaneously enhancing their self-esteem, sense of control and resiliency.[5]

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[1] Canada, Department of Justice Canada, *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review,* by Rachel Birnbaum, (Ottawa: DOJ, 2009) at 1 [Birnbaum 2009].

[2] Birnbaum 2009, note 1 at 1.

[3] Birnbaum 2009, note 1 at 9; *BJG v DLG,* 2010 YKSC 44 at para 4 [*BJG*]; Michael Saini, *The Voice of the Child in Family Law: Exploring Strategies, Challenges, and Best Practices for Canada*, (2019) CanLIIDocs 4522 at 45.

[4] Canada, Department of Justice, *Article 12 of the Convention on the Rights of the Child and Children's Participatory Rights in Canada*, Serving Canadians, by Nicholas Bala & Claire Houston, (Ottawa: DOJ, 2015) at 7 [Bala & Houston].

[5] Birnbaum 2009, note 1 at 10.

[4] Failing to hear from children during the family breakdown or protection process can have adverse consequences.[6] This is especially true as the child gets older. Courts across Canada have recognized that "in order for custody orders relating to children in their teens to be practical, they must reasonably conform to the wishes of the child."[7]

[5] Listening to the child's views puts the focus back on the child, which can help to reduce the intensity and duration of the conflict.[8] In fact, Bala and Birnbaum have found that parties are more likely to resolve a family dispute when they are informed about the child's views.[9] Further, children who feel their views have been heard and considered are more likely to comply with parenting arrangements and abide by court orders.

B. Purpose of this Report

[6] There is a lack of clarity and guidance for how to consider the child's views and preferences in Alberta's family court system. For example, there are disagreements surrounding what is the best method for providing evidence of the child's views to the court and there is variation in practice between the Court of King's Bench and the Court of Justice with respect to how and when to hear the child's views.

[7] At the end of 2024, the Alberta Law Reform Institute (ALRI) began a new reform project investigating the ways in which children's views are heard in Alberta family court proceedings. Though Alberta already has some mechanisms in place for hearing from children, they can be hard to locate. As a result, ALRI decided to publish a report that describes the different methods that already exist in Alberta for hearing from children. This report covers the services and methods available for both public (ie, child protection) and private (ie, parenting) family court proceedings. It does not make recommendations for reform.

[8] The Court of King's Bench is making changes to the procedures for hearing family matters at that court. The Family Focused Protocol will be a wholesale change for how family disputes are managed in that Court. However,

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[6] *BJG* at para 4.

[7] *O'Connell v McIndoe*, (1998) 56 BCLR (3d) 292 (CA), leave to appeal refused [1998] S.C.C.A. No. 576 (QL) at para 13.

[8] Birnbaum 2009, note 1 at 10.

[9] Nicholas Bala & Rachel Birnbaum, "Rethinking the Role of Lawyers for Children : Child Representation in Canadian Family Relationship Cases" (2018) 59:4 C de D 787 at 799 [Bala & Birnbaum, Rethinking].

a range of family law proceedings are excluded from the Protocol nor does it apply in the Alberta Court of Justice. ALRI hopes that this resource guide will help professionals and families involved in family disputes regardless of the court or whether the Protocol applies to a specific matter.

[9] The purpose of this report is to provide information to help users of the family court system understand and navigate the services that are already available for hearing the views of the children involved in their family court proceeding. It is meant to be a helpful resource for both legal professionals and users of the family court system.

[10] This report provides an overview of the research addressing children's participation in family court proceedings, describes the participation rights that children have under international treaties and federal and provincial legislation, and provides details about the methods for hearing from children that are currently available in Alberta's family court system.

[11] This report does not address children's court participation in areas outside of public or private family law, nor does it dictate how to hear from children.

[12] Finally, this report includes a summary chart that will hopefully clarify and facilitate children's participation throughout the course of a family law or child protection file.

C. Overview of this Report

[13] Chapter One introduces the topic and describes the purpose of the report.

[14] Chapter Two describes the legal framework governing the child's right to be heard.

[15] Chapter Three provides considerations for choosing which method to use when trying to ascertain the child's views.

[16] Chapter Four explains the methods currently available in Alberta for hearing from children in family court proceedings.

CHAPTER 2
Legal Framework

A. United Nations Convention on the Rights of the Child

[17] The *Convention on the Rights of the Child* was adopted by the United Nations in 1989, ratified by Canada in 1991, and endorsed by Alberta in 1999.[10] Neither Canada nor Alberta has specific legislation implementing the terms of the Convention. While the Convention has not been incorporated directly into domestic law, the general position is that the relevant laws, policies and practices already comply with obligations under the Convention and so direct implementation is unnecessary.[11]

1. ARTICLE 3 AND ARTICLE 12

[18] Article 3 of the Convention establishes that the primary consideration in all matters or actions concerning children should be the best interests of the child, while Article 12 confirms that children have a right to be heard in all matters affecting them.[12] Article 3 and Article 12 are often cited when discussing the voice of the child. In fact, the United Nations Committee on the Rights of the Child (the UN Committee) is clear that the primary consideration of the child's best interests and the right of the child to be heard are two of the four guiding principles of the Convention.[13] Similarly, Bala and Houston observe that Article 3 and Article 12 are "mutually reinforcing: the best interests of the child will be

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[10] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3; Letter from the Honorable Ralph Klein, Premier of Alberta, to the Right Honorable Jean Chretien, Prime Minister of Canada (13 January 1999), Edmonton, Provincial Archives of Alberta; Alberta, Legislative Assembly, *Alberta Hansard*, 27th Leg, 2nd Sess, No 17 (18 March 2009) at 467 (Ms. Tarchuck).

[11] The Honourable Donna J Martinson, QC, "Children's Legal Rights in Canada under the United Nations Convention on the Rights of the Child" (Paper delivered at the National Judicial Institute Family Law Program: Children, Toronto, 3-5 February 2016) at 8, online: <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/overarchingFramework/Resources> [perma.cc/SZ82-5Q3K].

[12] *BJG* at paras 9 and 14.

[13] UNCRC, *General Comment No. 12 (2009): The right of the child to be heard*, 51st Sess, adopted 20 July 2009, UN Doc CRC/C/GC/12, online: <https://www.refworld.org/legal/general/crc/2009/en/70207> at para 2 (the other two being the right to non-discrimination and the right to life and development) [UN General Comment].

The Committee is an independent body of international experts that monitors implementation of the Convention by State Parties. See https://www.refworld.org/document-sources/un-committee-rights-child-crc.

promoted where the views of the child are heard and considered. Conversely, denying the child the opportunity to be heard would seem to violate Article 3."[14]

2. PARTICIPATION RIGHTS UNDER ARTICLE 12

[19] According to Article 12(1), State Parties are required to ensure that children are able to exercise their right to be heard. While the participation rights found in Article 12 only attach to children who are capable of forming their own views, the UN Committee is very clear that States should presume capacity.[15] The child's views are assessed in accordance with their age and maturity, which includes a consideration of the impact of the outcome on their life and their ability to express their views "in a reasonable and independent manner."[16] This assessment must be done on a case by case basis.

[20] The child has the right to express their views "freely", which means they should not be subject to undue pressure from others. They also have the right to information about the facts of the matter in which they are participating, the options and possible consequences of the various decisions available to them, and the conditions governing the expression of their views. This right to information underpins all of the associated rights found in Article 12.[17]

[21] Of particular note is the child's right to be heard in judicial and administrative proceedings affecting them. The UN Committee provided a non-exhaustive list of judicial proceedings where, pursuant to the rights found in Article 12(2), children's views might be heard:[18]

- Separation of parents, custody, care and adoption
- Children in conflict with the law
- Child victims of physical or psychological violence, sexual abuse or other crimes
- Health care

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[14] Bala & Houston at 7.

[15] UN General Comment at para 20. The Committee also discourages the implementation of an age limit, noting that very young children are still capable of forming views, though they may not be able to fully express them. As a result, full implementation of Article 12 also requires respect for and recognition of non-verbal forms of communication: UN General Comment at para 21.

[16] UN General Comment at paras 29–30. Consideration must also be given to the child's evolving capacities.

[17] UN General Comment at para 22, 25.

[18] UN General Comment at para 32; Bala & Houston at 6.

- Social security
- Unaccompanied children
- Asylum-seeking and refugee children
- Victims of armed conflict and other emergencies

[22] With respect to administrative proceedings, the UN Committee suggests that children have a right to participate in decisions about their "education, health, environment, living conditions or protection." These participatory rights extend to mediation and other alternative dispute resolution processes.[19] Preference is given to hearing directly from the child, rather than indirectly through a representative.[20] Children also have a right to choose not to participate.[21]

B. Federal Jurisdiction (Canada)

[23] Federal legislation governing criminal law, immigration, family law, and the law of evidence address, in varying degrees, the participation rights of children. Because this report is focused on methods for hearing from children in family court proceedings that affect them, this chapter will be restricted to a discussion of the relevant family law statutes.

1. *DIVORCE ACT*

[24] Recent amendments to the *Divorce Act* have expressly recognized the right of a child to be heard and have imposed corresponding duties on the parties to divorce proceedings. For example, under sections 7.1 and 7.2, the parties have a statutory duty to exercise parenting time, contact and decision-making responsibility in a manner consistent with the best interests of the child and to protect the child from conflict.[22]

[25] The best interests of the child is the only consideration when making a parenting or contact order.[23] When determining best interests, the court must

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[19] UN General Comment at para 32.

[20] UN General Comment at para 35.

[21] UN General Comment at para 16.

[22] *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 7.1–7.2. Similarly, section 7.7(2)(c) establishes that the parties' legal advisers have a duty to inform them of their statutory duties found the in the preceding sections.

