

**HEARING THE VOICES OF CHILDREN IN ALBERTA FAMILY  
PROCEEDINGS: THE ROLE OF CHILDREN'S LAWYERS  
AND JUDICIAL INTERVIEWS**

Prepared by:

Lorne D. Bertrand, Ph.D.  
Canadian Research Institute for Law and the Family

Nicholas Bala, LL.M.  
Faculty of Law, Queen's University

Rachel Birnbaum, Ph.D., RSW, LL.M.  
Childhood and Social Institutions (Interdisciplinary Program)  
and Social Work, Western University

Joanne J. Paetsch, B.A.  
Canadian Research Institute for Law and the Family

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## 1.0 INTRODUCTION

There is growing recognition in Canada and internationally that children have a right to participate in family law proceedings that will have a direct effect on their lives. Historically, children were often treated as the passive subjects of decisions made in family courts regarding their future. Increasingly, however, it is argued that children not only have the right to be informed about proceedings affecting them, but further, to the extent that their capacity and desire to be involved allows, having them voice their opinions will result in better decisions and improve the well-being of children.

Article 12 of the United Nations Convention on the Rights of the Child gives children the right to be heard in proceedings affecting them. It states:

12(1) State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Within Canada there is a range of ways in which the views, preferences and experiences of children are brought into the decision-making process. Methods of hearing the voice of the child include:

- Through a report prepared by a court-appointed mental health professional (social worker or psychologist – often called an evaluator or assessor) after a series of interviews with the child. This report may focus solely on the wishes and perceptions of the child, though more commonly it is part of a broader report about the child's best interests;
- Through a report (or affidavit) prepared by a neutral lawyer or mental health professional after a single interview with a child;
- Through testimony of a mental health professional who has interviewed the child and is retained by a parent;
- Having a lawyer for the child;
- Having the child testify in court;
- Having an interview of the child by the judge in chambers;

- Allowing parties (i.e., parents) to testify about what the child has told them (i.e., hearsay evidence) through their oral testimony (or video/audiotape) or by calling other witnesses (e.g., teachers); and
- Allowing the child (or parent) to submit a letter, e-mail or videotaped statement.

The present project focused on two mechanisms for allowing the voice of the child to be heard in family cases in Alberta: providing legal counsel for the child and conducting judicial interviews with children to ascertain their views and wishes.

## 1.1 Legal Counsel for Children in Alberta

In Alberta, starting in the 1960s, judges would on occasion appoint counsel from the Office of the Public Trustee for children whose parents were embroiled in custody or access disputes. It was the role of these lawyers to represent the interests of the children in these cases. Legislation was enacted in 1984 that allowed a judge to appoint counsel for children involved in child protection cases if their interests and views could not be otherwise represented.

By the late 1980s, the Office of the Public Trustee was no longer providing counsel in family cases; however, the government embarked on a program to provide funding for lawyers from private practice to represent children in child welfare cases where the judge ordered counsel for the child.

More recently, there has been an increase in child representation in Alberta. The Alberta Legal Aid plan may, on a case-by-case basis, provide counsel for a child in a family case if requested by a judge. Alberta's Office of the Child and Youth Advocate has established the Legal Representation for Children and Youth (LRCY) program to provide representation for children and young people involved with the child protection system. The LRCY program maintains a roster of lawyers who are appointed to represent young people who are the subject of an application under the *Enhancement Act* or the *Protection of Sexually Exploited Children Act*.

It is commonly accepted that there are three possible roles that lawyers for children involved in family disputes can adopt: (1) the *amicus curiae* or friend of the court approach; (2) a best interests guardian; and (3) an instructional advocacy approach (Bala, 2006; Bala, Talwar, & Harris, 2005; McHale, 1980).

If an *amicus curiae* approach is adopted, the lawyer has the responsibility to ensure that all relevant evidence is presented to the court so that an informed decision can be made. This will involve disclosing the child's views and wishes to the court; thus, there is no expectation that communications between the child and the lawyer will be confidential. While the *amicus* lawyer has the responsibility to ensure that the child's views are before the court, he or she is not expected to argue in favour of these views or to adopt a position regarding the child's best interests.

If a best interests guardian approach is adopted, similar to the *amicus curiae* role, the lawyer has responsibility to ensure that all information regarding the child's views and wishes are introduced to the court. However, unlike the *amicus curiae* approach, a best interests lawyer is expected to advocate for the position that he or she believes is in the child's best interests. Like the *amicus* lawyer, best interests guardians will not always maintain confidentiality of information provided to them by the child.

If an instructional advocate role is adopted, the lawyer is acting on behalf of a child client, with essentially the same ethical and professional responsibilities that are appropriate with adult clients. It is assumed that the lawyer will advocate for a position based on the child's wishes, and that communications from the child will only be disclosed with the child's permission. In 2010, the Law Society of Alberta and LRCY both adopted policies requiring lawyers for children to take an instructional advocacy approach whenever possible.

## **1.2 Judicial Interviews with Children**

Earlier research indicated that many judges in Australia and Canada were opposed to judicial meetings with children (Paetsch, Bertrand, & Bala, 2006; Parkinson & Cashmore, 2007). These judges believed that:

- they have insufficient skills and lack appropriate training to interview children;
- they lack psychological knowledge of children;
- a single conversation may be superficial;
- it would be too stressful for children;
- such meetings would not be consistent with the traditional judicial role and the adversarial system; and
- older judges might be too intimidating to children.

