

***VOICE OF THE CHILD REPORTS: WHEN, HOW AND BY WHOM?  
ROLES OF PSYCHOLOGISTS AND LAWYERS***

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***INTRODUCTION***

Children's views are beginning to have a greater profile in decision making for parents and for courts. There can be little argument that the law across Canada now requires an increased recognition of children's rights to be heard and increased consideration of those views than in the past<sup>1</sup> and that there are many different mechanisms for obtaining those views.

Views of the Child Reports (VCR's) are one tool that is growing in application, particularly in some jurisdictions which have created resources to facilitate these reports.<sup>2</sup> There is less uniformity regarding how those reports are ordered, produced, and admitted.

Our intention is to introduce an ethics and competence-based analysis of the different roles of psychologists and lawyers when carrying out the assignment of preparing a VCR. This is intended to be complimentary to the recent work of our colleagues on the experience of the courts with these reports in Ontario<sup>3</sup>.

Lawyers working with children have not had a well-defined role in Canada. We suggest that the lawyer, who may move into the role of decision-maker, witness or expert, must be conscious of their boundaries based on their ethics and the appropriate competencies to take on such roles. This should limit lawyers from taking on roles in which they use their own opinion or provide evidence on behalf of their child client.

Psychologists working with children have the role of expert evaluators and require many competencies to carry out that role. Specific competencies psychologists bring to this task include the ability to identify the credibility of the child's statements, such as whether the statements are

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<sup>1</sup> Nicholas Bala and Patricia Hebert, "Views, Perspectives and Experiences of Children in Family Cases" National Judicial Institute and National Family Law Program, 2014.

<sup>2</sup> R. Birnbaum, N. Bala & J. Boyd, "The Canadian Experience with Views of the Child Reports: A Valuable Addition to the Toolbox?" (2016) 30 Inter J L Pol & Fam 158. Birnbaum, R. (in press)

<sup>3</sup> R. Birnbaum & N. Bala, "Views of The Child Reports: The Ontario Pilot Project" Inter J L Pol & Fam. (forthcoming 2017)

coming from an age-appropriate perspective and using age-appropriate language, and if they show characteristics of rehearsal or coaching. Psychologists making reports will generally provide some analysis of what is being said within the context of the family dynamic. Their expertise allows them to be qualified and to provide expert evidence in this form.

Awareness of these differences will significantly impact the choice of the type of report being sought, assuming both are available to the parties in their jurisdiction.

## I. Voice of the Child – What do Psychologists do and Why?

### A. Listening to Children – Some Examples

Psychologists have the opportunity, through both training and experience, to understand and interpret the language of children and youth. Those working with children in separated families will deepen their awareness of how children in those circumstances may report their views, as a result of their own internal efforts to make sense of their world and the many influences that may be operating.

Let's start by hearing from some of the children themselves as to what they may say in an interview. First, consider a comment made by Abigail:

*My mom isn't being nice to me. One time I was sleeping this way on the bed (she indicated sideways) and she picked me up and slammed me the other way. When my brother was a baby my mom wouldn't let my dad touch him. Sometimes mom is funny but most of the time she is quite mean. Most of the time she just beats us up. Mom arrested my dad in Red Deer when I was a baby and in Lamont and Spruce Grove. Mom knows I'm scared of the dark and one night she closed her door.*

It must be said that this was not a Voice of the Child report, rather it was from a play therapy session. Here is some context to consider. It was the third play therapy session for Abigail and she is seven years old. In the first two sessions, when she was brought by her mother, she was happy, appeared positive and readily engaged in play activities. When brought to the third session by her father, Abigail walked into the office and promptly announced she did not want to play today, she wanted to talk. She spoke for 15 minutes nonstop, including the above statement. She then stated she wanted to see if her dad was still in the waiting room, she went out and crawled up on his lap and they whispered back and forth for a few moments then she came into the office again and stated she had more to tell me. Abigail spoke for another five minutes after which time she again asked to go see her father and after a brief whispered consultation Abigail returned to the office and stated "okay, we can play now".

Consider a second example, which was a voice of the child evaluative intervention. In describing her family, Sharon referred to her father as “Walter”. Sharon was asked why she calls her father Walter and she went on at great length stating:

*“He wants me to call him dad but I prefer Walter because he’s so rude. He even says he hates Don and that makes me sad. Whenever Walter says stuff about mom or Don I get mad and fight with him. I don’t want to live with Walter, I want to live with mom and Don. He kicked my sissy out of the house. What I want is one day with him and he does not believe me. He says no, that’s not true. And Walter sends bad notes to my mom. When I was a baby and bit him, he smacked me on the bum so hard mom had to put lotion on it. He said sissy doesn’t love me but she does.”*

As Sharon was brought to the session by her mother, she was then asked if there was anything her mother had wanted her to remember to tell me. In a somewhat rambling account, listing a variety of deficiencies for her father, Sharon replied:

*“She wanted me to tell you a girlfriend with boys stole my room and I need to sleep on the couch. Now they’re going to move out because Walter says bad words about them. I lie to them a lot and say mom says bad things but I’m lying because I really want to live with my mom. Mom puts me on the listening chair for five minutes. Walter won’t give me food or drinks and if I talk I have to stay there longer. He buys me toys so I will love him more. I like the toys but he will say Don won’t bath me and mom can’t sleep with him but he sleeps with me and baths me. He washes my stuff with Tide and I have sensitive skin and I cough and he never put lotion on me. He wasn’t taking care of his dogs. Jimmy (the dog) died because he got so old and Walter gave him McDonald’s, not dog food, just human food.”*

Sharon was then asked if there is anything else her mother wanted her to tell me. She stated:

*“No. I also want to tell you I don’t like Walter because he makes me go on the listening chair because I say bad words: stupid, f\*\*\* and f\*\*\*ing asshole. I say them when I get mad. I say them because he gets me mad every time. You need to know if he said something bad to my mom I said I will hang up on him. When I go back he asks why did you hang up did mom say bad words? He asks if Don touched you in bad parts. I say no. He says Don is a bad guy and I will never live with Don. I try to help mom getting Walter away from her.”*

Sharon was asked what she meant by bad parts and she replied, “like the penis”.

