



# Family Violence & Family Law Brief

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Treating Children as Full Rights Bearers:  
Independent Legal Representation for  
Children in Family Violence and/or  
Resist-Refuse Contact Cases

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# Treating Children as Full Rights Bearers: Independent Legal Representation for Children in Family Violence and/or Resist-Refuse Contact Cases

The Honourable Donna Martinson, KC<sup>1</sup>

March 2023

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At Simon Fraser University, we live and work on the unceded traditional territories of the Coast Salish peoples of the x<sup>w</sup>məθkwəyəm (Musqueam), Skwxwú7mesh (Squamish), and Səlílwatał (Tsleil-Waututh) Nations.

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## Editing & Formatting

Edith Wu, MA, PhD student at the School of Criminology, Simon Fraser University.

## Design

Diana Corredor, Communications Coordinator at the Centre for Research & Education on Violence Against Women & Children

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## Part I – Empowerment of Children as Full Rights Bearers

Under the *United Nations Convention on the Rights of the Child (UN Convention)*, all children under the age of 18 are full rights bearers, entitling them to have those rights advanced and protected in court proceedings. This includes children involved in cases where there are allegations of family violence and/or resisting-refusing contact. As the Supreme Court of Canada said in *Michel v. Graydon*,<sup>2</sup> “Courts are not to be discouraged from defending the rights of children when they have the opportunity to do so”. The concurring judgment emphasized the dramatic shift of the status of children, from being treated as property of their parents, to being full rights bearers:<sup>3</sup>

*The status of children has changed dramatically from the times when children were viewed as property ... Today children are viewed as individuals, who as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society’s full protection.*

Justice Sheilah Martin, with Chief Justice Wagner, Justice Abella, and Justice Karakatsanis, Supreme Court of Canada, 2020 concurring judgment in  
*Michel v. Graydon*

This major shift to treating children as full rights bearers had a transitional stage: paternalism. For some time, the prevailing wisdom was that children should be kept out of – protected from – court processes. The approach was needs-based; children were viewed “paternalistically, [seeing] them as non-competent people on their way to adulthood, about whom protective decisions must be made” – “human becomings”,<sup>4</sup> rather than human beings with agency. This view, one that was often very well-intentioned, no longer reflects the recognized legal status of children. British Columbia’s (BC) Chief Justice Bauman referred to this final shift to viewing children as full rights bearers, highlighting the need to view the enforcement of children’s rights within a framework of empowerment, not paternalism.<sup>5</sup>

Children’s rights are found in Canadian domestic laws, including the *Charter*, and in Canada’s international obligations, particularly the *UN Convention* and the UN Committee on the Rights of the Child, created by the Convention (UN Committee) and its General Comments. All professionals, including judges and lawyers, have obligations to defend those rights. The role of independent legal representation for children in court proceedings is critical in implementing and advancing children’s rights. As the UN Committee states, the child will need appropriate legal representation when his, her, [or their,] best interests are to be formally assessed and determined by courts. This is particularly true in family violence, or resisting-refusing contact, cases.

Resist-refuse contact is the newer and preferable term for cases which have been referred to as parental alienation cases. The *Brief* uses that term, but if it is necessary to use parental alienation, it will appear in quotation marks. Among the child rights at stake in family violence and/or resist-refuse contact cases are:

- (1) The right to be protected from violence of all kinds while in the care of parents, legal guardians or any other person who has care of the child;
- (2) The right to participate in all decisions affecting them if they wish to do that, and to have their views taken seriously, which is said by the UN Committee to be inextricably linked to a child's best interests and of particular relevance in situations of violence;
- (3) The right of the child who is separated from one, or both, parents to maintain personal relations and direct contact with both parents but only when it is safe and in their best interests to do so;
- (4) The right to privacy; and
- (5) The right to the enjoyment of the highest attainable standard of health, to participate in all health-related matters (including therapeutic interventions) and to have their views taken seriously.

Children can face significant rights violations in these cases often due to lingering paternalistic thinking. They should have an independent child advocate to prevent such violations. The potential violations include, though are not limited to:

- (a) Inappropriately silencing children by excluding their views about family violence and reasons for refusing-resisting contact;
- (b) Denying children the right to independent legal representation to advance and protect their rights because of the nature of the allegations;
- (c) Biased assessments of family violence, generally;
- (d) Biased parenting assessments which do not appropriately consider family violence, and which minimize children's voices;
- (e) Discriminatory, and not scientifically founded, forced reunification therapies, without the child's consent; and
- (f) Discriminatory use of police enforcement clauses which, in effect, cause children to be "arrested" by the police.

The need for, and the role of, independent legal representation for children in Canada are topics not without some controversy. However, in the absence of such representation in court proceedings, only lip-service is paid to the legal principle of treating children as full rights bearers. The *Learning Brief* describes why independent legal representation is necessary and why its use must go beyond what the UN Committee calls tokenism. The UN Committee describes tokenistic approaches as those which limit children's expression of views or which allow children to be heard but fail to give their views due weight.<sup>6</sup>

To address the challenges raised, the *Brief* begins by providing an overview of key independent legal representation for children principles, briefly covering these topics:

- i. Children in Canada are full rights bearers;

- ii. Legal representation for children is one of the eight safeguards and guarantees required to advance and protect children’s rights in court proceedings;
- iii. Only the Child Advocate Model of Independent Legal Representation treats children as full rights bearers;
- iv. The Child Advocate has a role throughout the entire court process;
- v. A Child Advocate’s role includes making sure that Family Law Legislation is interpreted and applied, using child rights principles;
- vi. Children’s rights under the *UN Convention* apply to all children and all cases; and
- vii. An Independent Child Advocate is particularly important to protect child rights in cases of family violence and/or children resisting-refusing contact.

The *Brief* then addresses specific topics in more detail, with references, under these headings:

- A. Legal Foundations for Independent Legal Representation for Children in Canada
- B. Strong International Support for Independent Legal Representation for Children
- C. Practical Essentials: Role and Responsibilities of Counsel for Children
- D. Practical Essentials: The Need for Independent Legal Representation Applies to All Children and All Cases
- E. Practical Essentials: The Importance of Independent Legal Representation for Children in Family Violence and Resist-Refuse Contact Cases
- F. Other Appellate Court Support for Legal Representation for Children from a Child Rights Perspective
- G. Concluding Comments
- H. Resources

This *Learning Brief* expands upon the discussion on the importance of independent legal representation for children raised in two earlier *Learning Briefs*. They each discuss, in more detail, the broader legal child rights framework which supports treating children as full rights bearers, entitling them to legal representation:

- (1) The Honourable Donna Martinson & Margaret Jackson, “[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)”, *Family Violence & Family Law Brief* 5 (June 2021), Vancouver, BC: *The FREDA Centre for Research on Violence Against Women & Children*.
- (2) The Honourable Donna Martinson & the Honourable Rose Raven, “[Implementing Children’s Participation Rights in All Family Court Cases](#)”, *Family Violence & Family Law Brief* 9 (December 2021), Vancouver, BC: *The FREDA Centre for Research on Violence Against Women & Children*.



This *Learning Brief* provides general information about legal representation based on child rights principles. Child advocates will need to be familiar with specific legislation, rules, case law and practices in their jurisdiction.

Note: In the latter *Learning Brief*, the *Practical Guide/Checklist: Implementing Children's Participation Rights in All Family Court Proceedings* is a helpful tool for independent lawyers for children, and is reproduced [here](#).

## Part II – Overview: Key Independent Legal Representation for Children Principles

### *i. Children in Canada are Full Rights Bearers*

- *Children in Canada, like all people, are full rights bearers with rights found in domestic law, including the Charter, and international law, such as the UN Convention; rights are meaningless without the ability to implement them.*
- *The ability to access a lawyer to advance and protect rights without interference is considered a fundamental aspect of Canada’s legal system. This ability is inextricably linked to the ability to advance and protect rights.*
- *Children, as full rights bearers, are entitled to the benefit of this fundamental aspect of Canada’s legal system.*
- *While children can obtain general information about their rights from any knowledgeable person, not just a lawyer, only lawyers can provide the kind of child-specific advice an individual child requires to ensure that their rights are effectively implemented.*
- *When cases which impact children are before the courts, individual legal advice is necessary, but not sufficient. Actual independent legal representation throughout all the court processes, including resolution discussions, case management, hearings, trials, and appeals, is needed to advance and protect children’s rights.*

### *ii. Legal Representation for Children is One of the Eight Safeguards & Guarantees Required to Advance & Protect Children’s Rights in Court Proceedings*