[23] *Divorce Act*, s 16(1).

consider "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained."[24]

[26] The *Divorce Act* does not have an express provision permitting the appointment of counsel for a child. However, the Alberta Court of Appeal has recognized that superior courts in Alberta have the authority to appoint child's counsel pursuant to their *parens patriae* jurisdiction.[25]

2. *AN ACT RESPECTING FIRST NATIONS, INUIT, AND METIS CHILDREN, YOUTH AND FAMILIES* (BILL C-92)

[27] *An Act Respecting First Nations, Inuit and Métis Children, Youth and Families* (Bill C-92) establishes that the best interests of the child is the guiding principle of the legislation,[26] as well as the primary consideration "in the making of decisions or the taking of actions in the context of the provision of child and family services in relation to an Indigenous child."[27] If the decision or action relates to child apprehension, the best interests of the child is the paramount consideration.[28] In order to determine the best interests of an Indigenous child, the court must consider, among other factors, "the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained."[29]

3. *CANADA EVIDENCE ACT*

[28] Section 16.1 of the *Canada Evidence* Act establishes that a witness under the age of 14 may give evidence under a promise to tell the truth, provided they can understand and respond to questions. The evidence is treated the same as if it were given under oath and no corroboration is required.[30]

[29] Under section 16, a witness aged 14 to 18 who, because of mental capacity, does not understand the nature of an oath, but is able to communicate the

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[24] *Divorce Act*, s 16(3)(e). Section 22.1(1)(b) also sets out that a Canadian court will not recognize a foreign order that varies parenting or contact if it was made without the child being given an opportunity to be heard, because to do so would be "…in violation of the fundamental principles of procedure in that province."

[25] *Puszczak v Puszczak*, 2005 ABCA 426 at para 11–12 [*Puszczak*].

[26] *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, s 9(1) [Bill C-92].

[27] Bill C-92, s 10(1).

[28] Bill C-92, s 10(1).

[29] Bill C-92, s 10(3)(e).

[30] *Canada Evidence Act*, RSC 1985, c C-5, s 16.1.

evidence, shall testify on a promise to tell the truth. The burden is on the party disputing the capacity of the witness.[31]

[30] The above rules apply to "to all criminal proceedings and to all civil proceedings and other matters whatever respecting which Parliament has jurisdiction."[32] Further, section 40 provides:[33]

> In all proceedings over which Parliament has legislative authority, the laws of evidence in force in the province in which those proceedings are taken, including the laws of proof of service of any warrant, summons, subpoena or other document, subject to this Act and other Acts of Parliament, apply to those proceedings.

[31] Thus, the provincial rules of evidence (including the *Alberta Evidence Act*, discussed below) apply to proceedings over which Parliament has legislative authority, except to the extent that evidentiary rules for those proceedings are already provided for in the *Canada Evidence Act*. This means that, for example, the provisions of the *Canada Evidence Act* governing children's evidence would apply to family law proceedings under the *Divorce Act*, while the rules governing children's evidence in the *Alberta Evidence Act* would apply to family law proceedings under Alberta's *Family Law Act* or child protection proceedings under the *Child, Youth and Family Enhancement Act*.

C. Provincial Jurisdiction (Alberta)

[32] In Alberta, provisions that address children's participation rights in family court proceedings are found in provincial statutes governing private family law, child protection, the Child and Youth Advocate's Office and the rules of evidence.

1. *FAMILY LAW ACT*

[33] The *Family Law Act* governs parenting disputes for unmarried couples and married couples who are not seeking a divorce.[34] Like the *Divorce Act*, section 18(1) of the *Family Law Act* establishes that the only consideration for a court when making an order under Part 2 (Guardianship, Parenting and Contact

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[31] *Canada Evidence Act*, s 16.

[32] *Canada Evidence Act*, s 2.

[33] *Canada Evidence Act*, s 40.

[34] *Family Law Act*, SA 2003, c F-4.5.

Orders and Enforcement of Time with a Child) is the best interests of the child.[35] When determining the child's best interests, the court must consider "the child's views and preferences, to the extent that it is appropriate to ascertain them."[36]

[34] Under section 95(3), the court may appoint an individual to represent the interests of a child in proceedings under the Act.[37] This provision has been used to ground the court's authority to appoint a lawyer for the child. When such an appointment is made, the court shall allocate the costs among the parties, including the child, if appropriate.[38]

2. *CHILD, YOUTH AND FAMILY ENHANCEMENT ACT*

[35] The *Child, Youth and Family Enhancement Act* governs child protection and adoption proceedings in Alberta. If a child is in need of protection, any person or system must exercise their authority under *Child, Youth and Family Enhancement Act* in the best interests of the child, which includes considering the child's opinion if they are capable of forming one.[39] In fact, section 111(2) of *Child, Youth and Family Enhancement Act* stipulates that the child is a party to all child protection proceedings.[40] As a result, the child is able to make their own application for court orders in certain circumstances.[41]

[36] There are also many areas where the consent of a child 12 years of age or older is required though it can be dispensed with sometimes. Some examples of matters requiring the child's consent are access arrangements under a temporary guardianship or permanent guardianship order, or consent to a private guardianship order.[42]

[37] With respect to adoptions, section 58.1(f) stipulates that any adoption or placement must be determined according to the child's best interests, which

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[35] *Family Law Act*, s 18(1).

[36] *Family Law Act*, s 18(2)(b)(iv).

[37] *Family Law Act*, s 95(3).

[38] *Family Law Act*, s 95(4).

[39] *Child, Youth and Family Enhancement Act*, RSA 2000, c C-12, s 2(1)(b).

[40] *Child, Youth and Family Enhancement Act*, s 111(2).

[41] For example, under sections 31(4)–(5), any child 12 years of age or older who is subject to a temporary guardianship order may make an application for a court order specifying access and other arrangements between the child and their guardian or another significant person in their life: see *Child, Youth and Family Enhancement Act*, s 31(4)–(5).

[42] *Child, Youth and Family Enhancement Act*, s 31(5), 34(9), 55(1). Other areas that require the child's consent are found in sections 14(3), 34(11), 55(2), 57.1(3), 59(1)(b), 68(4)(c), 70(3), 70(4). Section 126.2(2)(b) establishes that a child 16 years of age or older may publish, or consent to the publication, of their name or image in a way that reveals they received intervention services.

includes a consideration of their opinion if they are capable of forming one.[43] Adoptions will not be approved for children over the age of 12 unless it is determined that the child's wishes and opinions have been considered and they have given their voluntary consent.[44]

[38] There are also provisions that address the legal representation of children. For example, if a child is subject to a secure services order, they must be informed of their right to a lawyer and given the contact information for the Office of the Child and Youth Advocate and Legal Aid Alberta (Legal Aid).[45]

[39] In proceedings relating to supervision orders, temporary guardianship orders, permanent guardianship orders or permanent guardianship agreements, the child, the guardian of the child or the director may make an application to have a lawyer appointed for the child.[46] In order to approve the appointment, the court must be satisfied that "the interests or views of the child would not be otherwise adequately represented."[47] The child, the guardian of the child, or the director may also call the Office of the Child and Youth Advocate directly to request the appointment of a lawyer for the child. Practitioners in this area report that direct referrals are the most common way that a child's lawyer is appointed by the Advocate's office.

[40] If the court directs the appointment via court order, a referral shall be made to the Child and Youth Advocate, who shall appoint a lawyer to represent the child. The legislation also states that:[48]

- the court may order that the lawyer's fees should be paid by the guardian of the child, the child, the director, or apportioned among all of them, and,
- when making an allocation decision, the court shall "have regard to the means of the child and the guardian."

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[43] *Child, Youth and Family Enhancement Act*, s 58.1(f).

[44] *Child, Youth and Family Enhancement Act*, s 95(2)(e)(ii)–(iii).

[45] *Child, Youth and Family Enhancement Act*, s 44(9)(b)(v), 44(9)(c), 44(9)(d).

[46] *Child, Youth and Family Enhancement Act*, s 112(1).

[47] *Child, Youth and Family Enhancement Act*, s 112(1)(b).

[48] *Child, Youth and Family Enhancement Act*, s 112(2)-(4).

However, practitioners in this area report that they have never witnessed the court grant such an order for payment. Rather, the child's lawyer is provided by the Child and Youth Advocate at no cost.[49]

[41] With respect to children's evidence, section 108(4)(b) expressly permits the acceptance of hearsay evidence, provided the court "considers it proper to do so and it is satisfied that no better form of evidence is readily available".[50]

3. *PROTECTION OF CHILDREN ABUSING DRUGS ACT* AND *PROTECTION OF SEXUALLY EXPLOITED CHILDREN ACT*

[42] The *Protection of Children Abusing Drugs* and the *Protection of Sexually Exploited Children Act* governs the confinement and protection of children involved in certain high-risk activities.[51] If a child is confined under one of these Acts, they must be notified of their right to call a lawyer and given the contact information for Legal Aid (for confinements under the *Protection of Children Abusing Drugs)*[52] or the Child and Youth Advocate (for confinements under the *Protection of Sexually Exploited Children Act*).[53]

4. *CHILD AND YOUTH ADVOCATE ACT*

[43] The *Child and Youth Advocate Act* creates the Office of the Child and Youth Advocate to represent "the rights, interests and viewpoints of children" receiving designated services under the Act.[54] Section 1(e) establishes that designated services refers to services provided under *Child, Youth and Family Enhancement Act*, *Protection of Sexually Exploited Children Act* and the youth criminal justice system.[55]

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[49] Office of the Child and Youth Advocate Alberta, "What We Do: Legal Representation for Children and Youth" (2025), online: <https://www.ocya.alberta.ca/legal-representation-for-children-youth-lrcy/> [perma.cc/PY5B-6WKP].

[50] *Child, Youth and Family Enhancement Act*, s 108(4)(b).