A further piece of information you should know: Sharon was 6-years-old at the time.

Patrick was 13 and was brought in for two appointments, once by each parent. In his first interview, when the process was being explained to Patrick he was told that because he was a reluctant participant in this process that if there were things he wanted to say, but did not want included in the report, he could say so and we could discuss that. In the first appointment Patrick spoke eloquently using age-appropriate language and from the age-appropriate perspective which resulted in 6 to 8 pages of single-spaced handwritten notes. In Patrick’s second appointment, he came in and started by asking “Steve, did you really mean that you would only put in the report

what I allow you to?” Patrick was told that yes, that was the case and he replied “Write this down. Tell my parents they are the adults, I’m the kid, they decide and I’ll be fine.”

## B. Documents Guiding the Practice of Psychology

For psychologists, the most important document guiding our profession is the Canadian Code of Ethics for Psychologists Fourth Edition (2017)<sup>4</sup>. This document is largely aspirational in nature but is valuable nonetheless. In Alberta, the College of Alberta Psychologists (CAP) publishes the Standards of Practice (2013)<sup>5</sup> which is more prescriptive in nature. Finally, psychologists are expected to be well-versed in issues pertaining to the culture in which we are working; in this case it is the psycho-legal world of trying to help families restructure when disputes exist pertaining to parenting time and parenting responsibilities. Within this, the preeminent organization to be involved with is the Association of Family and Conciliation Courts (AFCC). While AFCC publishes standards for Child Custody Evaluations<sup>6</sup> and not Voice of the Child Evaluative Interventions, many key elements can be taken from that document and applied to obtaining children’s views.

For the purpose of this article, we focus on two main areas: the CAP Standards of Practice which incorporates ethical principles for psychologists and the AFCC child custody evaluation standards. Keep in mind that the CAP standards are enforceable while the AFCC standards are viewed as guidelines.

What are the competencies required to provide a Voice of the Child evaluation and what does competence mean? CAP guidelines (2013) include the following statements on competence:

5.1 A psychologist shall not provide a professional service or supervision unless the psychologist is competent through education, training or experience to provide that professional service.

5.3 A psychologist, when developing competency in a professional service that is new to the psychologist, shall engage in ongoing consultation with a psychologist or other professional who has expertise in that area and shall seek appropriate education, training, and supervision in the new area.

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<sup>4</sup> Canadian Psychological Association, Canadian Code of Ethics for Psychologists, Fourth Edition, 2017.

<sup>5</sup> College of Alberta Psychologists, Standards of Practice, 2013.

<sup>6</sup> Association of Family and Conciliation Courts, Model Standards of Practice for Child Custody Evaluation, 2006.

Looking to the AFCC (2006) for essential guidelines pertaining to child custody evaluations, which arguably have significant overlap with Views of the Child Evaluative Interventions, necessary knowledge includes:

- (1) the psychological and developmental needs of children;
  - (2) family dynamics, including, but not limited to, parent-child relationships, blended families, and extended family relationships;
  - (3) the effects of separation, divorce, domestic violence, substance abuse, child alienation, child maltreatment including child sexual abuse, the effects of relocation, sexual orientation issues, and inter-parental conflict on the psychological and developmental needs of children, adolescents, and adults;
  - (4) the significance of culture and religion in the lives of parties;
  - (6) when and how to interview or assess adults, infants, and children;
  - (8) how to collect and assess relevant data and recognize the limits of the reliability and validity of different sources of data;
  - (9) how to address issues such as general mental health, medication use, and learning or physical disabilities;
  - (10) how to apply comparable interview, assessment, and testing procedures that meet generally accepted forensic standards to all parties;
  - (12) how to inform litigants, children, other participants, and collateral sources, of the purpose, nature, and method of the evaluation and the limits of confidentiality;
  - (15) how to make the relevant distinctions among the roles of evaluator, mediator, therapist, parenting coordinator, and co-parenting counselor;
  - (16) how to write reports for the courts to which they will be presented;
  - (17) how to prepare for and give testimony at deposition or at trial; and,
  - (18) how to maintain professional neutrality and objectivity when conducting child custody evaluations.
- (c) Areas of additional specialized training include the assessment of children's resistance to spending time with a parent or parent figure and allegations of attempts to alienate children from a parent, parent figure, or significant other;

Some of the guidelines from this document were omitted as they pertain specifically to child custody evaluations and address issues far beyond the scope of a brief evaluative intervention.

Another key area for psychologists refers to having sufficient professional knowledge before providing an opinion. The definition of psychologist providing an opinion is that it "includes but is not limited to, verbal or written statements, conclusions or recommendations about the

competence, character, emotional, educational, cognitive, physical or mental health of another person” (CAP, 2013).

Sufficient professional knowledge is defined as (CAP, 2013):

6.3 A psychologist rendering an opinion about a person that has, or could have, implications for that person’s rights or personal interests shall not do so without having direct and substantial professional contact with that person, including an informed consent process and formal or general assessment.

6.4 A psychologist rendering an opinion or making a statement about a parent or guardian that has, or could have, implications for the parent or guardian's rights or personal interests shall not do so without having direct and substantial professional contact, including an informed consent process and formal or general assessment of the person who is the subject of the opinion or statement being made.