- *The need for appropriate legal representation when children’s best interests are to be formally assessed and determined by courts is one of the eight safeguards and guarantees required by the UN Committee to effectively implement and advance rights, including implementing the other seven safeguards and guarantees. In particular, the child should be provided with a legal representative, in addition to a guardian or representative of the child’s views, where there is a potential conflict between the parties in the decision.*
- *Ensuring the right of the child to express their own views is only one of the remaining seven safeguards. Independent legal representation facilitates the other six:*
  - *Establishing relevant facts;*
  - *Making timely decisions;*
  - *Using qualified experts;*
  - *Ensuring appropriate “legal reasoning”;*
  - *Making sure there are mechanisms to revise or review decisions; and*
  - *Using child rights impact assessments.*

### *iii. Only the Child Advocate Model of Independent Legal Representation Treats Children as Full Rights Bearers*

- *The child advocate model of independent legal representation for children, rather than the friend of the court (amicus) or the best interests (guardian ad litem) models, is most consistent with the child rights approach found in the UN Convention.*
- *A child advocate represents the child's interest from the child's point of view, providing confidential case specific advice and representation, if necessary.*
- *The other two models do not do so:*
  - *A friend of the court (amicus) usually involves a lawyer who meets with the child and ensures that the court is provided with the child's views. That lawyer:*
    - *Does not advocate for the child's views, and*
    - *There is no confidentiality.*
  - *A best interest, or litigation, guardian stands in the place of the child, making recommendations based on what the lawyer considers is in the best interests of the child.*

### *iv. The Child Advocate has a Role Throughout the Entire Court Process*

- *A child advocate has a role throughout the entire court process:*
  - *Facilitating settlements which incorporate the child's rights, including the right to participate.*
  - *At a contested hearing/trial participating on the child's behalf:*
    - *In the presentation and testing of evidence, including evidence supporting the child's position;*
    - *In guarding against unreasonable delay; and*
    - *By advancing and protecting children's rights during final submissions.*
  - *Facilitating attendance at a judicial interview and attending with the child.*
  - *After the court makes the ultimate decision:*
    - *Explaining the decision to the child;*
    - *Reviewing the ultimate decision for correctness;*
    - *Recommending an appeal of the decision if appropriate; and*
    - *Representing the child during the appeal process.*
  - *Ensuring that child rights are protected during enforcement proceedings, including:*
    - *Requests for police enforcement orders, and*
    - *Non-consensual therapeutic interventions.*

*v. A Child Advocate’s Role Includes Making Sure that Family Law Legislation is Interpreted & Applied, Using Child Rights Principles*

- *It is essential to apply a child rights approach to the interpretation of the Divorce Act and provincial family law legislation.*
- *The statutory interpretation principles apply; they include the presumption that the legislation considers Canada’s international obligations, including the UN Convention as well as the social and historical context.*

*vi. Children’s Rights Under the UN Convention apply to All Children & All Cases*

- *The UN Convention applies to all children and all cases. All children have the rights set out in it, including their fundamental right to participate, in all types of cases.*
- *Independent legal representation is especially important in ongoing, contentious court proceedings. These are the cases in which:*
  - (1) *Both court processes and court outcomes can have a particularly profound impact on children’s daily lives and their short- and long-term well-being; and*
  - (2) *It is even more likely that children’s rights will be overlooked or undermined.*
- *Among the rights at stake are:*
  - *The right to participate in decisions that affect them, which is particularly important in violence cases;*
  - *The right to be free of violence of all kinds, including psychological, emotional and physical violence, which could lead to serious injury or even death;*
  - *The right to life and healthy development;*
  - *The right to health;*
  - *The right to have a relationship with both “parents” but only when it is safe to do so;*
  - *The right to education; and*
  - *The right to privacy.*

*vii. An Independent Child Advocate is Particularly Important to Protect Child Rights in Cases of Family Violence &/or Children Resisting-Refusing Contact*

- *Cases which involve allegations of family violence and/or “alienation” are ones in which the stakes for children could not be higher, making independent legal representation especially important.*

- *Potential child rights violations include:*
  - *Inappropriately silencing children by excluding their views about family violence and/or “alienation”;*
  - *Denying children the right to independent legal representation to advance and protect their rights;*
  - *Misuse of parenting assessments in family violence and “alienation” cases;*
  - *Non-examination of the scientific basis for reunifications therapies;*
  - *Not obtaining the child’s informed consent to reunification therapy; and*
  - *Use and misuse of police enforcement clauses in orders.*
- *Although there are such important rights at stake in these cases, some people argue that legal representation inappropriately forces the child in the middle of the conflict. However, it is most often the fact of the conflict, not that child’s participation, that can be harmful.*

## Part III – Details

### A. Legal Foundations for Independent Legal Representation for Children in Canada

*For rights to have meaning, effective remedies must be available to redress violations... So[,] States need to give particular attention to ensuring that there are effective child sensitive procedures available to children and their representatives. These should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to independent complaints procedures, and to the courts with necessary legal and other assistance...*

UN Committee on the Rights of the Child, created by the *UN Convention*.<sup>7</sup>

#### ***1) Children, Like Adults, have a Right to Access a Lawyer to Advance & Protect Their Rights***

Rights, without effective remedies to advance and protect them, can be meaningless. As BC’s Chief Justice Bauman has said, “for any right to be more than just a promise, an individual must have a means with which to enforce the right”.<sup>8</sup>

- The ability to access a lawyer without interference is considered a fundamental aspect of Canada’s legal system.<sup>9</sup> This ability is inextricably linked to the ability to advance and protect rights.
- Children, as full rights bearers, are entitled to the benefit of this fundamental aspect of Canada’s legal system. (See, for example, *Justice for Children and Youth v. G. (J.)*,<sup>10</sup> which states that access to legal advice is a fundamental right in Canada and there is nothing to limit that right to adults.)

The Ontario Court of Appeal (leave to appeal to the Supreme Court of Canada denied) in *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)* provided a strong endorsement for legal representation for children in family law cases, including cases where there are allegations of “alienation”, emphasizing how legal representation is fundamental to the proper functioning of the legal system. See, for example:<sup>11</sup>

- *The unique role of the Children’s Lawyer is fundamental to the proper functioning of the legal system...*
- *In summary, the role of the Children’s Lawyer is fundamental to the proper functioning of our system of justice...*

That court also emphasized how important it is for children to be able to confidentially speak to a lawyer:<sup>12</sup>

*The Children’s Lawyer not only represents the child’s interests; she provides a safe, effective way for the child’s voice to be heard. For her to do this, she must provide a promise of confidentiality. Children must be able to disclose feelings and facts to the children’s Lawyer that cannot or will not be communicated to parents. Children’s interests can be averse to that of their parents. Feelings of guilt and betrayal that may influence a child require a safe person to speak to.*

A lawyer was appointed for the children and appeared as their counsel throughout the entire court proceedings, including the initial hearings.

In *S.K. v. D.G.*,<sup>13</sup> the Alberta Court of Queen’s Bench described children as full rights bearers and access to justice for children as a fundamental right. The court’s comments reinforce the need to have a child lawyer to advance and protect child rights, including the right to have their views taken seriously:

- Access to justice for children is a fundamental right and a prerequisite to the protection of their human rights pursuant to the *UN Convention*...<sup>14</sup>
- Children are now recognized as “full rights bearers” who merit society’s full protection.<sup>15</sup> This foundational principle goes beyond simply allowing children to express their views in court proceedings; it includes the right to have those views taken seriously... (Citing [General Comment 14](#), at paras. 40 & 43, and providing cases where the UN Commentary have been used by courts to interpret Canada’s obligations.)<sup>16</sup>

## *2) The Ability to Access a Lawyer is Particularly Important to Children*

- Providing this ability to access a lawyer is even more important to children, as they do not have the same advantages as adults to access a lawyer to advance and protect their rights.
  - As Chief Justice Bauman said, “[f]or children, accessing enforcement measures is particularly problematic because of the dependence, lack of maturity and actual or perceived voicelessness”.<sup>17</sup>
  - The rights-based approach is of particular importance in the discussion of children’s rights because of children’s often intense vulnerability, the frequent competition between children’s rights and those of adults, and the resulting ease with which a more paternalistic and needs based approach can be adopted.<sup>18</sup>

*For more information about the importance of accessing a lawyer to implement rights, see:*

Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022).

The Honourable Donna Martinson & the Honourable Rose Raven, “Implementing Children’s Participation Rights in All Family Court Cases”, *Family Violence & Family Law Brief* 9 (December 2021), *Vancouver, BC: The FREDA Centre for Research on Violence Against Women & Children*, at 21-23.

“Participation and Independent Legal Representation for Children” in Alternative Report to the UN Committee on the Rights of the Child (Canadian Bar Association Child and Youth Law Section, February 2020), at 30-33.

Margaret Jackson, the Honourable Donna Martinson, Melissa Gregg, Chelsea Pang, & Sarah Yercich, Implementing Children’s Participation Rights in Family Law and Child Welfare Court Proceedings [Literature Review] (November 2020), at 6-8.