There has been an increase in recent years in interest in judicial interviewing of children involved in family law disputes, although little has been written about judges meeting with children in child protection cases. Judicial meetings with children are considerably more common in some jurisdictions (e.g., Germany, New Zealand, Scotland, Ohio, Quebec) than in others, even though a Resolution in support of such meetings was passed at the 5<sup>th</sup> World Congress on Family Law and Children's Rights, held in Canada in 2009.

In jurisdictions where such meetings are common, most judges and lawyers view them positively and see them as a substantial aid to their decision-making. Others are still reluctant to undertake interviews, though in jurisdictions where interviews are common, there is generally broad judicial support for the practice. (Birnbaum, Bala, & Cyr, 2011).

In a survey conducted with an international group of legal professionals at the 5<sup>th</sup> World Congress on Family Law and Children's Rights in 2009, just over one-half of

respondents thought that judicial interviews with children are a good mechanism for hearing their views (Paetsch et al., 2009).

Judges who regularly meet with children believe that there are several benefits (Krinsky & Rodriguez, 2006):

- the child is an important source of information;
- the judge can ascertain the child's wishes and feelings at first hand;
- options can be explored;
- information about the child is up-to-date in the here-and-now;
- seeing a child shows respect; and
- the conversation can be an important step in promoting settlement.

### **1.3 The Present Study**

The survey reported on in this report was conducted in conjunction with a presentation on the voice of the child delivered to members of the Child Welfare section of the Canadian Bar Association – Alberta chapter on May 3, 2012 in Calgary. The session was also available via web-cast to CBA members in Edmonton.

An invitation to attend the session was e-mailed to CBA Child Welfare section members during the week of March 26, 2012. This invitation also included a request to members that they complete a web-based Survey of Lawyers about Children's Participation in Family Disputes by April 20, 2012 and informed members that highlights of the survey results would be presented at the May 3<sup>rd</sup> session. The invitation contained a link to the survey. During the week of April 16, 2012, a reminder e-mail about the survey was sent to members of the Child Welfare section.

The survey contained background questions regarding respondents' experience in the family law area in general, as well as their experience with representing children in both custody and access and child welfare proceedings. Lawyers who had experience representing children were asked about the characteristics of their meetings with child clients and the type of approach they take to child representation. Participants were also asked about their experiences with and opinions of judicial interviews with children. Other issues explored included whether lawyers tell their child clients the different ways their views can be shared with the court in family cases, at what ages they think it is appropriate for judges to interview children in custody and access and child welfare proceedings, and whether they think it is appropriate for children to testify in open court.

The May 3, 2012 session was attended by approximately 65 legal and 20 mental health professionals in Calgary, with an additional 20 viewing the presentation by web-cast in Edmonton. A total of 29 surveys were completed by legal professionals. It should be noted that this relatively small sample size precludes generalization of participants' responses to all family law professionals in Alberta.



## 2.0 SURVEY FINDINGS

### 2.1 Background Information

A total of 29 surveys were received. Over two-thirds of respondents were female (n=20; 69%), and participants had been a member of the bar for an average of 19 years (range = 1 to 40 years). Respondents indicated that, on average, 84% of their practice is in family law.

### 2.2 Experiences with Child Representation

Respondents were asked if they had ever represented children in custody and access and/or child welfare proceedings. With respect to custody and access matters, one-half of respondents (52%; n=14) indicated that they had experience representing children; 13 participants (48%) indicated that they had not represented children in custody and access proceedings. Those who had represented children had done so in an average of 36 cases (range = 2 to 175 cases). When asked what proportion of their family law work involves representing children in custody and access proceedings, on average respondents stated that 17% of their family work was in this area (range = 0% to 50%).

Almost two-thirds of respondents had represented children in child welfare proceedings (63%; n=17), while 10 participants (37%) stated that they had not represented children in child welfare matters. Lawyers who had represented children in child welfare proceedings stated that they had done so in an average of 26 cases (range = 3 to 100 cases). Respondents who had experience representing children in child welfare cases indicated that an average of 15% of their family law practice was in this area (range = 0% to 50%).

Alberta's Office of the Child and Youth Advocate maintains the Legal Representation for Children and Youth (LRCY) program, which is a service provided to children and young people involved with the child protection system. The LRCY maintains a roster of lawyers who are appointed to represent young people who are the subject of an application under the *Enhancement Act* or the *Protection of Sexually Exploited Children Act*. Survey respondents were asked if they are on the LRCY roster. Of lawyers responding to this question, just over one-quarter (29%; n=6) indicated that they are on the roster; 15 (71%) stated that they are not on the LRCY roster. Lawyers on the roster indicated that 82% of their child welfare cases are conducted through the LRCY program (range = 0% to 100%).

### 2.3 Characteristics of Meetings with Child Clients

Lawyers who had experience representing children in custody and access and/or child welfare matters were asked about the number and length of meetings they have with their child clients. Figure 2.1 presents the average number of meetings held in

both custody and access and child welfare cases with children of various ages. In both custody and access and child welfare cases, the number of meetings increases as the age of the child increases. For example, for children aged birth to 3 years, in custody and access cases an average of 2 meetings are held (range = 1 to 5), while an average of 4.6 (range = 2 to 10) meetings are held with children aged 7 to 11 years and 12 years and older. Similarly, in child welfare cases, an average of 1.6 meetings are held with children aged birth to 3 years (range = 1 to 3), while an average of 4.1 meetings are held with children 12 years of age and older (range = 2 to 6). Notably, the lawyers reported that they typically have more meetings with child clients in custody and access cases than in child welfare cases.