This is an area where well-meaning psychologists, and most often but not exclusively those who only do counselling or play therapy, get themselves into the most difficulties with the regulatory body. A Voice of the Child report can state what the child says, as well as observations that suggest whether what they are saying appears credible, incredible or coached and what needs may exist within the family, but it cannot make any direct recommendations regarding if the child should or should not have parental contact or how much time the child should spend with either parent. This is because such a statement is impacting the parent’s rights and responsibilities without having done a complete, formal assessment of that parent.

A final important area pertains to the notion of dual relationships or role conflicts. Here, CAP Standards of Practice (2013) state:

10.1 A psychologist shall not undertake or continue a professional service when the psychologist is aware, or should be aware, that the psychologist faces a potentially harmful conflict of interest...

4.1 If the psychologist has or has had a previous therapeutic role with a client, the psychologist is cautioned against undertaking an assessment role that has an impact on the legal rights of that client or on the client’s access to funding or compensation.

While many will argue that who better could tell you what the opinion of the child is than the therapist who worked with the child for an extended period of time, their initial role was that of therapist, not of evaluator. Further, in the process of providing therapy, the psychologist may have substantially more contact with one parent than the other, which could lead to the introduction of bias. For any psycho-legal work being done, an essential component is obtaining a neutral, third-

party to provide the service and the person who has already worked with part or all of the family is not able to be viewed as a neutral person.

### C. The Myth of Twelve

The origin of the mistaken belief that children could make decisions in relation to their parenting arrangements at a specific age is not clear. At the age of 12, a child can be held criminally responsible for their actions under the *Youth Criminal Justice Act* and its modified approach to dealing with youth crime and responsibility. However, few would argue that a 12-year-old should be treated as an adult by being tried for all crimes in adult court. We do not allow children to practice driving with adult supervision until the age of 14 and they cannot drive a car alone or drop out of school until the age of 16. It is not until 18, 19 or even 21 that children are allowed to drink alcohol, vote or engage in other adult activities.

The two myths related to this issue are that when a child turns 12, they can choose where they want to live between separated parents and that it is good parenting to allow your child solely to choose their living arrangements. However, many parents have the belief that this is the case even though, at the age of 12, few parents would allow children to stop brushing their teeth, to drop out of school or to attend a weekend-long keg party with college students.

So what then would suggest that a 12, 14 or 16-year-old has the understanding or ability to be truly aware of the consequences of cutting one parent fully from their life? In the area of developmental psychology, a 14-year-old is not on par with an adult in terms of social development, moral development or with respect to their cognitive processes. Children are still moving towards fully developing abstract thought and beginning to view concepts such as right and wrong based on their own morality and situational variables. They are in the process of trying to find out who they will be as an adult. They often will take on different roles and test different perceptions over the course of their teenage years and will not make decisions consistently.

Across Canada, the age to vote in municipal, provincial and federal elections is 18. It is interesting to note that a young person is not considered sufficiently mature or responsible enough to help select a Member of Parliament, who likely has very little direct impact on his or her life, until 18. However, for some, they are placed in a position to select their primary parent or to cut out a parent at a much younger age, which is an overwhelming responsibility with major implications.

### D. Psychologists Interviewing Children

A number of ways exist for representing children's wishes in the court, including through hearsay transmitted by the parents, by children speaking to a judge, by children having a lawyer or by



utilizing a psychologist. According to Boshier and Steel-Baker (2007)<sup>7</sup> a child psychologist is often more skilled than either lawyers or judges in working with children and has the added benefit of being able to obtain children's opinions in a subtler manner which is less likely to result in the children's opinions being influenced by loyalty issues or intimidating circumstances. Benefits to including children's opinions in custody disputes are seen as providing for children to give feedback to the adults but not take on adult-like responsibilities. These benefits can include helping the children understand what is taking place, correcting mistaken assumptions, sharing their worries and developing solutions for dealing with parental conflict with the assistance of a professional<sup>8</sup>.

The concern has also been expressed that children involved in their parents' conflicted divorce are vulnerable to manipulation and pressure by one or both parents or by those aligned with either parent such as a sibling, grandparents or other adult family member or family friend<sup>9</sup> It has been suggested that children benefit more from expressing their opinions in the context of mediation which is ideally a "win-win" situation as opposed to in litigation which is often viewed as a "win-lose" situation There is a large difference between children making their wishes or needs known and feeling the need to decide between parents. Resetar and Emery (2008) state "we believe that when children are asked their opinion in contested custody cases, they are, in fact, being given a developmentally inappropriate responsibility of making an adult decision"<sup>10</sup>.

A consideration of children's rights from a psychological perspective, rather than a legal one, indicated the following five points:

1. All children have the right to be properly brought up, primarily by their parents with the help and support, rather than the interference, of the state.
2. But all children also have the right to be protected from harm, in or out of the family, including not only ill-treatment but also the prevention or neglect of their proper physical, social, educational and emotional development. The state is entitled to interfere with the rights of their families for this purpose and, in some circumstances, will have a positive obligation to do so.

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<sup>7</sup> Hon. Peter Boshier, Damien Steel-Baker (2007) "Invisible Parties: Listening To Children Family" Court Review 45 (4), 548–559

<sup>8</sup> Ernest A. Sanchez, Sherrie Kibler--- Sanchez (2004) "Empowering Children In Mediation. An Intervention Model" Family Court Review 42 (3), 554–575.

<sup>9</sup> Cashmore, Patrick Parkinson (2008) "Children's And Parents' Perceptions On Children's Participation In Decision Making After Parental Separation And Divorce" Family Court Review 46 (1), 91–104.