The Honourable Donna Martinson & Caterina E. Tempesta, “Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation” (2018) *Canadian Journal of family Law* 31(1), at 154-155.

## B. Strong International Support for Independent Legal Representation for Children

### 1) *The UN Convention on the Rights of the Child: Specific Legal Safeguards*

- An essential goal of the *UN Convention* is to ensure that children’s rights are not only clearly described, but also effectively implemented. A major role of the UN Committee, created by the Convention in Article 43, is to do exactly that.
- The Committee describes eight specific procedural safeguards necessary to determine children’s best interests, including their participation rights, in judicial proceedings.<sup>19</sup> They reinforce children’s right to due process under other international instruments and standards.
- The safeguards include, but are not limited to, obtaining children’s views.
- The legal representation safeguard calls for legal representation when best interests are formally assessed by courts.<sup>20</sup>

*The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.*



- Legal representation is particularly important as it is required to make sure that the other seven safeguards are followed:
  1. Prioritizing processes, avoiding unnecessary delay (time perception);<sup>21</sup>
  2. Obtaining children’s views;<sup>22</sup>
  3. Establishing relevant facts;<sup>23</sup>
  4. Using qualified professionals;<sup>24</sup>
  5. Using appropriate judicial “legal reasoning” in decisions, which:<sup>25</sup>
    - Apply child rights principles, including giving due weight to children’s views;
    - Explain conclusions different from children’s views; and
    - Are provided without delay.
  6. Providing mechanisms to revise or review decisions;<sup>26</sup> and
  7. Requiring governments to assess the impact of all laws and policies, including budget decisions, on children’s well-being.<sup>27</sup>

Note: This safeguard, though not applying to specific cases, is important in the general advocacy work lawyers do to support the rights of children.
- The need for independent legal representation applies throughout court processes; the reference to courts of law in Article 3 – the best interests of the child as a primary consideration in all matters affecting the child – encompasses all relevant judicial processes including conciliation, mediation, and arbitration processes.<sup>28</sup>

*For more information about Child Rights Safeguards, see:*

Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 198-200.

The Honourable Donna Martinson & the Honourable Rose Raven, “Implementing Children’s Participation Rights in All Family Court Cases”, *Family Violence & Family Law Brief 9* (December 2021), *Vancouver, BC: The FREDa Centre for Research on Violence Against Women & Children*, at 11-24.

See, in particular, the *Practical Guide/Checklist*, at 29-34.

Note: The *Practical Guide/Checklist* focuses on family law but is easily adaptable to other areas of law.

Alternative Report to the UN Committee on the Rights of the Child (Canadian Bar Association Child and Youth Law Section, February 2020), at 13-15.

“Fully Participating in Court Processes: Core Components”, in the Honourable Donna Martinson & Caterina E. Tempesta, “Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation” (2018) *Canadian Journal of Family Law* 31(1), at 179-185.

*For information about the importance of safeguards to Multiple Court Proceedings, see:*

The Honourable Donna Martinson & Margaret Jackson, “The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases”, *Family Violence & Family Law Brief* 5 (June 2021), Vancouver, BC: *The FREDA Centre for Research on Violence Against Women & Children*, at 15-16.

## *2) Other International Human Rights Support for Legal Representation for Children, including Legal Aid*

- The UN Human Rights Council supports legal aid for children under the same, or more lenient, conditions as adults (including the right to challenge decisions with a higher judicial authority).<sup>29</sup>
- The UN High Commissioner for Human Rights, in reporting to the Human Rights Council,
  - Supports free, or subsidized, legal (and other) assistance for children, saying they need it to effectively engage with the legal system.<sup>30</sup>
- The High Commissioner emphasizes that “[w]hile the right to free legal assistance is not explicitly provided for in international law outside the criminal law context, access to legal and other assistance in these matters is essential for ensuring that children are able to take action to protect their rights”.<sup>31</sup>

These principles were applied in *S.K. v. D.G.*, by the Alberta Court of Queen’s Bench:

- To provide meaningful access to justice, children must be legally empowered with the right to independent representation, information, education, and competent advice.<sup>32</sup>
- Access to legal assistance, though not explicitly provided for in international law outside the criminal law context, is essential for ensuring that children are able to take action and to protect their rights.<sup>33</sup>

*For more information about international human rights support, see:*

“The Right to Legal Representation: International and Regional Human Right”, in Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 200-202

### *3) Fair Trial & Due Process Rights Apply to Children*

- International human rights instruments, including the International Covenant on Civil and Political Rights, which Canada has ratified, recognize the right to a fair trial and due process. They apply to children. Legal representation in both criminal and civil law matters is an integral part of those due process rights.

*For details, see:*

Caterina E. Tempesta, *Legal Representation as a Critical Aspect of the Child's Right to be Heard*, Master of Laws Thesis: Advanced Studies in International Children's Rights Leiden University of Faculty of Law Netherlands (2018-2019), at 8-17.

## C. Practical Essentials: Role & Responsibilities of Counsel for Children

### *1) A Child Rights Approach Requires Using the Child Advocate Model rather than a Friend of the Court (Amicus) or a Best Interests Advocate (Guardian Ad Litem)*

- A somewhat controversial aspect of child legal representation, especially in child protection and custody/access/parenting matters, is counsel's role or representational stance. Much has been written on this subject, with the possible roles designated using various terms and described in numerous articles.
- From a child rights perspective – one that treats children as full rights bearers – only a lawyer who acts as a child's advocate is fully respecting a young person's rights.
- An *amicus curiae* usually involves a lawyer who meets with the child and ensures that the court is provided with the child's views. The *amicus* does not advocate for the child's interests from the child's perspective and there is no confidentiality attached to the child's communications with the lawyer.
- A best interests or litigation guardian, stands in the place of the child, making recommendations based on what the lawyer considers is in the best interests of the child. As such, the role undermines children's participation rights by replacing the child's voice with that of the guardian.
- Child advocacy involves explaining in a confidential child friendly way the law and options available to the child client, providing advice to the child, taking a position consistent with the child's expressed views, or 'instructions', and advocating accordingly.
- Representing a child's 'interests' should not be confused with 'best interests' advocacy. A child's interests are the individual child's subjective 'interests', not interests as

determined by some other individual's, or counsel's own, opinion or perspective of what is in a child's interests.

- The New Brunswick Court of Appeal referred to the Canadian Bar Association *Child Rights Toolkit* analysis (2015) in concluding that the role of counsel is to represent a child's interests, not to be confused with best interest advocacy.<sup>34</sup>
- Child counsel's obligations go beyond simply conveying a child's views to decision-makers. A child's lawyer must behave, as much as possible, as counsel for any adult, in accordance with federal and provincial/territorial professional *Codes of Conduct*.
- Competent legal representation of a child requires knowledge of these responsibilities, and more, given the particular vulnerabilities and capacity issues relating to children. Counsel must be particularly vigilant to follow procedural and evidentiary rules as closely as is possible to ensure proper representation of a child-client's interests and fairness to the parties.
- Information must be conveyed in a way that considers the child's particular circumstances, including their age, level of maturity, cognitive ability and social context.

*For more information on the importance of a child advocate approach, using a child rights analysis, see:*

"Not All Methods of Hearing from the Child are Created Equally", in Caterina E. Tempesta, "Legal Representation as a Necessary Element of Children's Access to and Participation in Family Justice". In M. Paré et al., eds. *Children's Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 206-209.

Margaret Jackson, the Honourable Donna Martinson, Melissa Gregg, Chelsea Pang, & Sarah Yercich, *Implementing Children's Participation Rights in Family Law and Child Welfare Court Proceedings* [Literature Review] (November 2020), at 6-8.

"Nature of Children's Legal Representation: Providing an Informed Child Perspective", in the Honourable Donna Martinson & Caterina E. Tempesta, "Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation" (2018) *Canadian Journal of Family Law* 31(1), at 186-193.

Dale Hensley, "Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner's Perspective and a Response to Professor Bala" (2006) *Alberta Law Review* 43(4), at 876-887.

*For information on the role of lawyers for children without a specific child rights analysis, see:*

Nicholas Bala & Rachel Birnbaum, "Rethinking the role of lawyers for children: Child Representation in Canadian Family Relationship Cases" (2018) *Les Cahiers de droit* 59(4).

## *2) Legal Advice Specific to the Child, not just General Legal Information, is Required*

- People, other than lawyers, can provide legal information to children, such as:
  - Their legal rights generally;
  - Their rights to participate and the choices available; and
  - The way the court processes works and the role of the judge.

That information is important and should be provided.

- However, only a child's lawyer can provide specific, confidential advice about this particular child and their rights; the lawyer has professional obligations to:
  - Investigate facts;
  - Identify issues;
  - Determine the child's objectives;
  - Consider possible options; and
  - Develop and advise the child on appropriate courses of action.