[51] *Protection of Children Abusing Drugs Act*, SA 2005, c P-27.5; *Protection of Sexually Exploited Children Act*, RSA 2000, c P-30.3. The *Protection of Children Abusing Drugs Act*, SA 2005, c P-27.5 will be replaced by the *Compassionate Intervention Act*, SA 2025, c C-21.5 when the *Compassionate Intervention Act* is proclaimed into force.

[52] *Protection of Children Abusing Drugs Act*, s 4.

[53] *Protection of Sexually Exploited Children Act*, s 2(13), 2.1(1).

[54] *Child and Youth Advocate Act*, SA 2011, c C-11.5, s 9(1).

[55] *Child and Youth Advocate Act*, s 1(e).

[44] The Act creates the position of the Child and Youth Advocate, who is an officer of the Legislature. Duties of the Advocate include the following:

- Assisting with appeals or reviews of decisions regarding designated services.[56]
- Appointing lawyers to represent children in any matter or proceeding under *Child, Youth and Family Enhancement Act* or *Protection of Sexually Exploited Children Act*, or any other matter prescribed by regulation.[57]
- Undertaking or collaborating in research related to improving designated services or addressing the needs of the children receiving those services.[58]

5. *ALBERTA EVIDENCE ACT*

[45] Sometimes, children may be asked to provide direct evidence about their views. Normally, a witness providing testimony in court must swear an oath.

[46] If a child who is preparing to testify does not understand the nature of an oath, they may still give evidence if "in the opinion of the judge, justice or other presiding officer, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth."[59]

[47] In other words, a court must first determine whether a child will give evidence and, if so, whether the child's evidence will be under oath or unsworn.

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[56] *Child and Youth Advocate Act*, s 9(2)(b).

[57] *Child and Youth Advocate Act*, s 9(2)(c). Further, pursuant the to the *Child and Youth Advocate Regulation*, Alta Reg 53/2012, s 1.1(1) a lawyer may be appointed for a child in the following matters, providing they are also receiving a designated service:

> **Appointment of lawyer to represent child**
>
> **1.1(1)** If a child is the subject of a permanent guardianship order or a permanent guardianship agreement under the *Child, Youth and Family Enhancement Act*, the Child and Youth Advocate may appoint or cause to be appointed a lawyer to represent the child where
>
> (a) the child is the subject of a guardianship application under the *Family Law Act*,
>
> (b) the child is the subject of a guardianship application, a trusteeship application, or both, under the *Adult Guardianship and Trusteeship Act*, or
>
> (c) the child is the subject of an application, proceeding or other matter under the *Citizenship Act* (Canada).
>
> **(2)** If a child is receiving any intervention services under the *Child, Youth and Family Enhancement Act* or any services under the *Protection of Sexually Exploited Children* Act, the Child and Youth Advocate may appoint or cause to be appointed a lawyer to represent the child
>
> (a) where the child wishes to apply for an order under the *Protection Against Family Violence Act*, or
>
> (b) for matters, other than those under the *Youth Criminal Justice Act* (Canada) or the *Youth Justice Act*, where the Child and Youth Advocate is of the opinion that the child requires independent representation.

[58] *Child and Youth Advocate Act*, s 9(2)(g).

[59] *Alberta Evidence Act*, RSA 2000, c A-18, s 19(1).

Although a child's unsworn evidence is admissible, a court may not rely on it unless it is corroborated.[60]

[60] *Alberta Evidence Act*, s 19(2). In 2018, ALRI made recommendations to reform these rules of children's evidence, including a proposal that corroboration should no longer be required: see Alberta Law Reform Institute, *Competence and Communication in the Alberta Evidence Act*, Final Report 111 (2018), online: < www.alri.ualberta.ca/2018/01/competence-and-communication-in-the-alberta-evidence-act-final-report-111/> [Final Report 111]. These recommendations have not yet been implemented.

CHAPTER 3

Deciding Which Method to Use

[48] In order to ensure meaningful participation by children in the legal process, the chosen method must ensure that the children are:[61]

- informed, at the beginning of the process, of their legal rights to be heard;
- 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;
- have a say in the manner in which they participate so that they do so in a way that works effectively for them;
- have their views considered in a substantive way; and
- be informed of both the result reached and the way in which their views have been taken into account.

[49] It is clear that children have a right to be heard in family court proceedings that affect them and their participation creates numerous benefits for families, governments, courts, systems, and the children themselves. What is less clear is how to best implement this right and, in particular, what programs and services should be available to facilitate meaningful participation by children. How a child's voice is heard will undoubtedly "be affected by the child's age and preferences, the resources available, and the attitude of judges, lawyers and parents."[62]

[50] In other words, an important preliminary question for parties to consider is which method is the most appropriate for consulting with the children who are involved in their particular proceeding? Unfortunately, there is no definitive answer to that question. In fact, the literature confirms that "no one way of consulting and involving children offers a panacea and that there are benefits and risks associated with all of them."[63]

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[61] *BJG* at para 47.

[62] Joanne J. Paetsch et al, "Consultation on the Voice of the Child at the 5th World Congress on Family Law and Children's Rights," (2009) [unpublished], at ix, online: <https://ucalgary.scholaris.ca/server/api/core/bitstreams/370e5bdc-8662-4aa9-826a-efe80ef1c8c5/content> [perma.cc/WH9T-WMF5] [5th World Congress].

[63] 5th World Congress, note 62 at 11.

[51] Ultimately, the most appropriate method will depend on the circumstances of the case. In fact, it is possible that more than one method will need to be used during the course of a file in order to accurately ascertain the child's views and preferences.[64]

[52] Several competing factors for determining the manner and extent of a child's involvement have been identified across case law and secondary sources. These factors include:[65]

- The age and circumstances of the individual child,
- The legal framework and applicable legislation,[66]
- The stage of the legal process,[67]
- The matters at issue,[68]
- The nature of the dispute resolution process (e.g., mediation, negotiation, litigation etc.),[69]
- The timing and the emotional state of the family in the healing spectrum;[70]
- The views of the child about their own involvement,[71]
- The readiness of the parents to hear from the child,[72]
- The readiness of the child to vocalize their feelings, needs and opinions to their parents,[73]

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[64] Andrea Doyle & Jeff Keller, "Hearing the Voice of the Child in Family Proceedings" (Paper delivered at LESA's Custody and Access 2018, Edmonton, 6 March 2018) at 2 [Doyle & Keller].

[65] Nicholas Bala & Krista Frohlich KC, "Parenting Law in Alberta: The Lawyer's Role in High Conflict & Family Violence Cases, the Alberta Parenting Plan Guide & Shared Parenting, and Child Participation" (Paper delivered at LESA's Refresher 2023: Family Law, 4-7 May 2023) at 107–108 [Bala & Frohlich]; 5th World Congress, note 62 at 2; Jessica A. MacDonald & Krysta H. Ostwald, "Hearing the Voice of the Child in Arbitration" (Paper delivered at LESA's 52nd Annual Refresher: Family Law, 5-7 May 2019) at 7 [MacDonald & Ostwald].

[66] Bala & Frohlich at 108; 5th World Congress, note 62 at 2.

[67] Bala & Frohlich at 107; 5th World Congress, note 62 at 2.

[68] 5th World Congress, note 62 at 2; Bala & Frohlich at 107; *DCE v DE*, 2021 ABQB 909 at para 25 [*DCE*].

[69] 5th World Congress, note 62 at 2; MacDonald & Ostwald at 7.

[70] MacDonald & Ostwald at 7.

[71] Bala & Frohlich at 107; 5th World Congress, note 62 at 2, *DCE*, note 68 at para 25.

[72] MacDonald & Ostwald at 7. It has been observed that this factor may, by its very nature, result in excluding the child from participation (e.g., if the parent is not "ready" to hear from them).

[73] MacDonald & Ostwald at 7.

- The independence of the child's views,[74]
- Providing the court with as much *accurate* information as possible,[75]
- Minimizing emotional stress to the child and preserving the child's relationships with each parent,[76]
- The risk of harm associated with the chosen method,[77]
- The availability of family and community resources,[78]
- The efficiency of the justice system,[79]
- Resolving disputes in a way that is as cost effective as possible for the parties and the court,[80]
- Concerns about fairness to the parties and to the child,[81] and
- The attitudes of the adults involved in the process (judges, parents and "other gatekeepers).[82]

[53] These considerations should be kept in mind when determining the best method for ascertaining the child's views and preferences during family court proceedings.

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[74] MacDonald & Ostwald at 7; *DCE*, note 68 at para 25.

[75] Nicholas Bala & Patricia Hebert, *Views, Perspectives and Experiences of Children in Family Cases*, Queen's Law Research Paper Series (Kingston: Queen's University Faculty of Law, 2016) at 4–5 [Bala & Hebert]; 5th World Congress, note 62 at 2; MacDonald & Ostwald, at 7; Bala & Frohlich at 107.

[76] Bala & Hebert at 4-5, MacDonald & Ostwald at 7.

[77] MacDonald & Ostwald at 7.

[78] Bala & Frohlich at 107; 5th World Congress, note 62 at 2; Bala & Hebert at 4–5.

[79] 5th World Congress, note 62 at 2; Bala & Frohlich at 107.

[80] Bala & Hebert at 4-5; MacDonald & Ostwald at 7.

[81] 5th World Congress, note 62 at 2; Bala & Hebert at 4–5; MacDonald & Ostwald at 7.

[82] Bala & Frohlich at 108; 5th World Congress, note 62 at 2, 9.

CHAPTER 4

Methods for Hearing from Children in Alberta Family Court Proceedings

[54] Though the Convention establishes that children have the right to be heard in any judicial or administrative proceeding that affects them, this publication is focused on hearing from children in family court proceedings – i.e. in private family law (parenting) disputes and child protection proceedings.