<sup>10</sup> Branka Rešetar, Robert E. Emery (2008) "Children's Rights In European Legal Proceedings: Why Are Family Practices So Different From Legal Theories?" Family Court Review 46 (1), 65–77.



3. All children have the right to be taken seriously as players and their own game of growing up, even if they cannot – indeed must not – be given the right to decide everything for themselves.
4. All children have the right to have someone assert their rights on their behalf if they cannot do so for themselves.
5. In the end, however, the fundamental right of a child is to grow up. Unlike other oppressed people, there is a light at the end of the tunnel. It is our job to make sure they get there.<sup>11</sup>

One study found that when children's opinions, expressed to a mental health professional, were considered within the mediation process, those cases showed significant improvement in parental emotional availability to the children and cooperation in a parenting relationship<sup>12</sup>. This reminds us that part of children's well-being is being heard, but not necessarily being given the parenting reins.

#### E. High-Conflict Children

Much has been written about the characteristics of high-conflict parents (for example Eddy, 2006<sup>13</sup>) but the children exposed to high-conflict parents also may have identifiable characteristics. Children who are coached or tricked into making false claims of abuse often face instant and significant changes in lifestyle by having to relocate or having one parent eliminated from their life. Once children make false allegations, they often have to repeatedly recite the story, which then becomes part of their identity and they may firmly believe and "remember" an event that may not have really happened. Young children who have been coached into making false allegations may accept those allegations as truth and can become life-long victims of an imaginary event.

No one likes to be in an emotionally charged pressure situation day after day and this also includes children. The highly-conflicted child seeks to reduce stress in their life and actively "picks" to be with one parent to minimize their internal conflicts in loyalty. Therefore, taking sides is seen to

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<sup>11</sup> Brenda Hale (2006) "Understanding Children's Rights: Theory And Practice" Family Court Review 44 (3), 350–360.

<sup>12</sup> Jennifer E. McIntosh, Yvonne D. Wells, Bruce M. Smyth, Caroline M. Long (2008) "Child-Focused And Child-Inclusive Divorce Mediation: Comparative Outcomes From A Prospective Study Of Post separation Adjustment" Family Court Review 46 (1), 105–124.

<sup>13</sup> Eddy, W. E. (2006) "High conflict people in legal disputes" Janis Publications, British Columbia.

be the lesser of two evils and is a somewhat surgical cutting-out of one parent to preserve their own emotional well-being and their relationship with the other parent.

While children are rarely responsible for their parents' dysfunction in high-conflict families, they can participate in escalating the conflict. When parents do not get along or even tolerate each other, they often look consciously, or unconsciously, for evidence to validate their position. This type of parent will frequently question the child upon their return home from a visit. They may verbally or nonverbally express disapproval at fun activities described but verbally or nonverbally show great interest and encouragement when problems are described. Therefore, the child learns that their "admission fee" to their parent's home is to say a few bad things about their visit, which will make the parent happy and allow the questioning to end sooner.

Even parents in high conflict can still maintain a great degree of caring and concern for their children. They may then tend to act quickly and decisively through emotional outburst or legal action based on the child's statements of concerns about the other parent, without being aware that those statements may have been embellished or completely false. The same parent that would question and investigate a child's claim that "school is cancelled for all of next week so the students can enjoy the good weather" is quick to believe an equally preposterous statement if it applies to the other parent without the need for validation.

Finally, children can be enlisted into one parent's dysfunctional behaviours. This includes adopting the view of that parent that is nowhere near reality. Children may describe this view with words and phrases they do not even understand.

Understanding these dynamics enables psychologists, even in the setting of brief involvement to providing VCRs, to raise issues in relation to the interpretation of children's views and whether those views are influenced or impacted by the children's conflict-avoidance strategies.

#### F. The 4 A's for Preferring a Parent: Alienation, Alignment, Affiliation and Appropriate

One of the problems of working with children is that they are children. They may lack insight and life experience and have difficulty expressing the reasons behind their behaviours. It is important that we do not misinterpret their actions based on our own biases. Although there is a spectrum, four different general reasons can be seen for one child stating that they do not want to see one of their parents.

The first reason is alienation and this comes in two varieties: deliberate and accidental. Deliberate is what we hear of most where the "evil" parent brainwashes the child using techniques that one would expect to see on movies about prisoner of war camps. Practically speaking, this involves engaging the child in discussions about the short-comings of the parent, leaving court documents next to the television guide, leaving books with titles such as "How to help your children with their abusive parent" in common areas of the home. Steps may be as extreme as setting up a situation

where a quiet provocation leads to the child witnessing the other parent striking out at the parent whose provocations went unnoticed by the child. Telling personal details, relying on the child for emotional support or taking time to pray with the child prior to a visit so that nothing bad happens to them on the visit all amounts to deliberate alienation.

It is not just the parent that can be the perpetrator of alienating behavior: it can also frequently be a grandparent or older sibling. Accidental alienation arises for a much more natural reason, that is, that children are naturally curious and that grieving parents often seek support from close friends and relatives. The same child that does not hear three requests to load the dishwasher may immediately stop to listen when hearing their parent is in another room speaking on the telephone in hushed tones. The parent's venting to another adult may be filtering to the child.

Alignment is no healthier than alienation. When high conflict exists, children want to do whatever they can to extricate themselves from the stress and tension created by parental conflict. Sometimes, when there appears to be a power imbalance between the parents, a child will pick the powerful parent out of fear that the parent's wrath will be turned on them. They align themselves in order to avoid stresses. Other times, children make use of their rigid sense of right and wrong to side with the victimized parent out of sympathy for them.