## *3) Legal Representation Throughout Court Proceedings is Required to Advance & Protect the Rights of Children; Legal Advice is Necessary but not Sufficient*

It is sometimes said that legal advice from a lawyer is sufficient for children and that independent legal representation in court proceeding, including settlement processes, contested hearing, and trials, is not necessary or appropriate.<sup>35</sup> However, providing legal advice, without the means of implementing the legal rights disclosed by that advice, does not treat children as full rights bearers. Rather, it deprives children of the ability to advance and protect their rights in court processes – ones that profoundly affect their lives. Among the child advocates responsibilities are these:

### *Facilitating Settlement Discussions*

A child advocate can effectively facilitate settlements, which incorporate the child's rights, including their right to participate.

### *Participating in Trials or Interim Hearings on behalf of the Child*

It cannot be assumed that other parties will accurately, or adequately, present evidence and arguments to advance and protect children's rights. At a contested hearing/trial, the lawyer's participation is essential in ensuring that the necessary safeguards and guarantees identified by

the UN Committee are, in fact, implemented. For example, the lawyer can use their legal knowledge and skills on the child's behalf:

- In the presentation and testing of evidence on behalf of the child, including evidence supporting the child's position;<sup>36</sup>
- In guarding against unreasonable delay;
- In ensuring that expert evidence is used only when necessary, and by experts with appropriate background and skills; and
- By advancing and protecting children's rights during submissions, including submissions on the relevant law, how the child's views should be weighed, and the admissibility and weight to be given to any expert assessment in the context of all the evidence.

### *Facilitating and Attending a Judicial Interview/Meeting with the Child*

- Reasons for meeting with a judge are described by the Honourable Donna Martinson and the Honourable Rose Raven.<sup>37</sup> A judicial interview can:
  - Support the UN Committee's view that children should be able to be heard directly by the decision-maker;
  - Enable children to be more involved and connected with the proceedings;
  - Make sure the judge has understood the views and feelings of the child; and
  - Make sure the child understands the judge's task and the nature of the court process.
- In Hensley,<sup>38</sup> the author supports counsel for the child not only attending such an interview but also preparing both the child and the judge, if permitted, for a positive interview experience.

### *Advising about an Appeal and Appealing the Decision When Appropriate*

Once the court's decision has been provided, an important role of a child advocate is to:

- Explain the decision to the child;
- Review the ultimate decision for correctness;
- Recommend appealing the decision if appropriate; and
- Represent the child during the appeal process.

### *Examples of Judicial Support for this Comprehensive Child Advocate Role*

The Alberta Court of Queens in *S.K. v. D.G.* supported the child's lawyer having a role throughout the judicial proceedings and emphasized these benefits of the child's lawyer:<sup>39</sup>

- Establishing a privileged, confidential, open, independent and honest relationship with the child;
- Engaging in an ongoing basis with the child in dynamic situations, especially in cases which are complex, multifactorial, and drawn out over an extended period; and
- In “alienation” cases, teasing apart concerns and properly guiding the child to understand the full picture and consequences of the child’s wishes.

That Court also agreed with the views of Caterina Tempesta, who emphasizes:<sup>40</sup>

- The unique legal assurances to the court a child’s lawyer, and no one else, can provide and which are essential to the child’s effective access to justice and participation.
- The fact that a child’s lawyer protects the child’s legal interests, while all other representatives either lack this expertise or do not have this primary mandate.
- That in adversarial legal systems, the child advocate is the only representative who gathers and tests evidence relevant to the child’s position and makes legal arguments in support of the child’s desired outcome. This is critical to ensuring the child’s views are not merely heard but given due consideration by decision-makers, as required by Article 12.
- That the child’s lawyer ensures, by being involved throughout the process, that the child’s participation is a process rather than a “momentary act”. (This can facilitate settlement consistent with the child’s interests, as well as provide up-to-date information about the child’s views and circumstances.)
- That the child advocate is the only representative able to directly assess, advise on, and access review or appeal mechanisms. This is significant if the child’s views have been inadequately considered or explained in the judgment (see *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*<sup>41</sup>).

Reference: Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 208.

The New Brunswick Court of Appeal, in *S.H. v. Minister of Social Development and C.H.*,<sup>42</sup> concluded that counsel for the child has the right to receive disclosure, to examine and cross-examine witnesses, to fully participate in the proceedings and to make recommendations to the court.

In *M. v. F.*,<sup>43</sup> the Ontario Superior Court, in requesting that the Office of the Children’s Lawyer represents the child in an “alienation” case, concluded that it is in the child’s “best interests to have a legal representative to ensure that the court has evidence and argument” on the child’s views and preferences.

The Yukon Supreme Court, in *B.J.G. v. D.L.G.*,<sup>44</sup> has supported legal representation in the proceedings, not just legal advice, as a meaningful way to ensure that more than lip-service is paid to children’s legal rights to be heard throughout the court processes. The approach in that case was referred to, with approval, by the BC Supreme Court in *S.T.C. v. D.J.B.*,<sup>45</sup> in *D.R. v. K.A.*,<sup>46</sup> and by the BC Provincial Court in *D.C. v. T.N.*<sup>47</sup>

Note: It has been suggested by some that lawyers are not always needed in court proceedings. See, for example, Bala and Birnbaum.<sup>48</sup> With real respect for those who hold a different view, from a child rights perspective, there are aspects of the roles lawyers play that are unique and necessary when courts are formally assessing children’s best interests.

*For more information on a child rights approach to independent legal representation for children, see:*

Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 197.

The Honourable Donna Martinson & Margaret Jackson, “**The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases**”, Family Violence & Family Law Brief 5 (June 2021), Vancouver, BC: *The FREDA Centre for Research on Violence Against Women & Children*, at 25.

“Fully Participating in Court Processes: Core Components”, in the Honourable Donna Martinson & Caterina E. Tempesta, “**Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation**” (2018) *Canadian Journal of Family Law* 31(1), at 179-185.

*For more information about the Child Advocate Model, see:*

“Not All Methods of Hearing From Children are Created Equally”, in Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 206-209.

The Honourable Donna Martinson & the Honourable Rose Raven, “**Implementing Children’s Participation Rights in All Family Court Cases**”, *Family Violence & Family Law Brief* 9 (December 2021), Vancouver, BC: *The FREDA Centre for Research on Violence Against Women & Children*, at 21-24.

“Nature of Children’s Legal Representation: Providing an Informed Child Perspective”, in the Honourable Donna Martinson & Caterina E. Tempesta, “**Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation**” (2018) *Canadian Journal of Family Law* 31(1), at 186-193.



“Why an Advocacy Approach”, in Dale Hensley, “Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner’s Perspective and a Response to Professor Bala” (2006) *Alberta Law Review* 43(4), at 876-887.

## D. Practical Essentials: The Need for Independent Legal Representation Applies to All Children & All Cases

### 1) *Rights, Safeguards & Guarantees Apply to All Children & All Cases*

- The *UN Convention* applies to all children and all cases. Article 1 specifically says that a child means every human being below the age of 18. All children have the rights set out in it, including their fundamental right to participate, no matter what issues are at stake.
- Canada shall respect and ensure the rights set forth in the present *UN Convention* to each child within its jurisdiction without discrimination of any kind...Article 2(1).
- None of the three other *UN Convention’s* general principles limit the application of the principle to particular children or cases:
  - Making the best interests of the child a primary consideration in all actions affecting the child (Article 3(1));
  - The child’s inherent right to life (Article 6); and
  - The child’s rights to express his/her/their views freely in all matters affecting the child, whereby those views be given due weight (Article 12(1)) and the child’s right to be heard in judicial proceedings affecting the child (Article 12(2)).

The legal representation safeguard/guarantee required by the UN Committee also applies to all children:

The child [with no qualification] will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts...<sup>49</sup>

### 2) *Independent Legal Representation is Necessary in Contentious Court Proceedings*

Independent legal representation is especially important in ongoing, contentious, court proceedings. Though child rights are relevant to all children, and all cases, these are the cases in which:

- i. Both court processes and outcomes can have a particularly profound impact on children’s daily lives and their short- and long-term well-being, and
- ii. It is even more likely that children’s rights may be overlooked or undermined.