[55] In Alberta, there are several ways that children's views may be heard by the court in a family proceeding:

- Hearsay statements from a parent
- Hearsay statements from a third party adult
- A letter or recording created by the child
- Direct evidence from the child (e.g., affidavit, oral testimony)
- Evaluative Voice of the Child Reports (Family Practice Note 7)
- Evaluation Reports (Family Practice Note 8)
- Independent legal representation
- Judicial interviews.

[56] It should be noted that each of these methods, while technically available to a litigant, may not be advisable or appropriate. Depending on the circumstances of the case, choosing a particular method may result in poor evidence that will be given very little weight by the judge, expose the child to unacceptable risks, or both. Parties and advocates should carefully weigh the advantages and disadvantages of each method before deciding which one to use.

A. Hearsay Statements from a Parent

[57] A common, though typically undesirable, method of presenting the child's views to the court is for a parent to relay information about the child's wishes in their own affidavits or sworn testimony. Technically, this is hearsay evidence.

However, it may nevertheless be accepted by the court, unless it is challenged or refuted by the other side.[83]

[58] If the admissibility of these hearsay statements needs to be determined, the court will use the test from *R v Khan*, which requires that the evidence admitted as an exception to the hearsay rule must be both necessary and reliable.[84] However, the test will often be applied "in a way that recognizes the family context."[85]

[59] It is also possible that this type of evidence could be admitted as part of the "state of mind" exception to the hearsay rule.[86] In other words, the evidence "is admitted to establish the child's "state of mind" rather than establish the truth of the statement."[87]

[60] In other words, there are special considerations when determining whether to admit a child's hearsay statements through a parent. The court must consider the honesty and accuracy of the parent's statement, as well as the impact that the parent may have had on the child's candour.[88] In fact, hearing the child's views through a parent may be more accurately described as "a biased party's interpretation of what a child has said or done."[89]

[61] Judges also want to discourage parents from questioning their children about ongoing family litigation. As a result, some judges will either refuse to admit a child's hearsay statement when introduced through a parent, or will choose to give it very little weight.[90]

B. Hearsay Statements from a Third Party Adult

[62] A child's hearsay views may also be relayed to the court through the evidence of a third party adult, like a teacher, coach or family friend. Again, the court will consider whether these hearsay statements can be admitted as an

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[83] Doyle & Keller at 5.

[84] *R v Khan*, [1990] 2 SCR 531.

[85] Bala & Hebert at 17.

[86] Bala & Houston at 23; Bala & Hebert at 16; Bala & Frohlich at 110.

[87] Bala & Houston at 23.

[88] Bala & Hebert at 16.

[89] Doyle & Keller at 5.

[90] Bala & Hebert at 16.

exception to the exclusionary rule, on the basis that they are necessary and reliable.[91]

[63] This type of hearsay is usually considered necessary because courts are "loathe to call the child" to testify directly about these statements.[92] It is also considered more reliable than hearsay evidence originating from two competing parents, especially if the third party adult is regarded as neutral.[93]

[64] As noted, it is also possible that this type of evidence could be admitted as part of the "state of mind" exception to the hearsay rule.[94]

C. Letter or Recording Created by the Child

[65] In some cases, the child writes a letter or makes an audio or video recording that is either attached as an exhibit to the parent's affidavit or submitted directly to the judge. Because it is not sworn evidence, it is considered hearsay and judges will typically refuse to admit it on the basis that it is too unreliable.[95] Unreliability stems from the fact that there is usually no information about the circumstances surrounding the preparation of the document or recording. In addition, it is often unclear whether the parent manipulated or coached the child on what to write or say.[96]

[66] Judges want to discourage parents from bringing forward this type of evidence, so refusing to admit evidence of this nature is also aimed at deterrence.[97] In fact, it is often remarked that parents who proffer this type of evidence should do so at their own peril because it "raises questions about how much concern that parent has about the children's welfare."[98]

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[91] In child welfare proceedings, hearsay evidence is statutorily admissible under section 108(4)(b) of the *Child, Youth and Family Enhancement Act*.

[92] Doyle & Keller at 7.

[93] Doyle & Keller at 7.

[94] Bala & Houston at 23; Bala & Hebert at 16; Bala & Frohlich at 110.

[95] Bala & Frohlich at 108–109.

[96] Bala & Hebert at 21.

[97] Bala & Frohlich at 109.

[98] Bala & Hebert at 17.

D. Child's Direct Evidence

[67] Theoretically, it is possible for a child to give direct evidence about their views, either in the form of an affidavit or through oral testimony. In practice, it is a rare occurrence. Not only does it put parents in the difficult position of either accepting the evidence or subjecting their child to cross-examination, but it is a practice that is strongly discouraged by the court.[99] In fact, even if a child wants to provide direct evidence, judges have the authority to refuse to allow it in order to protect the child.[100] The impact that testifying has on a child's future relationships cannot be understated.

[68] It should also be noted that, if children do provide direct evidence in family court proceedings, the admissibility and weight of that evidence will differ according to which statute governs the dispute.[101] The *Canada Evidence Act* applies to proceedings under the *Divorce Act*, which means that the testimony of children providing evidence under a promise to tell the truth does not have to be corroborated in order for the court to reply upon it.[102] In proceedings under the *Family Law Act* or *Child, Youth and Family Enhancement Act* (which are governed by the *Alberta Evidence Act*), the opposite is true. That is, if the child provides evidence under a promise to tell the truth, as opposed to a sworn oath, then it must be corroborated.[103]

E. Evaluative Voice of the Child Report (Family Practice Note 7)

[69] Family Practice Note 7 outlines various interventions that may be appropriate when "decisions concerning children are before the Court and families are experiencing a state of conflict."[104] Family Practice Note 7 does not apply to matters under *Child, Youth and Family Enhancement Act*.[105]

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[99] Doyle & Keller at 6; *S(ME) v S(DA)*, 2001 ABQB 1015 at para 24 [*S(ME)*].

[100] Bala & Frohlich at 124. In King's Bench, this authority is derived from the court's inherent *parens patriae* jurisdiction while, in the Court of Justice, it is part of the court's jurisdiction to control proceedings: see *S(ME)*, note 99 at para 23; Bala & Hebert at 31. It has also been argued that this same authority allows a judge to permit a child to give direct evidence, but limit or eliminate the parties' ability to cross-examine the child on that evidence.

[101] *Canada Evidence Act*, s 2, 40.

[102] *Canada Evidence Act*, s 16.

[103] *Alberta Evidence Act*, s 19. ALRI's recommendations from Final Report 111, note 60 would fix this gap.

[104] Court of King's Bench of Alberta, *King's Bench Family Law Practice Note 7 – Interventions*, (Alberta: 2019) at para 1 online: <https://www.albertacourts.ca/docs/default-source/qb/familypn7.pdf> [perma.cc/B8L2-6ZVF] [*Family Practice Note 7*].

[105] *Family Practice Note 7* at para 10.

[70] Family Practice Note 7 interventions are conducted by a Parenting Expert, who is defined as a registered psychologist or registered clinical social worker who qualifies as an expert witness.[106] The Parenting Expert describes what is happening within the family dynamic but does not provide opinions or recommendations about an appropriate parenting plan.[107]

[71] There are two types of interventions. Evaluative interventions "provide information to the Court to assist in decision-making". Therapeutic interventions "work toward resolution of disputes, manage conflict and make changes in the existing family dynamic."[108]

[72] Evaluative interventions include the following:[109]

- **Triage:** provides an assessment of the situation and determines which process would best meet the family's needs.
- **Views (Voice) of the Child Report:** canvases "…the views and needs of the child(ren), including information from parents and collaterals."
- **Parent Psychological Evaluation**: addresses a specific question or concern about the functioning of one parent.
- **Child/Adolescent Psychological Evaluation**: addresses a specific question or concern about the functioning of a child or adolescent.
- **Focused Assessment**: addresses a specific question (such as, where the child should go to school).

[73] The Evaluative Voice of the Child Report is the type of intervention that is often discussed in the literature. Family Practice Note 7 describes the purpose and process of the report in great detail. For example, the Parenting Expert will interview each parent and will typically have two or more interviews with the child. Each parent will bring the child to at least one of the interviews. In some circumstances, contact with collateral sources or psychological testing will occur.

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[106] *Family Practice Note 7* at para 2.

[107] *Family Practice Note 7* at para 6.

[108] Therapeutic interventions include different types of counselling, such as counselling for one parent, post-separation/divorce counselling, counselling for the child, counselling involving the entire family and parent-child reunification. *Family Practice Note 7* at para 1 and 41.

[109] *Family Practice Note 7* at para 41.

At the end of the interviews, the Parenting Expert will prepare a written report.[110]

[74] The report describes the issues about the child that are identified by the parents, the child's views about their parents and family situation, the child's views about their needs, the needs of the family and what processes could help to meet those needs. The report will also address whether the child's vocabulary and perspective is consistent with their age or whether they appear to have been coached or influenced. Finally, if the report is about an adolescent, it will address their understanding of the benefits, consequences and implications of a particular decision.[111] Family Practice Note 7 is very clear that an Evaluative Voice of the Child Report is not intended as an assessment of the parents and "no opinion is given regarding parenting time or the suitability of the child(ren) being in the care of either parent."[112] Its purpose is to communicate the views of the child to the court.

[75] An Evaluative Voice of the Child Report is available before or after a final determination of parenting. It can be done by consent (which may eliminate the necessity of report writing or communication with counsel/the court), through counsel, or with court involvement.[113] If the parties agree and both are represented by counsel, they can submit a desk application.[114] There is a different process if one party is self-represented or if the parties cannot agree on the terms of the order.[115]

[76] Parties must be able to afford the cost of an Evaluative Voice of the Child Report. Further court applications cannot be made while the process is ongoing, unless the health or safety of the child is at risk or an application is recommended by the Parenting Expert.[116]

[77] The Parenting Expert can decide the limits of confidentiality, but the information may ultimately be compelled if the matter goes to trial.[117] Counsel

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[110] *Family Practice Note 7* at para 47.