**Figure 2.1**

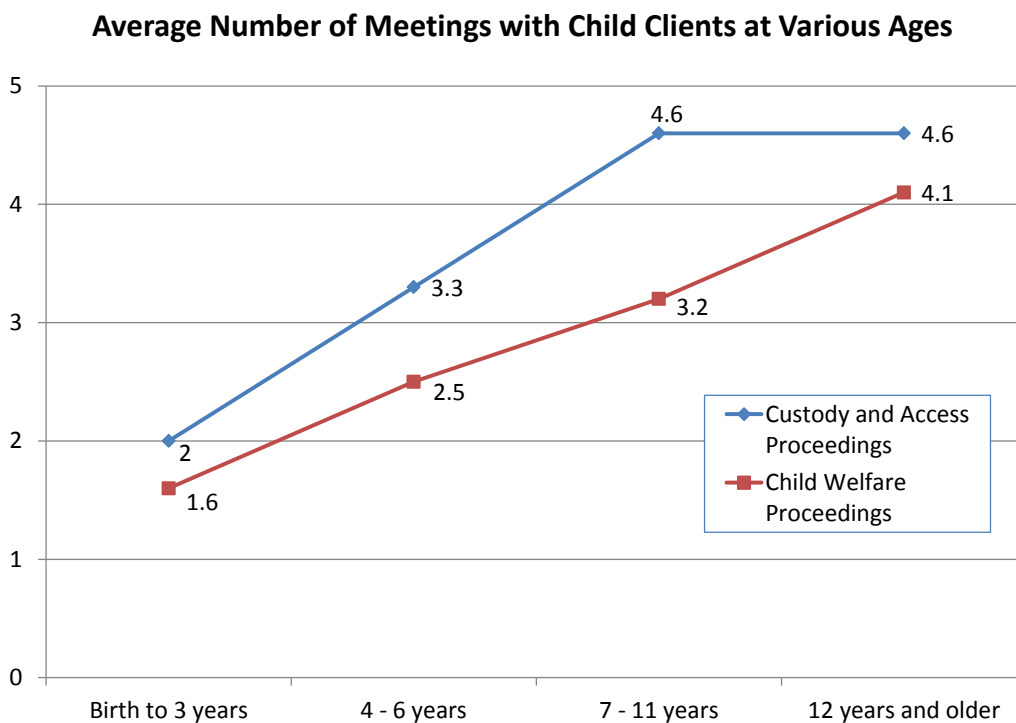
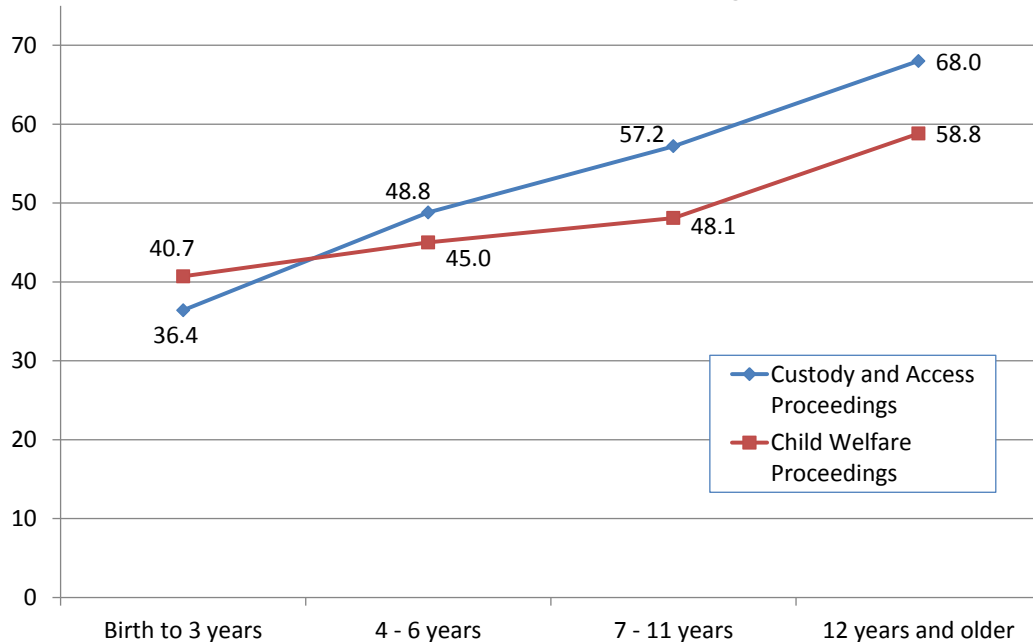


Figure 2.2 presents the average length of meetings with child clients of various ages in both custody and access and child welfare cases. Similar to the findings with respect to number of meetings, for both types of cases, the length of meetings increases with older children, and are generally somewhat longer on average for custody and access cases than child welfare cases. For custody and access cases, the average length of meetings with children from birth to 3 years of age is 36 minutes (range = 5 to 60 minutes); for children ages 12 and older, the average length of meetings increases to 68 minutes (range = 20 to 120 minutes). In child welfare cases, the average length of meetings with children from birth to 3 years of age is 41 minutes (range = 10 to 60 minutes) and increases to 59 minutes for children aged 12 and older (range = 20 to 90 minutes).