Attachment is completely normal and is not necessarily fixed over time. It is commonly seen that as a child's age and developmental level, along with their interests, change over time they will have more in common with one parent at one time and then switch to share common interests with the other parent at a later time. Other attachment issues relevant in custody are peer attachments starting with the early teenage years. The role of the parent of the teenager is largely to feed, clothe, drive and provide money to the teen. Healthy development requires a teenager to spend more time in the social environment with peers and to slowly withdraw from their heavy reliance on parents. In relocation cases, or even in cases where parents live a significant distance away from each other in the same city, attachments strongly come into play. If one parent is located near the child's school and peer group and the other parent is located far away from the supports, the teenager may naturally resist visiting the distant parent because it isolates them from their peers.

The last category, Appropriate, is also difficult for the child. This is a parenting situation in which one parent through inappropriate behaviour to, or in front of, the child justifiably earns the wrath and contempt of that child. Such behaviours would have the child angry with the other parent whether the parents were together or apart. It cannot be forgotten that, while false allegations of abuse do exist within custody disputes, an unfortunately high amount of inappropriate parenting behaviour takes place under these situations which may, or may not, be raised by the child.

These different types of attachment to parents can impact how children will report views and how those views may need to be considered. Expertise is required to flag concerns relating to alienation, for example, in a Voice of the Child report, so that the reader can consider the views in light of the risks relating to reliability for a child whose opinions, and perhaps even their perceptions, have been influenced through alienation. In a VCR, a psychologist cannot conclude

alienation but they may raise observations which, in light of other evidence, may be useful to decision makers.

## G. Evaluating Children's Opinions

Counsel, the court and mental health professionals all need to be aware of how impressionable and eager-to-please children can be. One of the most essential aspects of evaluating opinions is that we do not use language which would predetermine the nature of the response. Psychologists are often able to find out a child's opinion in a subtle manner in which the child does not feel put on the spot. Significant training is required for this level of comfort in working with children and it takes far more than using a soft voice and crouching down to match eye-level while still using adult terminology or leading questions.

Assuming that the adult working with the child has the necessary level of skill, questions to ask pertaining to the veracity of the statements include:

1. Is the language being used consistent with the child's developmental level and intelligence?
2. Are the statements being used appropriate from a child's perspective or is the child possibly repeating an adult's perception?
3. Does the child show an inappropriate awareness of adult issues, especially regarding a parent they are reporting to dislike?
4. Are there a few concrete examples of significant issues that would distance a child from a parent or are there multiple lower-level examples? Often what is seen when children are not expressing their own view is that they have one or two vague examples that they repeat over and over again such as "My dad promised to get me a bicycle for my eighth birthday and I did not get it till the next year at Christmas. Why would anyone give somebody a bicycle at Christmas time? That is just disrespectful!"
5. Does the child's language portray an "us against them" mentality; does the child actually make statements such as "we do not trust mom anymore"?
6. Do you see appropriate emotion accompanying the child's statements or does there seem to be a disconnect? For example, does the child talk about inappropriate parenting behaviour in a mood more suitable for someone who has won the lottery?

## II. Voice of the Child – Role of Lawyers

Our view is that there is potential value to report on the views of the child and that this service may be done by lawyers, particularly where there is some infrastructure to facilitate this work being carried out.

A VCR is a more focused and less expensive approach than a full assessment or other types of reports, as discussed above, but those conducted by lawyers provide a narrower piece for a court to consider – purely the views of the child as expressed to a neutral third party lawyer. Many Canadian judges prefer this to a judicial interview for a variety of reasons<sup>14</sup>.

There is however still controversy and confusion in Canada. Some of the issues include whether these reports are only to relay the views of the child, or can they be used to transmit evidence or facts related by the child? There is lack of consistency in process and in content. Secondarily, do lawyers just provide views or do they add any assessment of credibility or reliability of those views? Does the lawyer have any role to play in a broader assessment of the child's interests?

We specifically break down the issues relating to evidence, ethics and competencies for lawyers.

#### A. Views of children in family law proceedings

With respect to the use of children's stated preferences specifically, there is no unified approach.

The court will not always undertake an analysis of reliability of the child's statement as their true wishes first and apply appropriate weight second. Few cases provide examples of a careful and thorough review of one or more of the criteria we have discussed<sup>15</sup>. For example, the Alberta Court of Appeal has outlined that it is up to the trial judge to perform some analysis of a child's statement to determine its reliability<sup>16</sup>, which analysis has largely been abandoned in many later decisions.

With respect to applying the best interests test, courts generally continue to use a long-standing list of criteria, which includes the child's wishes. Each of these is to be given weight depending on the facts<sup>17</sup>.

With respect to the weight of a child's wishes, it has long been accepted that the children's views will be considered but may be rejected in the context of child protection proceedings<sup>18</sup>. In many provinces, these views must be considered as one factor of analyzing a child's best interests by

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<sup>14</sup> *K.R.D. v C.K.K.*, [2013] N.B.J. No. 332, per Baird J.

<sup>15</sup> *LE.G. v A.G.* [2002] B.C.J. No. 2319, B.C.S.C.

<sup>16</sup> *Chapman v. Chapman*, (1985) AJ No. 135, ABCA.

<sup>17</sup> *Gordon v. Goertz*, (1996) 2 S.C.R. 27 SCC

<sup>18</sup> *New Brunswick (Minister of Health and Community Services) v. M.L.*, [1998] S.C.J. No. 52

law. The Supreme Court of Canada has considered this issue on several occasions, and found that a child's wishes will be followed, even to the extent of limiting contact with a parent, for children at 13 and 14 years of age, where that desire was supported with other evidence that it was in the child's interests<sup>19</sup>.

With respect to custody, whether legislation requires it or not, the court has generally stated that "The wishes and preferences of children about their custody must be given due consideration by the courts, though their importance may vary with the age and maturity of the child expressing them"<sup>20</sup>. The court has also expressly rejected the notion that a 12-year-old can solely make such a decision<sup>21</sup>.