[111] *Family Practice Note 7* at para 48.

[112] *Family Practice Note 7* at para 50.

[113] *Family Practice Note 7* at para 4.

[114] *Family Practice Note 7* at para 15.

[115] *Family Practice Note 7* at paras 16–23.

[116] *Family Practice Note 7* at para 11 and 24.

[117] *Family Practice Note 7* at para 27.

and the court receive the final report and a sealed copy is placed on the court file. The parties can review it but are not allowed to receive or make copies.[118]

[78] An Evaluative Voice of the Child Report is a useful tool for ascertaining the views of the child, but it is still only one piece of evidence to be considered. It must be balanced with the other evidence when determining the best interests of the child.[119] Further, it must be kept in mind that an Evaluative Voice of the Child Report speaks to a child's wishes at a particular point in time. Children's views and preferences can change for numerous reasons and, sometimes, the report can be outdated by the time a matter gets to trial.

F. Evaluation Reports (Family Practice Note 8)

[79] Family Practice Note 8 provides for evaluation reports regarding child custody and parenting. Such evaluations are also known as bilateral custody assessments. They are intended to provide:[120]

> a comprehensive and objective assessment of a family in cases where the family is experiencing an impasse and an Intervention under Practice Note 7 is inappropriate or has not resulted in resolution of the parenting issues.

[80] The evaluations are conducted by Parenting Experts, who are psychologists that qualify as an expert witness. In particular, a Family Practice Note 8 Parenting Expert is "qualified to give opinion evidence on parenting arrangements, parenting responsibilities and decision-making."[121] If a Family Practice Note 7 Intervention has already been conducted, the same Parenting Expert cannot be used for a bilateral custody assessment under Family Practice Note 8.[122] Family Practice Note 8 does not apply to matters under *Child, Youth and Family Enhancement Act*.[123]

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[118] *Family Practice Note 7* at paras 31–32.

[119] Doyle & Keller at 8; *AJU v GSU*, 2015 ABQB 6 at paras 176–177.

[120] Court of King's Bench of Alberta, *King's Bench Family Law Practice Note 8 – Child Custody Parenting Evaluation,* (Alberta: 2019) at para 1 online: <https://www.albertacourts.ca/docs/default-source/qb/familypn8a.pdf?sfvrsn=2117b880_14> [perma.cc/B8L2-6ZVF] [*Family Practice Note 8*].

[121] *Family Practice Note 8* at para 2.

[122] *Family Practice Note 8* at para 6.

[123] *Family Practice Note 8* at para 8.

[81] There is no standard process for an evaluation report under Family Practice Note 8, but it may involve some combination of the following:[124]

> home visits/observations, interviews with each parent separately, interviews with each parent with the child(ren), and depending on the child(ren)'s ages, interviews with the child(ren) separately. The Evaluation may also involve document review including, when Court ordered, Alberta Child and Family Services files and police files. The Evaluation may also involve administering psychological testing to the parties and interviews with collateral witnesses such as counsellors, Alberta Child and Family Services and police personnel, teachers, as well as personal sources such as new spouses and partners, grandparents or close friends.

[82] An order for an evaluation report under Family Practice Note 8 will not be granted unless the parties can afford the cost.[125] It is estimated that evaluation reports under Family Practice Note 8 cost anywhere from $20,000 to $40,000. As with Evaluative Voice of the Child Reports, evaluations may also be outdated by the time of trial.

[83] Family Practice Note 8 sets out a detailed process for how to obtain an order for an evaluation report.[126] All Family Practice Note 8 actions must be case managed and an evaluation report under Family Practice Note 8 cannot begin until a trial date has been scheduled.[127] Further court applications cannot be made until the evaluation report is complete, unless it is permitted by the case management justice.[128] Within 60 days of receiving the evaluation report, the parties must schedule a case conference with the case management justice.[129]

[84] Evaluation reports under Family Practice Note 8 are a detailed look at the family, including the views and preferences of the child. However, they are typically used as a last resort because the "cost alone makes such an assessment unavailable to most families."[130]

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[124] *Family Practice Note 8* at para 3.

[125] *Family Practice Note 8* at para 9.

[126] *Family Practice Note 8* at paras 10–16.

[127] *Family Practice Note 8* at paras 17, 19.

[128] *Family Practice Note 8* at para 21.

[129] *Family Practice Note 8* at para 38.

[130] Doyle & Keller at 18.

G. Independent Legal Representation for the Child

[85] Appointing an independent lawyer for the child is a preferred method for some to ascertain the child's views and preferences. Others argue that it is unnecessary because the child's wishes can be adequately communicated by the lawyers for the parents. However, the commentary to rule 5.1-1 of the *Code of Conduct* (the "zealous advocate rule") specifically establishes that the lawyer for a parent is not required to introduce relevant evidence about the child's views or best interests if doing so would not support the parent/their client's position:[131]

> In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, *if this can be done without prejudicing the legitimate interests of the client.* [emphasis added].

[86] The Alberta Court of Appeal confirms that the court may appoint an independent lawyer for a child if doing so would be in the child's best interests.[132] In fact, independent legal representation for the child can have may benefits, such as:[133]

a) ensuring that all relevant evidence is available to the Court;

b) supporting the emotional well-being of the child;

c) focusing the parents on the child's needs;

d) facilitating the cooperation of older children who need to feel heard;

e) advancing the child's own rights;

f) preserving the integrity of the legal process; and

g) promoting a just determination of the issues affecting the child.

[87] However, issues surround this practice, including when it is appropriate to appoint a lawyer for a child. For example, in some circumstances lawyers are only appointed for children in high conflict disputes. In these circumstances parties to a family dispute, or the professionals helping them, may feel incentivised to label a dispute "high conflict" in order to obtain children's counsel. In turn, the people involved in the dispute may then focus on the adversarial process instead of more collaborative approaches. Other issues

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[131] Law Society of Alberta, *Code of Conduct*, (Alberta: Law Society of Alberta, 2024) rule 5.1-1, commentary at para 4 [*Code of Conduct*]. See also Bala & Birnbaum, Rethinking, note 9 at 824.

[132] *Puszczak* at para 10.

[133] *DCE*, note 68 at para 18.

include how to determine whether a child is able to instruct a lawyer, and what role the lawyer should take.

1. LEGAL REPRESENTATION SERVICES FOR CHILDREN IN ALBERTA

a. Child protection proceedings

[88] Under section 112 of *Child, Youth and Family Enhancement Act*, the court may appoint a lawyer for a child who is subject to proceedings or an order for supervision, private guardianship, temporary guardianship or permanent guardianship. The application for such an appointment must made by the director, the guardian of the child, or the child. Before making the appointment, the court must determine that the interests or views of the child would not otherwise be adequately represented.[134] If an order is made, the child will be referred to the Legal Representation for Children and Youth branch of the Office of the Child and Youth Advocate.

[89] Legal Representation for Children and Youth provides lawyers for children and youth in child intervention matters. It began in 2006 and makes an average of 1,100 legal appointments each year. According to the 2023/2024 Annual Report:[135]

- 1,756 intakes were completed for the Legal Representation for Children and Youth program.
- 914 general inquiries were received that were not captured in the completed intakes. These inquiries were primarily related to custody and access, government services, and information about the Advocate's office.
- 3,043 young people worked with a lawyer:
  - 62% were Indigenous, and,
  - 65% were under age 12.
- 1,130 new appointments were made.

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[134] *Child, Youth and Family Enhancement Act*, s 112.

[135] Office of the Child and Youth Advocate, *2023-2024 Annual Report* (Edmonton: Office of the Child and Youth Advocate Alberta, 2024), at 15, 18, online: <ocya.alberta.ca/wp-content/uploads/2024/11/2023-2024-OCYA-Annual-Report.pdf> [perma.cc/8F74-52J3].

[90] Legal Representation for Children and Youth maintains a roster of lawyers who accept appointments. Lawyers must apply to be on the roster, meet the minimum application requirements and complete the required orientation training. Roster lawyers are then expected to complete eight hours of relevant training every fiscal year, two of which must be related to Indigenous worldviews. In addition, roster lawyers must adhere to Legal Representation for Children and Youth's service standards and expectations in order to maintain active roster status.[136]

[91] Legal Representation for Children and Youth may also appoint a lawyer without a court order if a direct referral is made to their office.[137] A direct referral may be made by the child, the caseworker, or "any other interested person or party."[138]

[92] Though Legal Representation for Children and Youth only provides legal representation for children receiving designated services under *Child, Youth and Family Enhancement Act* or *Protection of Sexually Exploited Children Act*, or for matters prescribed by regulation, part of the Child and Youth Advocate's responsibility is to identify systemic issues facing young people. To that end, in March 2021, the Child and Youth Advocate published a Statement of Concern highlighting the number of children and youth that were contacting their office with concerns regarding high conflict parenting disputes:[139]

> The Alberta Child and Youth Advocate has the ability to provide advice to the Government of Alberta with respect to any matter relating to the rights, interests and well-being of children. I am concerned for young people whose parents are involved in high-conflict custody and access matters. I am releasing this statement of concern so that community professionals and decision-makers are able to ensure young people's needs are at the forefront, their voices are heard, and they are adequately supported.
>
> ...

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[136] Office of the Child and Youth Advocate, *Legal Representation for Children and Youth Policy Manual* (Edmonton: Office of the Child and Youth Advocate: 2025) at 20–24, online: https://www.ocya.alberta.ca/wp-content/uploads/2025/07/20250701-Policy-Manual-Final.pdf> [perma.cc/A6SQ-LS6T] [Legal Representation for Children and Youth Policy Manual].