Figure 2.2

**Average Length of Meetings (in Minutes)  
with Child Clients at Various Ages**



## 2.4 Approach Taken to Child Representation

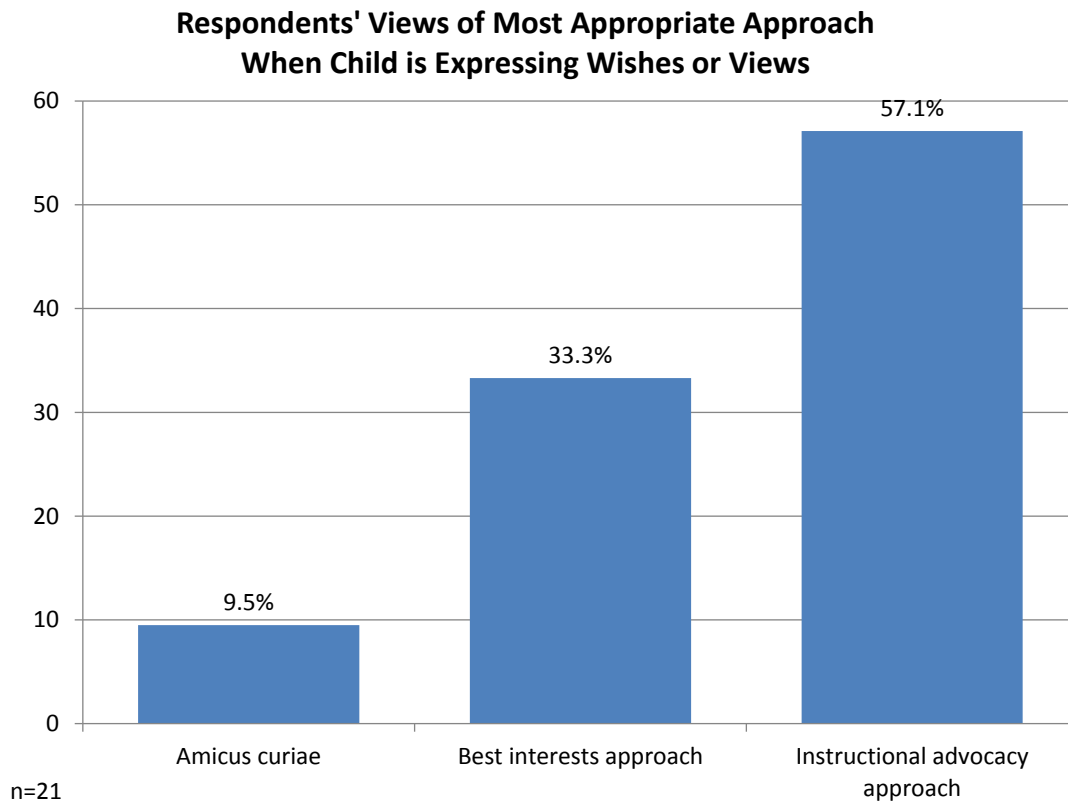
The literature identifies three different roles for lawyers representing children:

- (1) an *amicus curiae* (friend of the court) who ensures that all relevant evidence is before the court but does not advocate any position;
- (2) a best interests (or guardian) approach where the lawyer ensures that the child's views are before the court but advocates a position based on the lawyer's assessment of the evidence about the child's interests (taking account of the child's views as one factor in that assessment); and
- (3) an instructional advocacy approach, where the lawyer advocates a position based on the child's stated wishes or views.

In 2010, the Law Society of Alberta and LRCY both adopted policies directing lawyers for children to take an instructional advocacy approach whenever possible, essentially requiring lawyers to treat their child clients in much the same manner as they would adult clients.

Survey respondents were asked which of these three approaches they consider most appropriate in situations where a child client is expressing wishes or views; the findings for this question are shown in Figure 2.3. The majority of participants indicated that the instructional advocacy approach is most appropriate (57%), while one-third (33%) thought that the best interests approach was most appropriate and only 10% favoured the *amicus curiae* approach.

**Figure 2.3**



Lawyers were further asked to explain their choice of the most appropriate approach, and selected comments are provided below.

*Advocate wishes of child, and, at same time, make sure all relevant evidence is before the court.*

*This [instructional advocacy] is the approach set out by the Law Society of Alberta. If, in my opinion, a child lacks capacity to instruct I would still present their views and preferences to the Court as well as present evidence based on their interests and needs. It is up to counsel for the parents to argue best interests and the Court to determine best interests - not the child's counsel.*

*The role of the lawyer is to provide information regarding the child to the court, including the child's expressed views, and the court is then responsible for determining the child's best interests based on all of the evidence.*

*One can put forward what the child's wishes are, and then advise depending on the age of the child whether that wish is possible, and if not, what other arrangements might be preferred by the child or in the child's best interests.*

*If [a] child is expressing wishes and views, I would always make sure that those wishes and views are put forward to the court. Often those wishes and views are appropriate. However, the Court does not seem particularly interested in instructional advocacy for children. They are much more willing to rely on counsel if counsel is presenting a best interests or amicus curiae approach.*

Respondents were asked under what circumstances they would not adopt an instructional advocacy role with their child clients and their responses are provided in Table 2.1. Almost one-half (45%) of lawyers indicated that they would not adopt this approach if they believed that the child was too young or lacked the capacity to make a sound decision. Slightly fewer respondents (41% each) stated that they would not adopt this approach in situations where they thought the outcome preferred by the child might expose him/her to harm or to serious risk.