### 3) Addressing Arguments that having Independent Legal Representation Inappropriately puts Children in the Middle of the Conflict

In spite of the fact that there are such important rights at stake in these cases, it is sometimes argued that independent legal representation inappropriately forces the child to be in the middle of the conflict. The Ontario Superior Court, in *M. v. F.*,<sup>50</sup> rejected that submission in a case involving an allegation of “parental alienation”, concluding that it is the fact of the conflict that is harmful, not the child’s participation:

The father states that he wants the child to be kept out of the litigation, as having a legal representative would be like “forcing” C into the middle of the legal conflict, causing distress. I do not agree that keeping kids and their voices out of court is the solution. Rather, as stated by the Honourable Donna J. Martinson and Caterina E. Tempesta...:<sup>51</sup>

*In most cases, it is the fact of the conflict that is harmful, not the expression of the child’s views. Even in the few true “parental alienation cases”, efforts should be made to enable children to share their views, although the court may have to determine the weight to be assigned to those views. In addition, in many cases where alienation is alleged, children may have legitimate affinities for one parent over the other or may have had experiences with the “alienated” parent that justify the estrangement. In such cases, it would not be desirable to exclude the child’s perspective from the decision-making process.*

- This paragraph is also cited, with approval, by the Alberta Court of Queen’s Bench in *S.K. v. D.G.*<sup>52</sup>
- The Court, in *M. v. F.*,<sup>53</sup> also cites the following comments by Martinson and Tempesta, which emphasize that the chance of parental influence alone should not be the basis for excluding participation or discounting views:

*Even in cases where parents are careful to avoid influencing their children’s views, it is inevitable that children will be influenced by the words and actions of those around them. The possibility of parental influence on its own should not be a basis for excluding children’s participation nor for discounting their expressed views. An approach which considers the extent to which the child’s views are rooted or might reasonably be perceived as such by the child, is preferable, as it considers the situation from the child’s perspective. Reviewing the substance of a mature child’s reasons where the reasons are not based on objectively incorrect information and where there is no evidence that upholding the child’s views will be harmful is*

*unnecessarily paternalistic and inconsistent with the child's right to have appropriate weight attached to her views.*

On the other hand, the BC Court of Appeal, in *J.E.S.D. v. Y.E.P.*,<sup>54</sup> in comments not necessary to the decision (obiter), stated that:

- (1) Adversarial proceedings can easily destroy goodwill between the parties, and impede the development of healthy relationships, and
- (2) It would be invidious, and contrary to [the child]'s interests, to place her in an adversarial role against her father or against experts who have been engaged by the court.

This approach may well be reconsidered in future cases, in view of two later decisions. In *A.B. v. C.D.*,<sup>55</sup> the same Court supported the child's right to legal representation throughout contested, very high conflict, court proceedings which involved among other issues an allegation of family violence. In *Michel v. Graydon*,<sup>56</sup> the Supreme Court of Canada overturned a statutory interpretation decision of the BC Court of Appeal it considered did not support the rights of children. The Supreme Court said that courts are not to be discouraged from defending the rights of children when they have the opportunity to do so,<sup>57</sup> and emphasized using a child rights approach to questions of statutory interpretation.

*See:*

Caterina E. Tempesta, "Legal Representation as a Necessary Element of Children's Access to and Participation in Family Justice". In M. Paré et al., eds. *Children's Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 204-205.

## **E. Practical Essentials: The Importance of Independent Legal Representation for Children in Family Violence & Resist-Refuse Contact Cases**

### ***1) High Potential for Serious Child Rights Violations Generally***

Cases involving allegations of family violence, often associated with counter-allegations of children resisting-refusing contact due to "parental alienation", provide an important example of how independent legal representation is necessary to prevent child rights, including the safeguards and guarantees required to implement them, from being overlooked or undermined.

- Article 12 of the *Convention*, children's participation rights, applies in these cases. The UN Committee states that the child's right to be heard has particular relevance in violence situations and the participation right commences with very young children who are particularly vulnerable to violence (General Comment 13, para. 63). Several other articles of the *Convention* are of particular relevance in violence situations, including:

- The *Convention* Preamble which emphasizes the importance of recognizing the inherent dignity and worth of children, including their equal and inalienable rights, as “members of the human family”;
- The four general principles of the *UN Convention’s* holistic approach. In addition to Article 12, they are:<sup>58</sup>
  - Article 2 (non-discrimination);
  - Article 3 (best interests of the child); and
  - Article 6 (the right to life, including the right to healthy development).
- Children’s right to be protected from violence of all kinds, while in the care of parents, legal guardians or any other person who has care of the child (Article 19);
- The rights of the child who is separated from one, or both, parents to maintain personal relations and direct contact with both parents on a regular basis, but only when it is safe to do so: Article 9(3) stating that the principle applies “except if it is contrary to the child’s best interests”;
- The child’s right to the enjoyment of the highest attainable standard of health (Article 24);
- The child’s right to privacy (Article 16); and
- The child’s right to education (Article 28).

## *2) Silencing Children’s Voices on Issues of Family Violence & Resist-Refuse Contact*

There is significant judicial support for the conclusion that the right to participate applies to all children and all cases; no exception is made for cases involving violence and/or children resist-refuse contact. See, for example, *B.J.G. v. D.L.G.*;<sup>59</sup> *N.J.K. v. R.W.F.*;<sup>60</sup> *Medjuck v. Medjuck*;<sup>61</sup> and in *M. v. F.*<sup>62</sup> Yet, children are too often silenced in these cases. That is, some courts consider a bare allegation of “parental alienation” sufficient to conclude that the child should not have a lawyer and should not participate in the proceedings, even when there are also allegations of family violence. The (then) Alberta Court of Queen’s Bench in *S.K. v. D.G.* addressed this concern, referring to the importance of first determining *whether* there is “alienation” and not prematurely concluding that a child cannot form their own views *because* of “alienation”:<sup>63</sup>

*Justice Martinson and Dr. Margaret Jackson state that a court must determine whether there is in fact alienation and that caution must be exercised to ensure that a court does not prematurely conclude a child cannot form their own views because of alienation. The authors state that the “question of whether the child’s views have been “tainted” ought to be left to be determined as a question of due weight to be given to the views”.*

That Court also stated that allegations of “alienation” or coaching must be treated with caution. Courts should be careful not to rely on allegations of “alienation” as justification for silencing the voice of the child or according to their voice minimum weight, citing Caterina Tempesta (citations omitted).<sup>64</sup>

For an earlier, and oft cited, case, where the Quebec Court of Appeal supported children’s right to be heard and to have a child advocate, who appears throughout the proceedings involving “parental alienation”, see *F.(M.) v. L.(J.)*.<sup>65</sup>

Children can have highly relevant information about family violence and/or reasons for resisting-refusing contact, which directly affects their right to:

- (1) Be free of family violence of all kinds in their home, and
- (2) To have a significant relationship with both parents, but only when it is safe and otherwise appropriate to do so.

A child advocate can:

- (a) Ensure the child’s evidence, and other evidence supporting it, is before the court;
- (b) Test other evidence through cross-examination; and
- (c) Advance legal arguments based on child rights principles in submissions, including those which ensure that the assessment of the child’s credibility is unbiased.

Overall, the child advocate helps ensure both that the child is heard and his or her views are taken seriously, within a child rights framework.

### *3) Misuse of Parenting Assessments*

Parenting assessments can be used in ways that discriminate against children. Among the many concerns raised are these:

- (a) The inappropriate rejection or minimization of allegations of family violence by the assessor, and the over emphasis on “parental alienation”;
- (b) The minimal involvement of children in the process;
- (c) The rejection, or minimization, of the views and wishes of children with respect to family violence; and
- (d) Inappropriately concluding that children are lying or exaggerating because of “parental alienation”.

Here are some of the questions a child advocate can address:

- Is the report necessary at all, given the issues in dispute, the cost, delay and inevitable stress on everyone, but especially the child?
- If it is, does the proposed assessor have the appropriate qualifications, such as:

- In-depth training and experience about domestic violence and its impact, and the ability to provide an assessment of the risk of harm, or
- The expertise to offer an opinion in resist-refuse contact cases?
- If a report is prepared, how was the child included in the process in a meaningful way, taking into account the child’s participation and other rights?
- Is the assessor or assessment biased?
- Has the assessor provided an accurate assessment of the risk of harm to the child?
- Does the risk assessment include a consideration of safety planning for the child, from the child’s own perspective?
- How much weight should be attached to the report and its conclusions in the context of all the evidence, applying child rights legal principles?

*For more information about the potential misuse of parenting assessments, see:*

Rise Women’s Legal Centre (Haley Hrymak & Kim Hawkins), ***Section 211 Toolkit*** [BC Parenting assessment section] (March 2021).

Simon LaPierre, in Loretta Frederick, Peter Jaffe, Joan Meier, Simon LaPierre, & Linda C. Neilson, *Webinar: The Misuse of Alienation in Domestic Violence Cases in Family Court: Helping Court-Related Professionals to Sort through Conflicting Allegations*, Centre for Research and Education on Violence Against Women & Children (23 March 2021), at 25:55-43:00, and particularly at 41:22-43:00

The Honourable Donna Martinson & Margaret Jackson, ***Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts***, The FREDA Centre (2016).