[137] *Child and Youth Advocate Act*, s 9(2)(c); *N.A. (Re)*, 2009 ABPC 305 at para 15.

[138] Legal Representation for Children and Youth Policy Manual, note 136 at 17.

[139] Office of the Child and Youth Advocate, *Statement of Concern*, (Edmonton: Office of the Child and Youth Advocate: March 2021), at 1, 3 online: <https://www.ocya.alberta.ca/wp-content/uploads/2024/07/Statement_of_Concern_March_2021.pdf> [perma.cc/CLK4-L6Z2].

> If young people are in a situation where their parents are actively involved in family court processes, it is essential they have the necessary support to ensure their safety and well-being. In court proceedings, they should have timely access to therapeutic supports and other interventions as needed. Access to these services should be readily available, provided by professionals specially trained to work with young people, and not depend on ability to pay. The viewpoints and opinions of young people must be heard and seriously considered by decision-makers.

b. Private family law proceedings

[93] If a parenting dispute is heard under the *Family Law Act*, section 95(3) permits the court to appoint counsel in order to represent the child's interests.[140] If the parenting dispute is under the *Divorce Act*, then the court may appoint counsel for a child pursuant to its inherent *parens patriae* jurisdiction.[141] If a court order is made appointing children's counsel in a private family law dispute, the lawyer will either be provided by Legal Aid, or the parties can privately retain counsel for the child.

[94] Legal Aid will not appoint without a court order. The order must classify the matter as high conflict and specifically request Legal Aid to appoint child's counsel. The normal Legal Aid financial eligibility guidelines do not apply to the appointment of children's lawyers, but the parents will be expected to reimburse Legal Aid.[142]

[95] Legal Aid has an internal team of staff lawyers with experience and training in representing children in high conflict parenting matters. Child representation files are sent in priority to the staff on the Child Representation team. If they are unable to take the file due to conflict, capacity, geographic location or other reason, a roster lawyer on the Legal Aid Child Representation Panel will be appointed.

[96] Legal Aid created the Child Representation Panel in April 2022. It is comprised of Legal Aid roster lawyers and the lawyers are appointed to the

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[140] *Family Law Act*, s 95(3).

[141] *Puszczak* at para 12.

[142] Doyle & Keller at 10; Legal Aid Alberta, "Family Law" (last visited 11 December 2025), online: <legalaid.ab.ca/service/family law> [perma.cc/58NH-SRCW].

Child Representation Panel for a 3 year term. The lawyers appointed to the Child Representation Panel must have:[143]

- A minimum of 5 years of experience in family law,
- Experience working with children,
- An understanding of child development, brain science and the impact of toxic stress on children,
- Attended training on Representation of Children, and
- Completed the application and interview process.

[97] Once appointed, lawyers on the Child Representation Panel must complete a minimum of eight hours per year of continuing legal education in the area of child representation.

2. WHEN SHOULD CHILD'S COUNSEL BE APPOINTED?

[98] In *Puszczak*, the leading Alberta case governing the appointment of children's counsel, the Court of Appeal adopted a list of non-exhaustive factors that a court should consider when assessing the child's need for independent legal representation:[144]

> (i) cases involve allegations of child abuse,
>
> (ii) cases where there is an apparently intractable conflict between the parents,
>
> (iii) cases where the child is apparently alienated from one or both parents,
>
> (iv) where there are real issues of cultural or religious difference affecting the child,
>
> (v) where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge on the child's welfare,

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[143] Andrea G. Doyle & Meghan Hanson, "Representing Children: Intersection and Differences in High Conflict Parenting and Child Protection" (Paper delivered at Legal Representation for Children and Youth Conference, Canmore, 6-7 June 2024) at 14.

[144] *Puszczak* at para 14.

> (vi) where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare,
>
> (vii) where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the child,
>
> (viii) any case in which, on the material filed by the parents, neither seems a suitable custodian,
>
> (ix) any case in which a child of mature years is expressing strong views, the giving of effect to which would involve changing a long standing custodial arrangement or a complete denial of access to one parent,
>
> (x) where one of the parties proposes that the child will either be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict or for all practical purposes exclude the other party from the possibility of access to the child,
>
> (xi) cases where it is proposed to separate siblings,
>
> (xii) custody cases where none of the parties is legally represented, and
>
> (xiii) applications to the court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

[99] These factors were first set out in the Australian case of *Re (K)*, and have since been cited by many Canadian courts. *Puszczak* clarified that the existence of some or all of these factors does not necessarily mean that child's counsel is required but they will help guide the exercise of the court's discretion when determining whether to make an appointment.[145]

[100] Additional factors from case law include whether another method of hearing from the child would be more desirable, the impact of involving the child in the litigation process, the parents' ability to pay for a lawyer, the likely probative value of the child's information, whether the parties are self-represented, and any concerns regarding abuse of process.[146]

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[145] *Puszczak* at para 16.

[146] *DCE*, note 68 at para 41; *Chalmers v Lannan*, 2015 ABPC 262 [*Chalmers*].

3. POSSIBLE ROLES FOR CHILD'S COUNSEL

[101] Traditionally, three possible roles for child's counsel have been identified: (i) the *amicus* role; (ii) the best interests role; and, (iii) the instructional advocacy role. More recently, a fourth option has been developed; namely, the interests and entitlements role.

a. *Amicus* role

[102] A lawyer who adopts an *amicus* role takes no instructions from the child nor advocates for any particular position. Rather, they take steps to submit all necessary evidence to the court, including evidence of the child's views and preferences.[147] The lawyer explains the court process to the child and ensures all of the relevant evidence is available to assist the court in its role, but is not expected to make submissions about a preferred outcome.[148]

[103] Rule 3.3-1 of the *Code of Conduct* and its associated commentaries make it very clear that a lawyer owes a strict duty of confidentiality to each and every client.[149] However, when performing an *amicus* role, confidentiality does not attach between the lawyer and the child. In other words, the role is in direct conflict with a lawyer's obligations under the *Code of Conduct*.[150] For this reason, a lawyer may only adopt an *amicus* role on the express instruction of the court.[151]

[104] A court may direct the *amicus* role in situations involving undue influence, coaching, resist or refuse dynamics or allegations of alienation. In fact, the order that the Court of King's Bench uses when appointing children's counsel specifically states:[152]

> If there is a reason that causes counsel to be concerned about the sincerity of the child client's instructions, such as the belief the Child is subjected to coaching, duress, resist or refuse dynamics and/or parental alienation, then they shall advise the Court so that it may

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[147] Bala & Houston at 18.

[148] Sheryl Pearson, "Paper on the Role of Counsel – Legal Representation for Children and Youth" (Paper delivered at Legal Representation for Children and Youth Conference, Canmore, 6-7 June 2024) at 10 [Pearson].

[149] *Code of Conduct*, rule 3.3-1 and commentaries.

[150] *Code of Conduct*, rule 3.3-1 and commentaries.

[151] *SK v DG*, 2022 ABQB 425 at para 341–342 [*SK*].

[152] Court of King's Bench of Alberta, "Order to Appoint Child's Counsel" (last visited 27 March 2025), at para 4, online (pdf): <https://albertacourts.ca/kb/areas-of-law/family/family-law-forms> [perma.cc/QNP6-UQQP] [Appointing Order].

determine whether to relieve Counsel of their duties or appoint Amicus Curiae.

b. Best interests role

[105] If a lawyer adopts a best interests role, they advocate for an outcome which they have personally determined to be in the child's best interests.[153] The lawyer ensures that the child's views are before the court, but advances a position based on the lawyer's own assessment about what would promote the best interests of their child client.[154] Like the *amicus* role, there is no confidentiality expected, which violates the lawyer's obligations under rule 3.3-1 of the *Code of Conduct*.

[106] This role is controversial. There is nothing in legislation, the *Code of Conduct* or legal process authorizing a lawyer to perform these functions.[155] Further, it may undermine the child's position and leave them without effective representation.[156] Lawyers are also not necessarily qualified to determine what is in the best interests of a particular child; that is a job expressly reserved for the judge. In other words, permitting a child's counsel to adopt a best interests role may usurp the role of court.[157]

[107] Advancing a position based on what the lawyer believes to be in the child's best interests also requires the lawyer to instruct themselves, and to "advance a position without evidence, or provide evidence on behalf of the child."[158] However, commentary under the *Code of Conduct* specifically states that a lawyer cannot provide evidence, nor should they state their own personal opinion on the facts of a case.[159]

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[153] Bala & Houston at 18.

[154] Lorne D Bertrand et al, *Hearing the Voices of Children in Alberta Family Proceedings: The Role of Children's Lawyers and Judicial Interviews* (Calgary: Canadian Research Institute for Law and the Family, 2012) at 7, online (pdf): <https://ucalgary.scholaris.ca/server/api/core/bitstreams/a2b22165-6fce-4e1b-89ca-ac902c3d5174/content> [perma.cc/6853-JLRG].

[155] Dale Hensley, "Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner's Perspective and a Response to Professor Bala" (2006) 43:4 Alta L Rev 871 at 873 [Hensley].

[156] Hensley, note 155 at 873; Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) 43:4 Alta L Rev 845 at 850 [Bala 2006].

[157] Hensley, note 155 at 873; Bala 2006, note 156 at 850.

[158] *SK* at para 330.