**Table 2.1**

**Circumstances under which Lawyers would not Adopt an Instructional Advocacy Role**

<b>Circumstances</b>	<b>n</b>	<b>%</b>
If you believe that the child is too young to have the capacity to make a sound decision, despite having stated wishes or views.	13	44.8
If you believe that the child wants an outcome that may expose the child to harm.	12	41.4
If you believe that the child wants an outcome that may expose the child to serious risk.	12	41.4
Other circumstances	9	31.0

Total N=29

Multiple response data

Some respondents provided written comments on other circumstances in which they would not adopt an instructional advocacy approach:

*A child may lack capacity to instruct if they are subject to manipulation or alienation by a parent, regardless of age. This may fall under the risk of a*

*child being exposed to harm that includes psychological or emotional harm.*

*Whenever such an approach is not, in the lawyer's professional and experienced view, in the child's best interests.*

*If I believe the child's position is molded by a parent's inappropriate interventions.*

Lawyers were asked if they tell their child clients about different ways that their views can be shared with the court in a family dispute (e.g., through a report by a social worker or psychologist, child's lawyer, child having an interview with the judge or testifying, hearsay related by a parent). The vast majority of respondents indicated that they do tell their child clients how their views can be shared with the court (94%, n=15); only one respondent stated that child clients are not informed of this. However, as discussed below, this question did not specifically ask respondents whether they discuss with their child clients if they would like to meet with the judge.

When asked if they ever disclose confidential information that a child has told them, over two-thirds of respondents (69%, n=11) said that they do not; the remaining five (31%) said that they have done this. When asked under what circumstances they would disclose confidential information, the following responses were provided:

*If I thought a child was at risk of abuse or harm, I would ideally have the child tell a third party such as a teacher or counselor, etc. (which third party would be obligated to report), but if child refused, then I would talk to a colleague (mentor) and then disclose if necessary.*

*Only with child's permission or with prior notification of circumstances in which I might do so.*

*Only after explaining to the child the necessity for doing this.*

*Harm to child, if instructed by child, if evidence of a future criminal offence.*

Respondents were asked if they ever advocate for a position based on a child's instructions, but say that it is their own in order to protect the child. The substantial majority of lawyers (80%, n=12) stated that they never do this; three respondents (20%) said that they had done this in the past. When asked under what circumstances they advocate for a position based on a child's instructions, but say that it is their own, the following comments were offered:

*Some children will give me instructions, but be afraid of the repercussions if the parent knows or thinks it came from the child. Often, the child will ask me to tell their parents it was my idea.*

*Disclosure of sexual assault.*

*If child is at risk from ongoing contact with a parent against whom the child has expressed a preference: "I don't want to see daddy any more, he hits me."*

## **2.5 Judicial Interviews with Children**

The survey asked a number of questions regarding lawyers' experiences with judicial interviews with children in custody and access cases and in child welfare cases. When asked if they ever encourage a child to meet with the judge for an interview, less than one-half of respondents (43%, n=6) indicated that they do, while 8 respondents (57%) stated that they do not. When asked to elaborate on their response, lawyers provided the following comments:

*Meeting with the Judge should be a last resort, and creates a host of problems. Among them are the extent to which the Judge should disclose what is told by the child. The Judge cannot simply state that s/he has taken into account the child's wishes in arriving at a decision. Another problem relates to disclosures made by the child. What is the Judge to do if, e.g. the child discloses, e.g. previously un-disclosed sexual abuse at the hands of a parent. The Judge is now a witness to the disclosure and must consider the extent to which questioning should be pursued and the need to report the disclosure.*

*I think it gives the child an impression that their views count for more than they do. The question in child protection is the safety of the child. My fear would be that my client would prejudice their position by speaking to the judge, the fact that they lack a certain age appropriate level of sophistication would in some respects assist the director's case.*

*I would not advocate for a child to be interviewed by the judge. If the judge wished to interview the child, I would prepare the child for that interview.*

*I advise the child they could meet with the Judge if they ask but I also tell them that often a Judge will not meet with them and that is why I am there.*

Table 2.2 presents responses to a number of questions regarding judicial interviewing of children in custody and access cases and in child welfare cases. When asked how often they had been involved in a custody and access case where the judge interviewed a child, the most common response was "Sometimes" (59%), followed by "Never" (41%). When asked how often there was counsel for the child in these cases, equal proportions of lawyers (30%) stated "Always" and "Sometimes." A further 20% stated "Very often," and 10% each said "Often" and "Never." It would appear that a

judicial interview is generally not an alternative to child representation in a custody and access case, but most frequently is used in cases where the child has a lawyer.

With regard to recording of the judicial interview, the majority of respondents (60%) said that the judge never recorded the interview. Equal proportions (20%) stated that the interview was recorded “Always” or “Sometimes.” In cases where the interview was recorded, the majority of respondents (75%) said that the judge never shared the transcript with the parties; only one lawyer said that the transcript was shared “Sometimes.”