“Dealing with Risk Assessment and Safety Planning”, in the Honourable Donna Martinson & Margaret Jackson, ***Family Violence and Parenting Assessments: Law, Skills and Social Context***, The FREDA Centre (2019).

#### *4) Failure to Use a Child Rights Focus in Interpreting & Applying Family Law Legislation*

##### *Principles of Statutory Interpretation*

- Independent legal representation is necessary to ensure that children’s rights are advanced and protected in family law proceedings relevant to children.
- Doing so includes using well-established principles of statutory interpretation when interpreting and applying the relevant provisions of the *2021 Divorce Act*, and other

family law legislation, in ways that support the rights of children and their status as full rights bearers. See, *Michel v. Graydon*:<sup>66</sup>

- It is presumed that the legislation considers Canada’s international obligations, including the *UN Convention*;<sup>67</sup>
- Principles in international conventions, such as the *UN Convention*, help inform the contextual approach to the interpretation of the *Family Law Act (FLA)* as well as the *Divorce Act*;<sup>68</sup>
- Consider that the legislator is taken to know the social and historical context in which it makes its intention known;<sup>69</sup> and
- Consider the broader social framework as it is an approach called for in family law cases.<sup>70</sup>

### *Using a Child Rights Approach to Interpret Specific Sections*

- For an analysis of how these principles of statutory interpretation can be applied by lawyers in family violence and “alienation” cases under the *Divorce Act*, see the Honourable Donna Martinson and Margaret Jackson’s *Learning Brief* dealing with the issue.<sup>71</sup> The *Brief* summarizes the key points in this way:<sup>72</sup>
  - Provides four broad principles that are key to the *Act*’s scheme and objectives:
    - Best interests of the *particular child* as the only consideration;
    - That children’s safety, security and well-being *must be given primary consideration*;
    - No presumption of joint or shared parenting; and
    - No general maximum parenting time/contact principle – always subject to the child’s safety, security, well-being, and best interests.
  - Applies an expansive and non-exhaustive definition of family violence;
  - Recognizes protection requires risk assessment – determining the impact of family violence now and on future risk;
  - Makes clear that the “friendly” cooperative, communicative parenting provisions are subject to safety, security and well-being;
  - Establishes that children have the right to have their views and preferences *meaningfully considered in all cases, which includes family violence and “alienation” cases*; and
  - Recognizes that protection from family violence requires both knowledge and coordination of other relevant legal proceedings, especially child protection, criminal and immigration and refugee proceedings.

## 5) Misuse of Reunification Therapy

The use of reunification therapy in family law cases is controversial. An in depth look at the issue is beyond the scope of this *Learning Brief*. However, when the analysis starts by recognizing children as full rights bearers, several questions arise. Has the scientific validity of such therapies been subjected to rigorous scientific analysis, including whether it is actually effective and whether there is potential for serious harm to the child? Do courts have the authority to order reunification therapy at all? If they do, should such an intervention be ordered without the informed consent of the child? Should it be ordered in the absence of the participation of a child advocate who can call evidence and make submissions on behalf of the child? If it is ordered, can the order be appealed?

A child advocate is well placed to address these and other issues to ensure that children are in fact treated as full rights bearers.

*For more information, see:*

Jean Mercer, “Are Intensive Parental Alienation Treatments Effective and Safe for Children and Adolescents?” (2019) *Journal of Child Custody* 16(1).

## 6) Discriminatory Use of Police Enforcement Clauses for Orders

There are numerous examples of children in Canada being taken into police “custody”, against their will, sometimes at their home, but also at their school or otherwise in a public place, based on Court Orders which contain police enforcement clauses. Most often, the children had no input into the making of the order, or even knowledge of the order.

Children in these instances require a child advocate legal to argue, through submissions on behalf of the child and from a child rights perspective, that:

- Granting a police enforcement clause against a child is invasive, traumatic, draconian and an inappropriate way of enforcing an order made against a parent, and
- There are other suitable and less intrusive ways of ensuring that parents enforce orders.

If an order is made the child advocate can consider an appeal.

## F. Other Appellate Court Support for Legal Representation for Children from a Child Rights Perspective

The Supreme Court of Canada, in a family law case about the Hague Convention, *Office of the Children’s Lawyer v. Balev*,<sup>73</sup> dealt with an Ontario case where the Office of the Children’s Lawyer was appointed for the children during the original hearing, and that lawyer participated in the proceedings throughout the hearing. The Office of the Children’s Lawyer also reviewed the



original decision, recommended an appeal, launched the appeal, appeared, and made arguments on the children’s behalf at all stages of the appeal. These stages include seeking leave to appeal to, and arguing the appeal before, the Supreme Court of Canada. The Supreme Court accepted this extensive participation without comment. The Ontario Court of Appeal had also recognized that the Office of the Children’s Lawyer had become involved at the court’s request to help determine the children’s wishes and to represent their interests.

The New Brunswick Court of Appeal, in *S.H. v. Minister of Social Development and C.H.*,<sup>74</sup> considered the role of children’s counsel appointed under the province’s child welfare legislation. The children’s lawyer expressed a personal view about what is in the best interests of the children, instead of advocating for their views and preferences. Though the judgment in the hearing was not overturned, the Court considered various aspects of the counsel’s role in “child custody” hearings:

1. Children’s counsel should not offer a personal opinion on the very issue the court is tasked to decide. The best interests assessment is that of the application judges,<sup>75</sup> and
2. The role of counsel is to represent a child’s interests viewed from the child’s perspective, not to be confused with best interests advocacy.<sup>76</sup>

Counsel for the child has the right to receive disclosure, to examine and cross-examine witnesses, to fully participate in the proceedings and to make recommendations to the court.<sup>77</sup> In reaching its conclusions, the Court helpfully reviewed various legal representation policies and programs across Canada,<sup>78</sup> as well as a number of cases discussing the issue.<sup>79</sup>

The BC Court of Appeal, in *A.B. v. C.D.*,<sup>80</sup> supported the right to legal representation throughout contested court proceedings. In that case, a 14-year-old transgender boy (AB) brought a family claim under the *BC FLA*, applying for a Protection Order restraining his father from interfering in his treatment. He did so through his own lawyer, and that lawyer, and co-counsel appeared on his behalf throughout. The Court of Appeal upheld the hearing judge’s order, which declared that “pursuant to para. 201(2)(b), AB is permitted to bring this application under the [FLA] and to bring or defend any further or future proceedings concerning his gender identity”.<sup>81</sup> The Court of Appeal stated that they would leave with this paragraph: “as is, with the declaratory language removed. Allowing a child to conduct a proceeding without a litigation guardian is a straightforward order of the court and requires no declaration”.<sup>82</sup>

## G. Concluding Comments

We would never ask the question: “Should an adult have the right to independent legal representation in court proceedings, if they wish to do so?”. We would not ask because we consider it a fundamental aspect of our legal system that people have a right to access a lawyer without interference to advance and protect their rights. And we would feel particularly strongly about this ability to have independent legal representation in proceedings, which could have a profound and adverse impact upon the adult’s life.

Children are people, so they also have this basic right. Yet, there continues to be debates about children and their right to independent legal representation. The question often asked is “Should children have the right to independent legal representation in court proceedings?”. Discussions can focus on that issue. And in some cases, the more serious the issue(s) at stake (such as family violence and/or child resist-refuse cases, where the risks for children and their safety, security and well-being are particularly concerning), the more resistance there can be to independent legal representation for them.

In my respectful view the only question which empowers children, treats them as full rights bearers and ensures that they are safe, secure, and well, is: “How can we, throughout court proceedings, facilitate the independent legal representation to which children are entitled?”. Justice for children requires no less.

## H. Resources

Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 197.

The Honourable Donna Martinson & Margaret Jackson, “[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)”, *Family Violence & Family Law Brief* 5 (June 2021), Vancouver, BC: The FREDA Centre for Research on Violence Against Women & Children.

The Honourable Donna Martinson & the Honourable Rose Raven, “[Implementing Children’s Participation Rights in All Family Court Cases](#)”, *Family Violence & Family Law Brief* 9 (December 2021), Vancouver, BC: The FREDA Centre for Research on Violence Against Women & Children.

Lauren Irvine, the Honourable Donna Martinson, the Honourable Judge Rose Raven, Suzette Narbonne, & Margaret Jackson, [Webinar: Implementing Children’s Rights in All Family Court Cases](#), The FREDA Centre, a research project for the Public Health Agency of Canada with other Canadian research institutes (25 November 2021).

Jassamine Tabibi, Peter Jaffe, & Linda Baker, “[The Misuse of Parental Alienation in Family Court Proceedings with Allegation of Intimate Partner Violence – Part 1: Understanding the Issue](#)”, *Learning Network* 33 (2021), London, ON: Centre for Research and Education on Violence Against Women & Children.