[159] *Code of Conduct*, rule 5.1-1, commentary at para 5; rule 5.2-1, commentary at para 1.

c. Instructional advocacy role

[108] An instructional advocacy role is the traditional role adopted by a lawyer in any lawyer-client relationship. The lawyer takes instructions from the client and advances the client's stated position.[160] Confidentiality and the duty of loyalty attaches to the relationship, which means that the lawyer requires the child's express permission in order disclose what they have said to the court.[161]

[109] In a recent Legal Representation for Children and Youth Discussion Paper, which forms the basis of the official policy regarding the proper role of a Legal Representation for Children and Youth lawyer, the instructional advocacy role was explained in the following manner:[162]

> The instructional advocacy role includes the following aspects:
>
> 1) Counsel meets with a child (several times) so counsel can provide information to the child and ensure their child client understands their situation.
>
> 2) Counsel assists the child in formulating a position or viewpoint and, as appropriate, a choice about the outcome. Counsel must take care not to impose their own values and perceptions on their child client.
>
> 3) Counsel asks for the child's consent to advocate their viewpoint and, if applicable, their choice about the outcome, on his or her behalf.
>
> 4) Counsel ensures the parties and court are aware of the child's views and preferences (provided child consents to information being shared).
>
> 5) Counsel presents evidence consistent with the child's position and desired outcome, if applicable.
>
> 6) Counsel should make clear to the parties and court that an instructional advocacy approach is being adopted.

[110] A final consideration when adopting an instructional advocacy role is how to get the actual evidence of the child's views and preferences before the court. Typically, the child will not testify or submit an affidavit and case law is very clear that child's counsel cannot simply tell the court what the child has said

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[160] Bala & Houston at 18.

[161] Hensley, note 155 at 881, 895; Bala & Birnbaum, Rethinking, note 9 at 816.

[162] Pearson, note 148 at 2 (Finding #3). See also Legal Representation for Children and Youth Policy Manual, note 136 at 73.

without the proper evidentiary basis. While the child's lawyer can advise the court about the child's position on the issues, without proper evidence, they cannot go further by expressing the child's experiences, statements, thoughts or perceptions.[163] This would be equivalent to the lawyer providing evidence from the counsel table, which is prohibited by both case law and the *Code of Conduct*.[164] Often, the lawyer submits evidence of the child's wishes through a social worker, psychologist or other mental health professional who has interviewed the child and can testify to what they have said.[165]

d. Interests and entitlements role

[111] The interests and entitlements role was developed as an alternative to the perceived shortcomings of the best interests role. A lawyer who adopts an interests and entitlements role is practicing non-instructional advocacy. While the role is advocacy based and confidentiality still attaches, no instructing agent is required. The role of an interests and entitlements counsel is to:[166]

> objectively explore all the interests and entitlements of the child, including but not limited to physical security and safety, emotional well-being, education, health, religion, family connections, and social involvement.

[112] In other words, the child's wishes are still relayed to the court but the lawyer must also outline other factors. When considering all of the evidence, it is left up to the court to determine what weight to give to the stated preferences of the child.

[113] In *SK v DG*, the court explained the difference between instructional advocacy and interests and entitlements in the following manner:[167]

> [335] Instructional advocacy is where child's counsel honours the child's instructions (or lack of instructions if the child chooses not to advance a position). This requires that the child can articulate a wish, preference, or viewpoint.

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[163] Appointing Order, note 152 at para 11. In fact, the order used by the Court of King's Bench to appoint counsel for a child specifically states:

> Child counsel shall be permitted to provide a written or oral summary to the court of the information acquired in the course of performing their duties, subject to any protection of confidentiality and privilege over such information, and by doing so, they shall not be deemed to be a witness in these proceedings.

[164] *Strobridge v Strobridge*, (1994) 18 O.R. (3d) 753 [*Strobridge*]; *Code of Conduct*, rule 5.2-1 and commentaries.

[165] *Strobridge*, note 164; *Puszczak*; Also see *JC v KC*, 2022 ABKB 707 at paras 71–86 for a discussion about how information from child's counsel should be provided to and used by the court.

[166] Pearson, note 148 at 10.

[167] *SK* at paras 335–339.

> [336] Interests and entitlements advocacy (non-instructional advocacy) is where a child cannot articulate a wish, preference, or viewpoint, and thus the role of counsel shall be to objectively explore all the interests and entitlements of the child, including but not limited to physical security and safety, emotional well-being, education, health, religion, family connections, and social involvement.
>
> [337] In either case, counsel introduces evidence that support the favoured position in line with the child's instructions (if the role is instructional advocacy), or their interests and entitlements (a non-instructional role).
>
> [338] The "interests and entitlements" role is a position based on an objective assessment of what is important in a child's life. It is not a lawyer advocating for an outcome that aligns with their subjective interpretation of what is best for the child.
>
> [339] Even where a child lacks the ability to articulate a wish and appreciate the consequences to support an instructional advocacy role, the child's viewpoint remains a factor to be assessed and shared with the court, and the child's confidentiality is to be respected.

4. WHAT ROLE SHOULD CHILD'S COUNSEL TAKE?

a. Law Society of Alberta

[114] The Law Society of Alberta does not have any published guidelines for the representation of children. Many secondary sources refer to a former policy, which has since been removed from the Law Society's website. Apparently, that policy required child's counsel to adopt an instructional advocacy role, unless the child lacked the ability to instruct.[168]

[115] The current guidance from the *Code of Conduct* is found in Rule 3.2-15:[169]

> When a client's ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

[116] This suggests that the lawyer should adopt an instructional advocacy role, unless the child client is unable to instruct.

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[168] Doyle & Keller at 15.

[169] *Code of Conduct*, rule 3.2-15.

[117] The commentary to this rule states that a lawyer should decline to act if the child client is incapable of giving instructions, unless the child has no other representative and declining to act would cause harm. In that case, the lawyer may take action to prevent harm until another representative is appointed. The lawyer will have the same duties to the child client who is unable to instruct as the lawyer would with any other client.[170] This means that they still owe a duty of loyalty and confidentiality to a child client who is unable to provide instructions, which rules out the *amicus* or best interests role.

[118] To put it another way, when considered together with the other rules regarding confidentiality and the lawyer's inability to give evidence, the combined rules and commentaries suggest that, when a child client is unable to provide instructions, an interests and entitlements role is most appropriate.

b. Legal Representation for Children and Youth and Legal Aid

[119] If the child has the ability to instruct counsel, Legal Representation for Children and Youth requires their lawyers to adopt an instructional advocacy role. If the child is unable to instruct, Legal Representation for Children and Youth policy is to adopt an interests and entitlements role. Legal Representation for Children and Youth lawyers are not permitted to adopt an *amicus* role.[171]

[120] Legal Aid does not have a formal policy about what role to adopt because considerations and circumstances can vary widely. The lawyer must first look to the appointing order to determine if the court has already identified the role of child's counsel. The appointing order used by the Court of King's Bench states:[172]

> Child's counsel shall meet with the Child(ren) and determine what role – instructional or non-instructional – is appropriate in the circumstances.
>
> If the Child(ren) is determined to be able to provide instructions, and only if any Child client chooses to advance a position, Counsel shall advocate in accordance with the Child's instructions and abide by all the Law Society Rules in relation to the solicitor-client relationship; if the Child lacks the ability to provide instructions, counsel shall advance the views and preferences of the Child but advocate in favour of the Child's interests and entitlements from an objective perspective.

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[170] *Code of Conduct*, rule 3.2-15, commentary at para 2.

[171] Legal Representation for Children and Youth Policy Manual, note 136 at 72–73.

[172] Appointing Order, note 152 at paras 2–3.

[121] In order for a Legal Aid lawyer to adopt an *amicus* role, the court must specifically direct it.[173]

5. DETERMINING THE CHILD'S ABILITY TO INSTRUCT COUNSEL

[122] The commentary to rule 3.2-15 of the *Code of Conduct* states that the key for determining whether a child client has the ability to instruct is:[174]

> whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision.

[123] In *SK v DG*, the court set out three questions for determining whether a child has the ability to instruct counsel.[175] These considerations have been expressly adopted by Legal Representation for Children and Youth:[176]

> The questions posed by Justice Loparco in *SK v. DG* encapsulate the evolution of the case law in this area and conform to Rule 3.2-15 of the *Code of Conduct*. As such, the following questions should be adopted when assessing whether a child has the ability to instruct counsel:
>
> - Can the child express their wish, preference or viewpoint clearly?
> - Can the child comprehend the nature of the legal question, context, and factors relevant to the decision?
> - Does the child appreciate the foreseeable consequences of their wish, preference or viewpoint?

[124] The threshold for determining a child's ability to instruct is not a high one.[177] Concerns about manipulation or influence over the child should also be considered. In cases where alienation is present, an instructional advocacy role may be inappropriate and the court may prefer the lawyer to adopt an *amicus* or interests and entitlements role. Further, the lawyer's role may change throughout the proceedings, especially in family conflicts that last for many years. In all

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[173] As stated in *SK* at 341–342 adopting an *amicus* role requires the court's permission. This is also confirmed in the Appointing Order, note 152 at para 4.

[174] *Code of Conduct* at rule 3.2-15, commentary at para 1.

[175] *SK* at 325.

[176] Pearson, note 148 at 2 (Finding #1); Legal Representation for Children and Youth Policy Manual, note 136, Appendix 5.

[177] Bala & Birnbaum, Rethinking, note 9 at 823.

cases, once the lawyer's role has been determined, or once it has been decided that the role must change, the lawyer must inform the court.

H. Judicial Interviews

[125] The purpose of a judicial interview is to obtain information about the child's wishes, supply the child with information about the court process, ensure the child is given an opportunity to provide input, and provide the judge with information about the child.[178] It lets the child know that their feelings have been taken into account, even if their preferred outcome is not reflected in the final decision.[179] It is not a fact finding exercise and should only be used to confirm the child's point of view.[180] If there are concerns about manipulation or influence, a judicial interview may be an appropriate tool to determine whether the child's stated views are independent.[181]

[126] Judges are typically reluctant to interview children in order to ascertain their views and many believe that judicial interviews should only be used as a last resort. A single interview with a judge may not be sufficient to ensure a reliable understanding of the child's views. Judges hold a position of authority in society which, in the context of a single interview model, may lead children to experience nerves, regret or miscommunication.