**Table 2.2**

**Respondents’ Experiences with Custody and Access and Child Welfare Cases Involving Judicial Interviews with Children**

	Always		Very Often		Often		Sometimes		Never		Total	
	n	%	n	%	n	%	n	%	n	%	n	%
How often have you been involved in cases where a judge interviewed a child in a custody and access matter?	0	0.0	0	0.0	0	0.0	10	58.8	7	41.2	17	100.0
How often was there counsel for the child in these cases? <sup>1</sup>	3	30.0	2	20.0	1	10.0	3	30.0	1	10.0	10	100.0
How often did the judge record the interview? <sup>1</sup>	2	20.0	0	0.0	0	0.0	2	20.0	6	60.0	10	100.0
If the judge recorded the interview, how often did the judge share the transcript with the parties? <sup>2</sup>	0	0.0	0	0.0	0	0.0	1	25.0	3	75.0	4	100.0
How often have you been involved in cases where a judge interviewed a child in a child welfare matter?	0	0.0	0	0.0	0	0.0	8	50.0	8	50.0	16	100.0
How often was there counsel for the child in these cases? <sup>3</sup>	2	25.0	1	12.5	1	12.5	3	37.5	1	12.5	8	100.0
How often did the judge record the interview? <sup>3</sup>	2	25.0	0	0.0	0	0.0	2	25.0	4	50.0	8	100.0
If the judge recorded the interview, how often did the judge share the transcript with the parties? <sup>4</sup>	0	0.0	0	0.0	0	0.0	0	0.0	3	100.0	3	100.0

Total N=29

<sup>1</sup>These questions were only asked of respondents who indicated that they had been involved in cases where a judge interviewed a child in a custody and access matter.

<sup>2</sup>This question was only asked of respondents who indicated that they had been involved in custody and access cases where the judge interviewed a child.

<sup>3</sup>These questions were only asked of respondents who indicated that they had been involved in cases where a judge interviewed a child in a child welfare matter.

<sup>4</sup>This question was only asked of respondents who indicated that they had been involved in child welfare cases where the judge interviewed a child.



When asked how often they had been involved in cases where the judge interviewed a child in a child welfare case, equal proportions of respondents stated “Sometimes” (50%) and “Never” (50%). Lawyers who had been involved in these cases were asked how often there was counsel for the child; the most common response was “Sometimes” (38%), followed by “Always” (25%). Equal proportions (13%) indicated that there was counsel for the child “Very often,” “Often,” and “Never.”

When asked how often the judge recorded the interview, one-half of respondents stated “Never”; 25% of lawyers each stated that the interview was recorded “Always” or “Sometimes.” In cases where the interview was recorded, all respondents stated that the judge never shared the transcript with the parties. It would also appear that a judicial interview is generally not an alternative to child representation in a child welfare case, but most frequently is used in cases where the child has a lawyer.

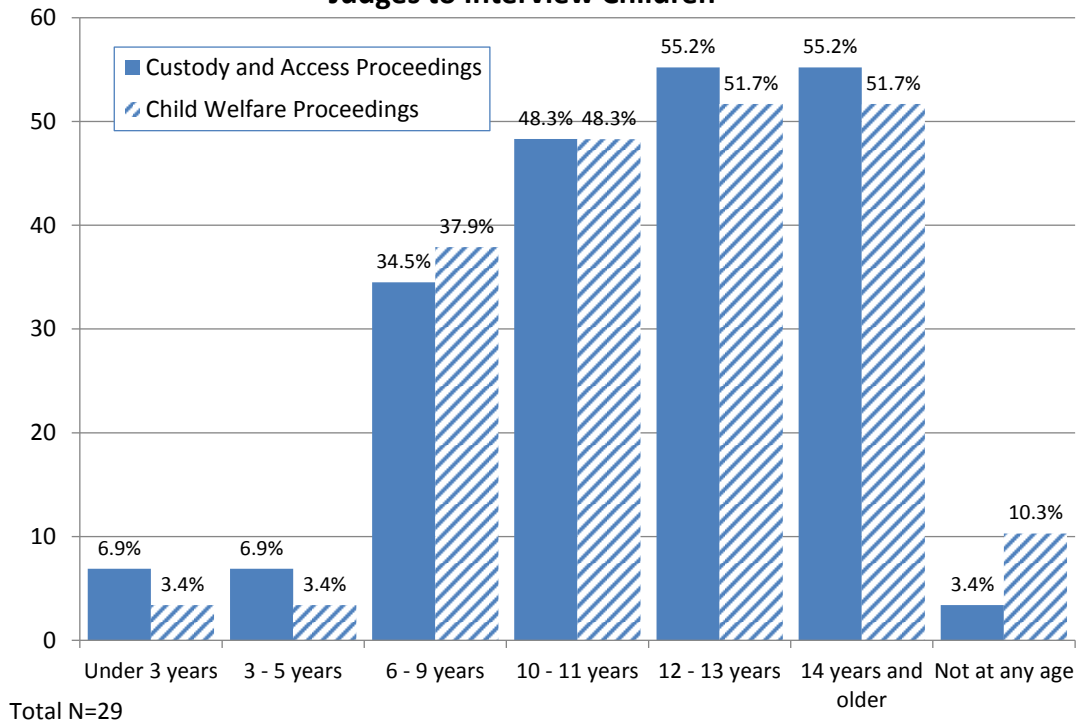
Respondents were asked if they have had cases where they requested that the judge interview their child client and the judge refused. Approximately two-thirds of lawyers (69%, n=11) said that this has never occurred in their practice; 31% (n=5) stated that they have had this happen to them. It would, therefore, seem that if counsel for a child requests that the judge meet the child, the judge will do so.

Lawyers were asked whether it is appropriate for the judge to interview children of various ages in custody and access and child welfare proceedings (see Figure 2.4). Not surprisingly, for both types of cases, the proportion of respondents who thought that judges could interview children increased with increasing age of the child. For example, only 7% and 3% of respondents thought that it is appropriate for judges to interview children under 3 years of age in custody and access and child welfare proceedings, respectively. This proportion increased to 48% of respondents for children 10-11 years of age for both types of cases. For children ages 14 and older, 55% of respondents thought it was appropriate for judges to interview them in custody and access cases, and 52% thought it was appropriate in child welfare cases. Only 3% of lawyers thought that judges interviewing children was inappropriate at all ages in custody and access cases, and only 10% thought interviews were inappropriate at all ages in child welfare cases.