Generally, the case law reveals that the court is more likely to follow the views of the child in decision-making if there is no evidence of alienating behavior<sup>22</sup>. Where alienating behaviour on the part of the preferred parent (or extended family) exists, following the child's request entirely is more rare<sup>23</sup>. Exceptions are made where the child would be even more harmed by forcing contact notwithstanding alienating behavior.

Further, the child's expressed wishes are more likely to be followed if the preferred plan is not at one extreme. Specifically, if the child is not seeking to exclude one parent completely from their life and there will be at least some contact with each parent, their wishes are more likely to be followed. Further, reliability and the court's weight will be increased if the child maintains the same position over a significant period of time.

Another critical factor is, not surprisingly, the age of the child. Although there is no specific age whatsoever that amounts to universal acceptance of a child's preference, the older the child, the more likely a court would follow the wishes of that child even despite any findings relating to the four A's discussed above. With younger children, the court has supported that the child's views are only one factor to be considered. It is observed that the cooperation of a teenager is essential to a successful parenting plan for that teenager<sup>24</sup>.

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<sup>19</sup> Ibid.

<sup>20</sup> C. (G.) v. V.-F. (T.) [G.C. v. T.V.-F.] Droit de la famille - 320 (SOQUIJ), [1987] S.C.J. No. 50

<sup>21</sup> Leblue v. Leblue, [1997] A.J. No. 1186

<sup>22</sup> Behrens v. Stoodley, [1999] O.J. No. 4838

<sup>23</sup> See, for example Beck v. Beck (1993) PEICA; Dhaliwal v. Beloud (2002) BCCA; Montgomery v. Montgomery [1992] 97 D.L.R. (4th) 437, 59 O.A.C. 19, ONCA; Alexander v. Alexander, [1986] B.C.J. No. 699

<sup>24</sup> O'Connell v. McIndoe, [1998] B.C.J. No. 2392

Also of importance in considering the wishes of children was the availability of any expert evidence regarding the nature of the bonding between the child and parent or of any risks given a parent's behaviour or parenting difficulties. This is particularly so with children on the younger side<sup>25</sup>.

Although custody may continue with one parent due to evidence of other successes for the child despite his wishes<sup>26</sup>, these parties may find themselves in litigation again if the child's views continue to be that a change is necessary. As the B.C. Court of Appeal found in the subsequent Alexander decisions<sup>27</sup>, the child holding the same views consistently over time understandably adds to their perceived reliability, as well as their weight in considering best interests.

Given the weight placed on children's views, lawyers should look critically at the method or methods used to obtain and transmit those views.

## B. Evidentiary rules regarding children's views

It should be obvious that we recommend healthy participation by children outside of the court process as a much better alternative to family restructuring<sup>28</sup>.

Where a family comes to professionals later in the process, where the children are already expressing a preference in some way, or if they are expected to express some views due to the circumstances (such as with older children or mobility cases), how can this be done in a way that the parents or a court will accept?

Of course, the testimony of children in family cases remains largely discouraged in most jurisdictions. A request for such testimony by a parent should be viewed critically in the context of the concerns for the child and may raise questions about that parent's intention or manipulation.

Where children are represented by counsel, if there is permissive legislation or consent of the parties, counsel may put forward the child's view. Counsel must be cautious of their authority to act<sup>29</sup> and the opportunities to obtain and present evidence<sup>30</sup>. However, it is clear that absent

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<sup>25</sup> C.D. v. A.B. (2004) NBCA

<sup>26</sup> Alexander v. Alexander [1986] 3 R.F.L. (3d) 408, B.C.C.A

<sup>27</sup> Alexander v. Alexander [1988] 15 R.F.L. (3d) 363, 11 A.C.W.S. (3d) 384, B.C.C.A

<sup>28</sup> Supra, Note 8.

<sup>29</sup> M.F. c. J.L., [2002] J.Q. no 480.

<sup>30</sup> Bala, N. "Child Representation in Alberta: Role & Responsibilities of Counsel for the Child" (2006) 43 Alta L.Rev. 845-870.



consent, an advocate may not give evidence through their submissions to the court regarding the child's preferences<sup>31</sup>. Further, counsel may not advocate a child's interests beyond their stated position in a direct advocacy role.<sup>32</sup> Counsel may, in confidence, discuss these issues with a child client just as one would with an adult. In cases of alienation in particular, attention must be paid to the risks of direct advocacy<sup>33</sup>.

Particularly where children are not represented by counsel or a social worker authorized to speak on their behalf, the court should be interested in the context of how a child's views or wishes are expressed and how those views come to be presented in court. Generally, a parent reciting a child's statements to that parent in their sworn statements to the court should not be given great weight. The test for hearsay must always be considered. In light of the above concerns regarding the mixed messages children may send and the pressures they may face, this skepticism is understandable.

Conversely, a technical application of statement validity analysis, such as is done in cases of admitting a child's statement as evidence in a criminal case, is also not necessary. The scrutiny of children's statements in family cases, as an admission of hearsay, is significantly relaxed. In addition, the exact words spoken by the child on one occasion are rarely determinative. The words are, in any event, meant to indicate the child's state of mind.

On a more practical analysis typical of family cases, children's stated views come to the court in many different ways and, beyond admissibility, are given various degrees of weight. Both reliability and greater weight may be placed on children's views when a trained psychologist expresses them<sup>34</sup> as discussed above. That psychologist is able to give information on the context of how the child's views were expressed and what questions were asked to illicit those responses. In addition, a mental health professional can explain the emotional affect of the child and the consistency of the child's statements with their emotion and language to look at the reliability of the statement. This can be done even if the psychologist has not conducted any assessment and is not in a position to offer opinion on the child's best interests – rather, their testimony can go to the child's views alone and the reliability of them.