Loretta Frederick, Peter Jaffe, Joan Meier, Simon LaPierre, & Linda C. Neilson, [Webinar: The Misuse of Alienation in Domestic Violence Cases in Family Court: Helping Court-Related Professionals to Sort through Conflicting Allegations](#), Centre for Research and Education on Violence Against Women & Children (23 March 2021).

Rise Women’s Legal Centre (Haley Hrymak & Kim Hawkins), [Section 211 Toolkit](#) [BC ‘Parenting assessment section] (March 2021).

Rise Women’s Legal Centre (Haley Hrymak & Kim Hawkins), [Why Can’t Everyone Just Get Along? How BC’s Family Law System Puts Survivors in Danger](#) (January 2021).

Nicholas Bala & Rachel Birnbaum, “Hearing the Voices of Children in Family Disputes”. In Pierre Noreau et al., eds. *Youth at the Crossroads of Family, Community, Law and Society* (Montreal, QC: Éditions Thémis, 2021), at 21-42.

Margaret Jackson, the Honourable Donna Martinson, Melissa Gregg, Chelsea Pang, & Sarah Yercich, [Implementing Children’s Participation Rights in Family Law and Child Welfare Court Proceedings](#) [Literature Review] (November 2020).

[Alternative Report to the UN Committee on the Rights of the Child](#) (Canadian Bar Association Child and Youth Law Section, February 2020).

Barbara Jo Fidler & Nicholas Bala, "Introduction to the 2020 Special Issue on Parent–Child Contact Problems: Concepts, Controversies & Conundrum" (2020) *Family Court Review* 58(2).

The Honourable Donna Martinson & Margaret Jackson, [Family Violence and Parenting Assessments: Law, Skills and Social Context](#), The FREDA Centre (2019).

Jean Mercer, “Are Intensive Parental Alienation Treatments Effective and Safe for Children and Adolescents?” (2019) *Journal of Child Custody* 16(1).

Caterina E. Tempesta, [Legal Representation as a Critical Aspect of the Child’s Right to be Heard](#), Master of Laws Thesis: Advanced Studies in International Children’s Rights Leiden University of Faculty of Law Netherlands (2018-2019).

The Honourable Donna Martinson & Caterina E. Tempesta, “Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation” (2018) *Canadian Journal of Family Law* 31(1).

Nicholas Bala & Rachel Birnbaum, “Rethinking the role of lawyers for children: Child Representation in Canadian Family Relationship Cases” (2018) *Les Cahiers de droit* 59(4).

Nicholas Bala, Rachel Birnbaum, & Carly Watt, “Addressing Controversies in Disputes Over Children” (2017) *Canadian Journal of Family Law* 30, at 71.

The Canadian Bar Association comprehensive, online Child Rights Toolkit:  
<https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit>

The Honourable Chief Justice Robert J. Bauman, [Why Access to Justice for Children Matters](#), CLE BC Access to Justice for Children: Child Rights in Action Conference (11 May 2017), at 2.

The Honourable Donna Martinson & Margaret Jackson, [Risk of Future Harm: Family Violence and Information Sharing Between Family and Criminal Courts](#), The FREDA Centre (2016).

Debra Lovinsky & Jessica Gagne, “Legal Representation of Children in Canada” (2015) *Ottawa ON: Family, Children & Youth Section, Department of Justice Canada*.

The Honourable Raynell Andreychuk & the Honourable Joan Fraser, *Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, Final Report of the Senate Standing Committee on Human Rights (April 2007).

Nicholas Bala, "Child Representation in Alberta: Role and Responsibilities of Counsel for the Child in Family Proceedings" (2006) *Alberta Law Review* 43(4), at 845.

Dale Hensley, "Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner's Perspective and a Response to Professor Bala" (2006) *Alberta Law Review* 43(4), at 870.

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## Endnotes

<sup>1</sup>The Honourable Donna Martinson, KC, LL.M., has worked throughout her career to address discriminatory laws and practices against women and children to ensure that visions of “equality for all” in our justice system include equality for women and children. She has made invaluable contributions as a lawyer working as a Crown Prosecutor and in private practice, as a law teacher in Alberta and British Columbia (BC), and as a judge with the BC Provincial Court and then the BC Supreme Court. She has continued advocating for equality and access to justice through her extensive post-judge volunteer work from July 2009 to the present: (1) as an Adjunct Professor at the School of Criminology at Simon Fraser University, through the FREDA Centre on Research on Violence Against Women and Children; (2) at the Peter A. Allard School of Law, University of British Columbia (UBC), through the Centre for Feminist Legal Studies; (3) as an Executive member of the national Canadian Bar Association Child and Youth Law Section, where she Chaired its *United Nations Convention on the Rights of the Child Committee*; (4) as founding Chair of the Canadian Bar Association, BC Branch, Children’s Law Section; (5) as a Board Member of Rise Women’s Legal Centre where she also teaches a seminar on independent legal representation for children to law students; and (6) as an organizer and speaker at several Judges’ Conferences for the Canadian National Judicial Institute, including co-chairing and speaking at the newly created Child Rights and Access to Justice for Children Seminar for Judges in 2022. In 2020 Pro Bono Students Canada, UBC Branch named its newly created awards The Honourable Donna J Martinson Access to Justice Awards.

<sup>2</sup> *Michel v. Graydon*, 2020 SCC 24, at para. 31.

<sup>3</sup> *Michel v. Graydon*, 2020 SCC 24, at para. 77.

<sup>4</sup> The Honourable Raynell Andreychuk & the Honourable Joan Fraser, *Children: The Silenced Citizens, Effective Implementation of Canada’s International Obligations with Respect to the Rights of Children*, Final Report of the Senate Standing Committee on Human Rights (2007).

<sup>5</sup> The Honourable Chief Justice Robert J. Bauman, *Why Access to Justice for Children Matters*, CLE BC Access to Justice for Children: Child Rights in Action Conference (11 May 2017).

<sup>6</sup> *General Comment No. 12 (2009)*, *The Right for the Child to be Heard*, at para. 132.

<sup>7</sup> *General Comment No. 5 (2003)*, *General Measures of Implementation of the Convention on the Rights of the Child*.

<sup>8</sup> The Honourable Chief Justice Robert J. Bauman, *Why Access to Justice for Children Matters*, CLE BC Access to Justice for Children: Child Rights in Action Conference (11 May 2017), at para. 4.

<sup>9</sup> *Canada (AG) v. Federation of Law Societies of Canada*, 2015 SCC 7, at para. 101.

<sup>10</sup> *Justice for Children and Youth v. G.(J.)*, 2020 ONSC 4716.

<sup>11</sup> *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, at paras. 46 & 53.

<sup>12</sup> *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, at para. 70.

<sup>13</sup> *S.K. v. D.G.*, 2022 ABQB 425.

<sup>14</sup> *S.K. v. D.G.*, 2022 ABQB 425, at para. 158.

<sup>15</sup> *S.K. v. D.G.*, 2022 ABQB 425, at para. 162.

<sup>16</sup> *S.K. v. D.G.*, 2022 ABQB 425, at para. 162.

<sup>17</sup> The Honourable Chief Justice Robert J. Bauman, *Why Access to Justice for Children Matters*, CLE BC Access to Justice for Children: Child Rights in Action Conference (11 May 2017), at 4.

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<sup>18</sup> The Honourable Raynell Andreychuk & the Honourable Joan Fraser, *Children: The Silenced Citizens, Effective Implementation of Canada's International Obligations with Respect to the Rights of Children*, Final Report of the Senate Standing Committee on Human Rights (2007), at 27.

<sup>19</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at paras. 85-99.

<sup>20</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 96.

<sup>21</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 93.

<sup>22</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at paras. 89-91.

<sup>23</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 92.

<sup>24</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at paras. 94-95.

<sup>25</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 97.

<sup>26</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 98.

<sup>27</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 99.

<sup>28</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 27.

<sup>29</sup> The Human Rights Council, "[Rights of the Child: Access to Justice for Children](#)" (25 March 2014) *United Nations Draft Resolution A/HRC/25/L.10*.

<sup>30</sup> The Human Rights Council, "[Access to Justice for Children](#)" (16 December 2013) *Report of the United Nations High Commissioner for Human Rights A/HRC/25/35*, at para. 40.

<sup>31</sup> The Human Rights Council, "[Access to Justice for Children](#)" (16 December 2013) *Report of the United Nations High Commissioner for Human Rights A/HRC/25/35*, at para. 43.

<sup>32</sup> *S.K. v. D.G.*, 2022 ABQB 425, at para. 159.

<sup>33</sup> *S.K. v. D.G.*, 2022 ABQB 425, at para. 304.

<sup>34</sup> *S.H. v. Minister of Social Development and C.H.*, 2021 NBCA 56, at paras. 41, 55, & 58.