Respondents were asked how often they have been involved in cases in which their child clients testified or spoke to the judge in open court in custody and access and/or child welfare cases (see Table 2.3). Over one-half of lawyers (53%) said that this has never happened in their custody and access cases; the remainder said that this had occurred “Sometimes” (47%). Similarly, almost two-thirds of participants (63%) said that they had never had a child client testify or speak to the judge in open court in child welfare cases and the remainder said that this had occurred “Sometimes” (37%).

**Figure 2.4**

**Respondents' Views of Appropriate Ages for Judges to Interview Children**



**Table 2.3**

**Respondents' Experiences with Child Clients Testifying or Speaking to the Judge in Open Court in Custody and Access and Child Welfare Cases**

	Always		Very Often		Often		Sometimes		Never		Total	
	n	%	n	%	n	%	n	%	n	%	n	%
How often have you had a child client testify on the witness stand in court or speak to the judge in open court:												
- in a custody and access proceeding?	0	0.0	0	0.0	0	0.0	7	46.7	8	53.3	15	100.0
- in a child welfare proceeding?	0	0.0	0	0.0	0	0.0	6	37.5	10	62.5	16	100.0

Total N=29

When asked to elaborate on their answer, respondents provided the following comments:

*If an older child has a strong desire to be heard, they should be heard.*

*It is always appropriate if the child wishes to do so but I would assist the child in preparing his/her submission so that it will be a positive experience for the child and minimize damage to the future child/parent relationship.*

*To do so puts the child in an untenable position. We know that children will usually support the parent(s) in Child Protection matters. We do not want to put them in the middle of the dispute in family matters and, effectively, to make them decide between their parents.*

*It is never appropriate to have a young child as a witness in court. Children's evidence can be presented in other formats.*

*For a Child Welfare matter, if the child wants to and it assists his case and they have some sort of knowledge that is unique to them that cannot be brought out adequately through other witnesses. But that is rare. I think a very helpful place for the child to come, if they are older, is the JDR. I did attempt to do that once but the judge did not allow it, which was disappointing. For a custody matter I would suspect that they would have such knowledge more often than in a child welfare matter.*

*I do not think it is appropriate to expect the child to take sides when parents and others are present. Child Welfare proceedings in particular have much evidence of parental wrongdoing and the children may not benefit from hearing that kind of evidence.*

## **2.6 Respondents' Concluding Comments**

Finally, respondents were asked if they had any concluding comments regarding children's participation in custody and access or child welfare proceedings. Comments received included:

*I have never had a case in child welfare where I thought the children's views were considered by the judge. I am not sure that is inappropriate given that the children's views are not really the deciding factor as it is the parents' ability to parent that is at issue. It seems to me to be rare that a child has information that is not already known. I find that much of my role when representing children is explaining the situation to them and advocating for them to receive the services that they need.*

*There needs to be better training so that lawyers who are representing children are not giving evidence. It is very simple to get the evidence before the court through examination and cross examination - just as you would if you were not calling your adult client. Lawyers need training in how to present a case when they have a client who will not be appearing and giving evidence. There is far too much weight being given to lawyer's representations without the evidentiary basis.*

*I believe children should have the opportunity to have their views factored into decisions, whenever they wish to do so and have sufficient capacity.*

*Judges need to be careful to allow counsel for mother, father and others to know of what went on behind closed doors if the child will be interviewed or express a preference. The parents otherwise do not know the case they must meet.*

*Since I cannot support only instructional advocacy, I no longer represent children through LRCY.*

*Regrettably, some judges have closed minds and never allow a child to directly participate - even to the extent of the child observing the proceedings.*

## 3.0 SUMMARY AND CONCLUSIONS

### 3.1 Summary of Survey Findings

#### 3.1.1 Demographic Characteristics

- Over two-thirds of respondents were female.
- Participants had been a member of the bar for an average of 19 years and, on average, 84% of their practice was in family law.

#### 3.1.2 Experiences with Child Representation

- One-half of respondents had experience representing children in custody and access matters; those who had experience had represented children in an average of 36 cases.
- Almost two-thirds of participants had experience representing children in child welfare cases and had done so in an average of 26 cases.
- Just over one-quarter of respondents were on the roster for Alberta's Legal Representation for Children and Youth (LRCY) program. These lawyers indicated that 82% of their child welfare cases are conducted through LRCY.

#### 3.1.3 Meetings with Child Clients

- The number of meetings that lawyers hold with child clients in both custody and access and child welfare cases increases as the age of the child increases. There were, on average, somewhat more meetings with children in custody and access cases.
- The length of meetings with child clients in both custody and access and child welfare cases also increases as the age of the child increases. For all but the youngest age group, on average, the meetings with children in custody and access cases were somewhat longer.

#### 3.1.4 Approach to Child Representation

- Over one-half of respondents stated that the instructional advocacy approach is most appropriate when representing child clients, while one-third endorsed the best interests approach and only 10% favoured the *amicus curiae* approach.
- Almost one-half of lawyers said they would not adopt an instructional advocacy approach if they believed that the child was too young or lacked the capacity to make a sound decision. Slightly fewer respondents stated that they would not

adopt an instructional advocacy approach in situations where they thought the outcome preferred by the child might expose him or her to harm or serious risk.