Judicial interviews are very difficult for appellate courts, as there is little means to obtain information on these reliability factors<sup>35</sup>. Even judges who may have special training in interviewing children, which is rare, may not be in a position to ameliorate the problems of the child's role in a single stressful interview by an unknown person in authority. The reliability of

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<sup>31</sup> *Strobridge v. Strobridge* (1994), 18 O.R. (3d) 753 (C.A.).

<sup>32</sup> Bala, N. "Child Representation in Alberta: Role & Responsibilities of Counsel for the Child" (2006) 43 Alta L.Rev. 845-870

<sup>33</sup> *Supra*, note 13.

<sup>34</sup> *Catholic Children's Aid Society of Toronto v. S.R.M.*, [2006] O.J. No. 1741, ONCJ

<sup>35</sup> *Neigel v. Neigel*, [1996] A.J. No. 581.

that single statement as well as the evidentiary problems rarely makes this approach worthwhile. It may be that a judicial interview, while discretionary, should be the last resort where no other alternative is readily available due to the unique circumstances of a particular case. Judges must certainly only consider this evidence in light of other evidence in support of the same conclusion<sup>36</sup>.

Courts may, however the views came to be expressed, undertake some analysis of the reliability of a child's statements as their true views just as they might with any witness. The court may overtly or intuitively employ the criteria outlined above to determine if the child is stating their true feelings or may be reacting to coaching, influence or pressure.

A court will generally consider the additional available evidence to support or contradict the child's statements in two respects. Firstly, on the issue of the child's statement as a reflection of their true wishes, evidence such as ambiguous or contradictory statements to others would be considered. If it is not clear through analysis of those factors that the child's stated views are their true wishes, they will be given less weight.

Secondly, on the greater issue of whether to follow a child's stated preference, the court will examine additional evidence to determine if it is in the child's interest to do so. All custody decisions are very fact-specific, including those where a child states a preference. The court may examine the routine factors in assessing a child's best interests to determine if their wishes coincide sufficiently with other evidence supporting that choice.

Family legislation in Canada, including the *Divorce Act*, does not include a specific exception to the hearsay rules to provide for alternative sources of evidence from children, other than in child protection legislation which may specifically allow hearsay to be considered<sup>37</sup>. As a result, in private settings, hearsay options need to be assessed based on the usual tests. Counsel may short-cut this strategy where children are concerned, but some analysis should be considered:

- Reliability – The legal definition, rather than the test of reliability in a social science context, includes consideration of whether the hearsay may be accepted for the truth of its contents as the circumstances of obtaining the hearsay increase the likelihood of that truthfulness. In this context, the assessment of reliability depends in part upon who the statement is made to and under what circumstances.
- Necessity – For hearsay to be admissible, it must be necessary to be presented in the form of hearsay rather than direct evidence. Keeping hearsay as clean and direct as possible, while avoiding children having first hand engagement in court processes, often meets this test.
- Procedural issues – Sworn evidence can be subject to cross examination to provide further information, clarifications, limitations, or context to the sworn statement. Having a third party receive evidence in a sworn form limits cross examination only to how the

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<sup>36</sup> L.J.A. v L.A. [2002] B.C.J. No. 491, 2002 BCCA 161, 165 B.C.A.C. 65, 25 R.F.L. (5th) 8, 111 A.C.W.S. (3d) 1158 B.C.C.A.

<sup>37</sup> See for example Child Youth and Family Enhancement Act RSA {}

information was collected or foundations of opinion, if given. If counsel give evidence, there may be no mechanism for cross examination

- Generally little weight is given to hearsay statements of the views of children if those statements of children are repeated by parents

When is sworn evidence preferable? Certainly, it may be necessary if the child's actual observations, her *evidence of experiences* of facts, is in dispute and is essential to the determination.

This requires a case by case analysis. For example, the letter of a 12-year-old may be considered in light of all these factors<sup>38</sup>, even where a similar letter by an older child is discounted when other factors are considered (Trish add case).

### C. Competence for lawyers and "Views of the Child" reports

When appropriate, or available, the court has ordered and accepted these reports by lawyers. Recall that, due to the evidentiary rules, counsel - unlike a mental health professional, who is clearly only speaking to the court if authorized to do so or called as a witness - should not confuse their roles and simply address the court on the child's expressed views. This may amount to the lawyer "giving evidence from counsel table".<sup>39</sup>

Courts have noted: "The purpose of getting a view of the child report is to allow a child to speak frankly to a qualified neutral third party without the child being pressured to say things that the parent wants to hear."<sup>40</sup> Similarly, "the sole purpose of requiring a Voice of the Child report is to ensure the Court hears the views and the preferences of the child without pressure from any source."<sup>41</sup>

Lawyers should consider whether both their competencies and the rules of expert evidence allow them to express an opinion by way of a voice of the child report. Our view is that they do not.

Note the court's clear direction in *M.A.S. v J.S.S.*, [2012] N.B.J. No. 350:

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<sup>38</sup> *LKM v JF*, 2004 ABQB 824

<sup>39</sup> *R.M. v J.S.*, 2013 ABCA 441

<sup>40</sup> *K.L.S. v J.G.M.*, [2012] B.C.J. No. 387

<sup>41</sup> *New Brunswick v S.T.*, [2014] N.B.J. No. 74

“[W]hether anyone authoring a ‘Voice of the Child’ [report] should be entitled to express so-called expert opinion in any area of a court ordered report, without a particular opinion having been sought by the court, is of some serious question. After all, what is actually being authorized by a ‘Voice of the Child’ is the formal collection of hearsay evidence (if offered for the truth of the assertion) because it is necessary (i.e. to avoid children becoming more directly exposed to custody disputes and because, where feasible, children’s views and preferences need to be considered). From a principled evidentiary perspective, what a court is obviously seeking is the most accurate rendition, i.e. an account that meets a threshold of reasonable reliability. Of course, the determination of the accuracy and ultimate reliability of that evidence is for the judge, as is the weight to be accorded to the views and preferences expressed, whether based specifically on the age and maturity of the child or globally, in the context of the child’s circumstances as a whole.”