[127] However, proponents of judicial interviews contend that, while there may be issues with the process, it is better than not hearing the views of the child at all.[182] There may be cases where the stage of the proceedings, the urgency of the matter, the means of the parents or the lack of resources within the jurisdiction leaves a judicial interview as the only possible method for ascertaining the child's wishes.[183] Conversely, if the parties have good access to other suitable

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[178] *SK* at para 191–192.

[179] Nicholas Bala et al, "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013) 47:3 Fam LQ 379 at 383 [Bala et al].

[180] *SK* at para 192.

[181] *SK* at para 191.

[182] Patrick Parkinson & Judy Cashmore, *The Voice of a Child in Family Law Disputes*, (Oxford: Oxford University Press, 2008) at 210 [Parkinson & Cashmore].

[183] Bala et al, note 179 at 383.

mechanisms for learning the child's views and preferences, judicial interviews may be unnecessary.[184]

[128] In a frequently cited Yukon Supreme Court decision addressing the participation rights of children under the Convention, Justice Martinson held that it is the child's right to meet with the judge who is deciding their case, if they so choose.[185] Further, research has shown that, if properly asked, most children want to have the option to meet with their judge.[186]

[129] In Alberta, case law establishes that judges have discretion in family law cases to decide whether to conduct an interview with a child. This stems from their inherent authority to control the court process.[187] Further, while the judge should ask for the parties and child's counsel (if one has been appointed) to make submissions before deciding whether to conduct an interview, parental consent is not required. Similarly, even if an interview is requested or desired by both parties or by child's counsel (if there is one), a judge is not obliged to meet with a child. While the requirement to consider a child's views and preferences when determining best interests has been codified in both federal and provincial legislation, trial judges maintain absolute discretion regarding how to accomplish this task.[188]

[130] There are questions about whether judicial interviews are appropriate. For example, it has been noted that interviewing is inconsistent with the judicial role and places the judge in the inappropriate position of becoming a witness.[189] Further, it may impact the due process rights of the parents by providing the judge with information that the parties cannot test or challenge.[190]

[131] There are also significant questions about the proper procedure. Currently, whether judicial interviews take place at all and, if they do, what process should be followed completely depends on the discretion of the individual judge.[191]

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[184] Nicholas Bala & Rachel Birnbaum, "A Survey of Canadian Judges About Their Meetings with Children: Becoming More Common But Still Contentious" (2014) 91:3 Can Bar Rev 637 at 643 [Bala & Birnbaum Survey].

[185] *BJG* at paras 56–59.

[186] Bala et al, note 179 at 382.

[187] *Puszczak*; *Chalmers*, note 146 at para 51.

[188] Bala & Frohlich at 114; *McCauley v McCauley*, 2021 ABCA 311 at paras 18–19.

[189] Bala & Birnbaum Survey, note 184 at 651.

[190] Bala et al, note 179 at 391.

[191] Parkinson & Cashmore, note 182 at 188.

[132] If a judicial interview does occur, the following issues should be assessed and considered prior to meeting with the child:

- Is the child at an appropriate age?
- At what stage of the proceeding should the interview take place?
- Who is present during the interview?
- Where does the interview take place?
- Should the interview be recorded?
- If yes, how is the recording treated? Is it provided to the parents?
- What are the rules about confidentiality and what information, if any, is provided back to the parents?

[133] There have been some recent Alberta cases where judges have decided to interview a child.[192] In each case, the child was interviewed in the courtroom, in the presence of the judge and a court clerk, but without the parents. In one case, the child's doctor[193] was also present and, in the other, the child's counsel was in attendance.[194] The interview was recorded and a sealed transcript was placed on the court file. The judge's written decision contained a general summary of what was discussed during the interview. In one case, the judge told the child that their permission would be required before any information would be released to the parents.[195] In the other case, how confidentiality was explained to the child was not reflected in the written judgment.[196]

[134] Ultimately, each case is unique and the court must maintain sole discretion over the decision of whether to conduct a judicial interview. However, the development of some general best practices is desirable so that parents, children and counsel know what to expect if an interview does take place.

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[192] *CMB v AMB*, 2022 ABQB 528 [*CMB*]; *SK*.

[193] *CMB*, note 192 at para 113.

[194] *SK* at para 196.

[195] *SK* at para 196

[196] *CMB*, note 192 at para 113.

Summary Chart

Hearsay evidence from a parent	
May be admitted • as an exception to the hearsay rule, on the basis that it is necessary and reliable [*R v. Khan*, [1990] 2 SCR 531] • as part of the "state of mind" exception to the hearsay rule • in child protection proceedings under the *Child, Youth and Family Enhancement Act*, s 108(4)(b)	Comments: • One of the least desirable methods for hearing from children. Courts are typically skeptical of hearsay evidence originating from two competing parents and want to discourage parties from questioning children about ongoing family litigation. • There may be a cost where an affidavit is drafted by a lawyer.
Hearsay evidence from a third party adult	
May be admitted • as an exception to the hearsay rule, on the basis that it is necessary and reliable [*R v. Khan*, [1990] 2 SCR 531] • as part of the "state of mind" exception to the hearsay rule • in child protection proceedings under the *Child, Youth and Family Enhancement Act*, s 108(4)(b)	Comments: • Considered more reliable than hearsay evidence originating from two competing parents, especially if the third party adult is regarded as neutral. • There may be a cost where an affidavit is drafted by a lawyer.
Letter or recording created by the child	
May be admitted • as an exception to the hearsay rule (see above) if attached to an adult's affidavit • as part of the court's ability to control its process if submitted directly to the judge	Comments: • This type of evidence is generally seen as unreliable. There is usually no indication about the circumstances in which the letter or recording was created and it may be unclear whether the child has been coached or manipulated. Courts generally discourage parents from offering this type of evidence. • There may be a cost where an affidavit is drafted by a lawyer.
Child's direct evidence (affidavit or oral testimony)	
May be admitted • under the *Canada Evidence Act*, ss 2, 16, 40 in proceedings where federal legislation applies (eg. *Divorce Act*) • under the *Alberta Evidence Act*, s 1 in proceedings where provincial legislation applies (eg. *Family Law Act*, *Child, Youth and Family Enhancement Act*.)	Comments: • Children rarely provide direct evidence because it exposes them to the possibility of cross-examination. • Even if the child wants to provide direct evidence, the court has the authority to refuse to allow it, in order to protect the child. This is because a child testifying in family court proceedings can have immediate and long term consequences on the child and their relationships with family members. The short term gain must be weighed against the long term harm.

	• There may be a cost where an affidavit is drafted by a lawyer.
Evaluative Voice of the Child Report	
Available under Family Practice Note 7	Comments: • Only available in private family law proceedings. Not available in proceedings under the *Child, Youth, and Family Enhancement Act*. • Report is prepared by qualified Parenting Experts under the Practice Note. (See Association of Family and Conciliation Courts Alberta's Roster of Professionals providing Practice Note services) • There is cost. Parents must be able to afford the cost of the report before it will be ordered. Subsidies may be available.
Evaluation Report (also known as a Bilateral Custody Assessment Report)	
Available under Family Practice Note 8	Comments: • Only available in private family law proceedings. Not available in proceedings under the *Child, Youth, and Family Enhancement Act*. • Report is prepared by qualified Parenting Experts under the Practice Note. (See Association of Family and Conciliation Courts Alberta's Roster of Professionals providing Practice Note services) • The cost for an evaluation report under Family Practice Note 8 can range from $20,000 and $40,000 and may be outdated by the time the matter gets to trial. Parents must be able to bear the cost of the report before it will be ordered. Subsidies may be available.
Independent legal counsel for the child	
For child protection proceedings: • *Child, Youth and Family Enhancement Act*, s 112 • Direct referral (provided the child is receiving a designated service)	Comments: • There are different roles a lawyer for a child can take. See chapter 3, section F of the Resource Guide. • Representation may be provided by Legal Representation for Children and Youth. If the child's lawyer is provided by Legal Representation for Children and Youth, there is no cost.
For private family law proceedings: • *Family Law Act*, s 95(3) (if proceeding under that statute) • The court's inherent parens patriae jurisdiction [Puszczak v Puszczak, 2005 ABCA 426.]	Comments: • There are different roles a lawyer for a child can take. See chapter 3, section F of the Resource Guide. • Representation may be provided by Legal Aid Alberta (for private family law proceedings). Legal Aid Alberta requires a court order before they will appoint a lawyer for a child involved in private family law

	proceedings. If the child's lawyer is provided by Legal Aid Alberta, the parents will be expected to reimburse them. However, the financial eligibility guidelines will be waived. • Privately retained counsel who have training in representation of children in high conflict parenting matters (for private family law proceedings). For privately retained counsel, the parties will need to assess the lawyer's qualifications and hourly rates and ensure there is no conflicts or bias. If the parties privately retain a lawyer, they will agree to a billable rate.
Judicial interview	
SK v DG, 2022 ABQB 425. *BJG v DLG,* 2010 YKSC 44.	Comments: • The interview is carried out by a judge. • The court has absolute discretion to decide whether to conduct an interview and to determine the appropriate procedure. This discretion is derived from their authority to control the court process. In the Court of King's Bench, this discretion also comes from the court's inherent *parens patriae* jurisdiction. [*Puszczak v Puszczak*, 2005 ABCA 426; *SK* v DG, 2022 ABQB 425; *Chalmers v Lannan*, 2015 ABPC 262.]

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