- Almost all participants said that they tell their child clients how their views can be shared with the court in a family dispute, though it is not clear that this regularly includes discussion about the possibility of the child meeting the judge.
- Over-two thirds of lawyers said that they never disclose confidential information that a child has told them, while just under one-third stated that they have done this on occasion.
- One-fifth of participants said that they have advocated for a position based on a child's instructions, but said that it is their own in order to protect the child.

### 3.1.5 Judicial Interviews with Children

- Fewer than one-half of respondents said that, on occasion, they encourage their child clients to meet with the judge for an interview.
- When asked how often they had been involved in a custody and access case where the judge interviewed a child, the majority of participants responded "Sometimes." When asked how often there was counsel for the child in these cases, the most common responses were "Always" and "Sometimes," indicating that judicial interviews are generally conducted in addition to child legal representation, rather than instead of child legal representation alone. In the majority of cases where the judge met the child, the judge did not record the interview. In cases where the interview was recorded, the majority of respondents said that the transcript was not shared with the parties.
- When asked how often they had been involved in child welfare cases where the judge interviewed the child, equal number of respondents said "Sometimes" and "Never." When asked how often there was counsel for the child in these cases, the most common response was "Sometimes." One-half of respondents said that the judge did not record the interview in these cases. In cases where the judge recorded the interview, all participants said that the judge never shared the transcript with the parties.
- Two-thirds of lawyers said that they had never been involved in a case where they asked the judge to interview their child client and the judge refused.
- When asked whether it is appropriate for the judge to interview children of various ages in custody and access or child welfare proceedings, the proportion of respondents who thought that judges could interview children increased with the age of the child.

- Over one-half of lawyers said that they had never been involved in a custody and access case in which their child client testified or spoke to the judge in open court.
- Almost two-thirds of respondents said that they had never been involved in a child welfare case in which their child client testified or spoke to the judge in open court.

### **3.2 Conclusions**

While there is growing recognition that children have a right to have their views heard in family law cases that will have an impact on their future, there is considerable controversy about the best way to achieve this. This report focused on the experiences of Alberta lawyers with two mechanisms for hearing the voice of the child in family disputes: legal counsel for children and judicial interviews with children. The findings of the Survey of Lawyers about Children's Participation in Family Disputes presented in this report provide some insight into the views of a small sample of Alberta legal professionals on these mechanisms.

With respect to legal counsel for children, a substantial number of survey respondents had experience with representing children in custody and access and/or child welfare matters, either as private counsel or through Alberta's Legal Representation for Children and Youth (LRCY) program. There was some controversy over the best approach to take when representing children, even though both the Law Society of Alberta and LRCY have adopted policies directing lawyers for children to take an instructional advocacy approach whenever possible. While one-half of survey respondents said that the instructional advocacy approach is most appropriate with child clients, one-third indicated that the best interests approach is preferable. This discrepancy mirrors the lack of consensus around this issue across jurisdictions. Indeed, while Alberta has mandated the instructional advocacy approach, the *Policy Statement* of the Ontario Children's Lawyer instructs lawyers for children to take a best interests approach.

It can be argued that the most appropriate approach to take when representing children may be the one that best fits with the circumstances of an individual case. Thus, for example, in cases where there is a young child client or one who is reluctant to express his or her views, a best interests approach might be most appropriate. In fact, one-half of lawyers who responded to the survey said that they would not adopt an instructional advocacy approach if they believed that the child was too young or lacked the capacity to make a sound decision. Conversely, in cases with older children who are clearly expressing their wishes, the instructional advocacy role is likely preferable.

Given the lack of consensus regarding the most appropriate approach for children's counsel both within Alberta and across jurisdictions, it could be argued that it was premature for the Law Society of Alberta and LRCY to direct that lawyers adopt the instructional advocacy approach whenever possible. The small sample size for the

present survey suggests that further research on this issue would be desirable, not just with lawyers, but with other professionals involved in the justice system such as judges and mental health professionals (e.g., social workers, psychologists). Further, there is a clear need for research that includes children who have had legal representation and/or were interviewed by a judge to learn more about their experiences and perspectives on how the family law system can be more helpful to them as well.

Another mechanism for allowing children to voice their opinions in family law matters is through judicial interviews or testifying in open court. It is apparent, however, that, even with the small sample size in the present survey, there is no consensus among the Alberta bar regarding the desirability of these practices. While some survey respondents indicated that they had been involved in cases where a judge interviewed a child, the practice was not particularly common. Further, less than one-half had been involved in cases where they had encouraged their child clients to meet with the judge. In addition, the majority of respondents had never been involved in a family case where their child client testified or spoke to the judge in open court.

There also appears to be little consistency in how judicial interviews are handled procedurally. When asked if judges typically recorded interviews with children, the responses were mixed; however, in the majority of cases interviews were not recorded. Further, in the majority of cases where recordings were made, these recordings were never shared with the parties. This lack of consistency points to the need for judicial education regarding interviewing children in family law cases, and arguably for the development of guidelines regarding the procedures that should be followed when conducting these interviews. In addition, training and education for lawyers on how to support their child clients in meeting with judges would be beneficial.

The present survey could not provide any information on the opinions of judges regarding conducting interviews with children in family cases. It is clear that more research is needed that will ascertain judges' views in this area and what supports they feel are necessary to facilitate this process. Further, there is a need for research with children involved in the family law system to determine their views on whether meeting with judges is beneficial and, for those who have done so, whether this left them feeling that they were allowed to actively participate in the decision making process.



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