Accordingly, counsel should turn their minds to proper authority for a voice of the child report as well as their competency requirements.

All law societies have as part of their Code, the requirement for the lawyer to have competence in the area practiced. For example, in Alberta, Rule 3.1-1 reads:

*In this rule*

- “*competent lawyer*” means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:
  - (a) *knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practices*
  - (h) *recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;*

How does competency apply to voice of the child reports? The first core competency may be a purely legal one, which requires an understanding of the law relating to parenting or custody, and the law relating to children’s views and input. Surely also the law relating to the admissibility of these types of reports, the need for a court order, and the issues relating to unsworn statements should be well understood.

Should counsel also have training, or at minimum significant experience, in issues relating to interviewing children, alienation, and family dynamics which may influence children’s reporting, to enable them to safeguard an independent interview? These issues have largely been ignored in the development of VCR’s that are conducted by counsel. There is a developing body of knowledge suggesting that family lawyers should have awareness of issues relating to children’s

best interests in separation as an extension of their ethical obligation to their parenting clients<sup>42</sup>. Surely this applies in full if the child is the client or the beneficiary of the service when requested by the court. If lawyers lack competence in these skills, however, they may produce VCR's that are not useful, at best, and perpetuate some harm at worst, by derailing the accurate collection of the child's views which may be relied on by the parents and the court.

#### D. Ethics and Recommendations for Lawyers VCR's

Acting as counsel for a child client does not automatically address issues of providing the voice of the child – the issues above relating to competence to give opinions and admissibility of evidence still apply and must be addressed.

Given the method by which a child is to participate in providing their views is ill-defined in law, counsel must be alive to the issues of evidence and competence when seeking these orders or accepting the appointments.

Considerations include having detailed and specific court orders that set out the role of counsel and the nature of the report. Counsel should also expressly address how the report will meet the rules of evidence for even a verbatim report, and competence to give any information beyond a verbatim record. This discussion should take place upon notice to both parents. Recommendations are addressed by others in this symposium<sup>43</sup>. Our recommendation is to be very aware of the ethical and competence constraints of each profession.

Counsel and mental health professionals should consider these recommendations such as ensuring neutrality in the interview process, giving children input and choice about what is contained in the report, and warning to parents regarding coaching or interrogation of the child during the report writing process.

Some jurisdictions have already consolidated this research into guidelines for VCR's, such as BC Hear the Child Society, as they have had a longer history with such reports. The Society promotes

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<sup>42</sup> Nicholas Bala, Patricia Hebert & Rachel Birnbaum, "Ethical Duties of Lawyers for Parents Regarding Children of Clients: Being a Child-Focused Family Lawyer" 2017 Canadian Bar Review (pending publication)

<sup>43</sup> Supra, Note 3.

the inclusion of the voices of children in decisions affecting them, maintains a roster of trained non-evaluative child interviewers; and provides public and professional education<sup>44</sup>.

Nova Scotia has “Voice of the Child Report Guidelines”<sup>45</sup> that are a guide but not legislated or part of Rules of Court. This framework is used by the court, but not required if parents arrange for such a report by consent. It seems wise to use guidelines to ensure all of these issues are addressed whether on a consent basis or not, and whether the particular jurisdiction has adopted such guidelines or not. These reports in Nova Scotia are conducted only by “assessors” whose qualifications are to be disclosed, but minimum criteria are not addressed in the guidelines. It is clear, however, that the assessors are expert witnesses rather than counsel, who may be qualified to give expert evidence, may be called to testify and may be cross-examined.

Using clear guidelines could be an interim step toward uniformity of practice in preparing these reports.

### III. CONCLUSION: What voice does this child need?

In conclusion, psychologists’ competencies require a breadth and depth of skills relating to interviewing and assessing children in the context of their social settings. This allows them to competently provide a child’s views in the course of an assessment process, which may include the whole family or a more focused issue. They may also provide a more narrow but evaluative Voice of the Child Report, which would include the context of the interview, an interpretation of the child’s expressed wishes given their developmental stage, and indications of their thought processes or influences. Provision of that report as an expert allows the report to be entered into evidence and permits opportunities for cross examination.

Legal counsel can provide a child’s position through the representation of the child as an amicus or direct representation. Ideally they should have a combination of training and experience beyond the law to be equipped for that task. In those contexts, they must stop short of providing evidence either that is hearsay from the child or that is couched as personal observations or impressions, which is their own evidence, at least in the absence of a clear direction and authorization from the court. Counsel can give a non-evaluative or verbatim report as an alternative to other sources of information from the child when authorized to do so, and when limited to their areas of competence. We recommend consistency in the use of these differing roles and training to permit both disciplines to have the necessary competency to carry out those roles. Clarity about roles of

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<sup>44</sup> [www.hearthechild.ca](http://www.hearthechild.ca)

<sup>45</sup> Voice of the Child Report Guidelines, Nova Scotia Department of Justice, 2015, [nsfamilylaw.ca](http://nsfamilylaw.ca)

the report provider in the appointing process is also recommended, for the most effective use of the valuable tool of voice of the child reports.