<sup>35</sup> Note that with respect to the legal representation safeguard found in [General Comment 14](#), the BC Court of Appeal, in *J.E.S.D. v. Y.E.P.* 2018 BCCA 296, at paras. 40-42, noted, in comments not necessary to the decision and therefore not binding (obiter), that while the English version of the UN Committee's comments refers to legal representation, the French version refers to "un conseil juridique". This, the court said, "appears to indicate" that the level of representation contemplated is not a full right to counsel, but rather a right to have the benefit of legal advice.

I respectfully disagree and support Caterina Tempesta's analysis. She addresses this from a child rights perspective (*Legal Representation as a Critical Aspect of the Child Right to be Heard*, Master of Laws Thesis: Advanced Studies in International Children's rights Leiden University of Faculty of Law Netherlands (2018-2019), at 30-31). She states that when using a teleological approach to the interpretation of the *UN Convention*, it is difficult to imagine that the UN Committee intended children to have less than fulsome legal protection in judicial proceedings, where their best interests are being assessed and where there is a conflict with a parent. Such an interpretation, she adds, is also inconsistent with the due process guarantees afforded to all persons under other human rights standards.

She also states that those human rights standards include the fair trial and due process rights found in the *International Covenant on Civil and Political Rights*, which applies to children. Both the UN High Commissioner for Human Rights and the Human Rights Council support legal assistance, which includes representation in court, for children in all court proceedings, as being essential to those fair trial and due process rights. Those rights are captured in the safeguards and guarantees considered necessary by the UN Committee. The right to legal representation is considered to be implicit in Article 12 of the *UN Convention*. The underlying rationale is that, as the Supreme Court of Canada stated in *Michel v. Graydon*, child rights are meaningless without accessible means of enforcing them.:

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<sup>36</sup> Some argue that the child’s lawyer should be responsible for ensuring that all significant evidence relevant to the child’s best interests is before the court. Though a detailed discussion of this issue is beyond the scope of this Learning Brief, note that from a child rights perspective, expecting a child to have a lawyer-client relationship fundamentally different from that accorded to adults, and expecting child’s counsel to take on a role other than representing the child’s interests, is inconsistent with treating children as full rights bearers.

Others have legal responsibility to ensure that decisions are made in the child’s best interests and that respect all their human rights. Children’s rights and interests are at the core of the proceedings. Children’s vulnerability makes them most at risk of rights violations. Children must be able to trust their advocate, knowing they are solely and confidentially focused on them and the outcome most consistent with their goals as individual rights-bearers.

<sup>37</sup> The Honourable Donna Martinson & the Honourable Rose Raven, “[Implementing Children’s Participation Rights in All Family Court Cases](#)”, *Family Violence & Family Law Brief* 9 (December 2021), Vancouver, BC: *The FREDA Centre for Research on Violence Against Women & Children*, at 16-18.

<sup>38</sup> Dale Hensley, “[Role and Responsibilities of Counsel for the Child in Alberta: A Practitioner’s Perspective and a Response to Professor Bala](#)” (2006) *Alberta Law Review* 43(4), at 901.

<sup>39</sup> *S.K. v. D.G.*, 2022 ABQB 425, at paras. 171 & 175.

<sup>40</sup> *S.K. v. D.G.*, 2022 ABQB 425.

<sup>41</sup> *Ontario (Children’s Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559.

<sup>42</sup> *S.H. v. Minister of Social Development and C.H.*, 2021 NBCA 56, at para. 55.

<sup>43</sup> *M. v. F.*, 2022 ONSC 505, at 16.

<sup>44</sup> *B.J.G. v. D.L.G.*, 2010 YKSC 44, at para. 47. Note that the author of this *Learning Brief* was the judge in this case.

<sup>45</sup> *S.T.C. v. D.J.B.*, 2021 BCSC 1987, at paras. 24-26.

<sup>46</sup> *D.R. v. K.A.*, 2022 BCSC 1257, at paras. 39 & 40.

<sup>47</sup> *D.C. v. T.N.*, 2023 BCPC 26, at paras. 107 & 108.

<sup>48</sup> Nicholas Bala & Rachel Birnbaum, “[Rethinking the role of lawyers for children: Child Representation in Canadian Family Relationship Cases](#)” (2018) *Les Cahiers de droit* 59(4), at 794.

<sup>49</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at 96.

<sup>50</sup> *M. v. F.*, 2022 ONSC 505, at para. 15.

<sup>51</sup> The Honourable Donna Martinson & Caterina E. Tempesta, “[Young People as Humans in Family Court Processes: A Child Rights Approach to Legal Representation](#)” (2018) *Canadian Journal of Family Law* 31(1), at 167-168.

<sup>52</sup> *S.K. v. D.G.*, 2022 ABQB 425, at paras. 349 & 350.

<sup>53</sup> *M. v. F.*, 2022 ONSC 505.

<sup>54</sup> *J.E.S.D. v. Y.E.P.*, 2018 BCCA 286, para. 55.

<sup>55</sup> *A.B. v. C.D.*, 2020 BCCA 11.

<sup>56</sup> *Michel v. Graydon*, 2020 SCC 24.

<sup>57</sup> *Michel v. Graydon*, 2020 SCC 24, at para. 31.

<sup>58</sup> [General Comment No. 14 \(2013\)](#), *Convention on the Rights of the Child*, at para. 63.

<sup>59</sup> *B.J.G. v. D.L.G.*, 2010 YKSC 44, at para. 13.

<sup>60</sup> *N.J.K. v. R.W.F.*, 2011 BCSC 1666.

<sup>61</sup> *Medjuck v. Medjuck*, 2019 ONSC 3254, at para 31.

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<sup>62</sup> *M. v. F.*, 2022 ONSC 505.

<sup>63</sup> *S.K. v. D.G.*, 2022 ABQB 425, at para. 179, referring to the Honourable Donna Martinson & Margaret Jackson, “[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)”, *Family Violence & Family Law Brief 5* (June 2021), Vancouver, BC: The FREDa Centre for Research on Violence Against Women & Children.

<sup>64</sup> *S.K. v. D.G.*, 2022 ABQB 425, at 178, referring to Caterina E. Tempesta, “Legal Representation as a Necessary Element of Children’s Access to and Participation in Family Justice”. In M. Paré et al., eds. *Children’s Access to Justice: A Critical Assessment* (Cambridge, UK: Intersentia, 2022), at 204.

<sup>65</sup> *F.(M.) v. L.(J.)*, 2002 CanLII 63106.

<sup>66</sup> *Michel v. Graydon*, 2020 SCC 24.

<sup>67</sup> *Michel v. Graydon*, 2020 SCC 24, concurring judgment at para. 103.

<sup>68</sup> *Michel v. Graydon*, 2020 SCC 24, concurring judgment at para. 103.

<sup>69</sup> *Michel v. Graydon*, 2020 SCC 24, concurring judgment at para. 97.

<sup>70</sup> *Michel v. Graydon*, 2020 SCC 24, concurring judgment at para. 88.

<sup>71</sup> The Honourable Donna Martinson & Margaret Jackson, “[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)”, *Family Violence & Family Law Brief 5* (June 2021), Vancouver, BC: The FREDa Centre for Research on Violence Against Women & Children, at 6-16.

<sup>72</sup> The Honourable Donna Martinson & Margaret Jackson, “[The 2021 Divorce Act: Using Statutory Interpretation Principles to Support Substantive Equality for Women and Children in Family Violence Cases](#)”, *Family Violence & Family Law Brief 5* (June 2021), Vancouver, BC: The FREDa Centre for Research on Violence Against Women & Children, at 8.

<sup>73</sup> *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16.

<sup>74</sup> *S.H. v. Minister of Social Development and C.H.*, 2021 NBCA 56.

<sup>75</sup> *S.H. v. Minister of Social Development and C.H.*, 2021 NBCA 56, at paras. 54 & 58.

<sup>76</sup> *S.H. v. Minister of Social Development and C.H.*, 2021 NBCA 56, at paras. 51, 55, & 58.

<sup>77</sup> *S.H. v. Minister of Social Development and C.H.*, 2021 NBCA 56, at para. 55.

<sup>78</sup> *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, at paras. 39-42.

<sup>79</sup> *Office of the Children’s Lawyer v. Balev*, 2018 SCC 16, at paras. 44-53.

<sup>80</sup> *A.B. v. C.D.*, 2020 BCCA 11.

<sup>81</sup> *A.B. v. C.D.*, 2020 BCCA 11, at para. 38.

<sup>82</sup> *A.B. v. C.D.*, 2020 BCCA 11, at para. 144



To learn more about the Supporting the Health and Well-Being of Survivors of Family Violence in Family Law Proceedings project, go to: [alliancevaw.ca](http://alliancevaw.ca) or our partnered research centres:

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