Family Law

Chapter Two

CHILDREN'S WISHES

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CHILDREN'S WISHES

1. INTRODUCTION

(a) Focus of Paper

The focus of this paper is the subject of "Children's Wishes" with particular emphasis upon child protection proceedings.

(b) Historical Background

Traditionally the Courts have adopted a paternalistic attitude towards children. At common-law, a child was powerless in the Courts. There was no enforceable right to support and, in custody matters, a child's rights were secondary to those of his parents.

Within the adversarial system, children have traditionally had little or no voice. Countless legal arrangements have been entered into by consent or adjudicated upon without input directly from the child. Parents have become embroiled in custodial disputes with the child as the subject of competing claims by parents, relatives and others.

Maintenance awards for children have been entered into by consent or after a hearing without any input from the child who is to be the beneficiary of the award.

In protection proceedings, children have been removed from the home and away from emotional attachments with their parents and other siblings and placed in foster homes, adoption homes and other environments without reference to their wishes.

With legal developments mandating the best interests of the child as the guiding principle both with respect to custody proceedings and protection proceedings, issues have

been raised surrounding the circumstances in which the wishes of the children who are the subject of the proceeding can be put before the Court.

(c) Welfare of the Child vs. Wishes of the Child

In all cases the welfare of the child must be separated from the wishes of the child. The exercise in custody proceedings is for the Court to determine what alternative most favours the best interests of the child[1]. The best interests of the child test has also been legislated as the overriding consideration in protection proceedings[2].

2. Rights of Children who are the Subject of Protection Proceedings

(a) Definition of "Child"

A child is defined in the Children and Family Services Act (which I will refer to as the "Act") as a person under the age of sixteen (16) years. The Act will continue to apply to a child if agency intervention takes place prior to the child's sixteenth (16th) birthday, should the child reach age sixteen (16) before final disposition.

(b) Preamble

The preamble to the Act refers to certain rights of children. Although preambles have no binding effect, it is submitted that this is a significant development in the area of children's rights.

Preamble 4 states as follows:

> "And whereas children have basic rights and fundamental freedoms no less than those of adults and a

> right to special safeguards and assistance in the preservation of those rights and freedoms".

Preamble 5 states as follows:

> "And whereas children are entitled, to the extent they are capable of understanding, to be informed of their rights and freedoms, to be heard in the course of and to participate in the processes that lead to decisions that affect them".

Significantly, Section 15 of the Canadian Charter of Rights and Freedoms declares that everyone has the right to equal protection under the law without discrimination on the basis of age.

(c) Best Interests of Children

Section 2(2) of the Act stipulates that the best interests of the child shall be the paramount consideration.

Section 3(2) of the Act directs any person making an order or determination pursuant to the Act to consider a number of factors when considering the best interests of children. Since this Section is directed to any "person", these are factors which must be considered not only by the court, but also by the agency making determinations or decisions on behalf of the child.

Section 3(2)(j) specifically sets out one of the factors to be considered in the best interests test as the child's "views and wishes, if they can be reasonably ascertained".

(d) Rights as a Party to the Proceeding

The Act defines who is a party to the proceeding[3]. If the child is over sixteen (16) years of age, then he is a

party to the proceeding unless the Court otherwise orders. If the child is between twelve (12) and sixteen (16), then the Court may order that a child is a party to the proceeding.

What is not immediately clear from a reading of the statute is what rights follow from party status, although it is clear that a party must be given full disclosure of the agency's case[4].

The Ontario Statute[5] establishes that a child over twelve (12) years of age is entitled to receive notice of the proceeding and to be present at the hearing unless being present would cause emotional harm to the child and, further, that a child under twelve (12) years of age is not entitled to receive notice of the hearing or be present at the hearing unless the Court is satisfied that the child is capable of understanding the hearing and will not suffer emotional harm by being present. If counsel is appointed for the child in Ontario, then it would appear that they are entitled to full participation[6].

His Honour Judge A.P. Nasmith in his articile "The Inchoate Voice[7]" states at Page 51 as follows:

> "In my opinion, the most convincing explanation for the movement towards children of any age having legal representation is that children are being recognized as persons involved in litigation that is vital to them, and in which they have a right to be heard".

Certainly the child's right to be heard and to have full participation in the proceeding must be balanced against the protection of that child from possible harm, if the child is present at the proceeding. Under the Nova Scotia legislation, if an agency must make full disclosure to a party, then once a child becomes a party to a proceeding,

it would follow that they should be present at the hearing and have full participation. It would seem that any considerations with respect to potential harm to the child from disclosure of information should be raised at the time application is made to have the child become a party to the proceeding.

(e) Right to Legal Counsel

A child is also allowed legal representation upon request[8]. Where a child is between age twelve (12) and fifteen (15), and if the child so requests, a Court may order representation by counsel[9].

Normally the status of a child as a party in the proceeding and whether they wish to be represented by counsel will be dealt with at the time of the interim hearing[10].

Counsel for children will be paid in accordance with the Regulations. Section 46 of the Regulations provides for reimbursement in accordance with the Nova Scotia Legal Aid Tariff of Fees.

If a child reaches age twelve (12) during the course of a proceeding, then that child should be provided with notice of any subsequent proceedings and at the first opportunity should be informed of his right to legal counsel and his right to request party status. Between the ages of twelve (12) and sixteen (16) the Court retains discretion whether to appoint counsel for the child or not. Normally that discretion will only be exercised in favour of appointing counsel where it is necessary to protect the interests of the child, for example if the child will be taking a position that differs from that of the agency or the parents or if for some other reason the child is deemed to require separate legal representation.

There seems to be a growing tendency to respect the child's right to independent representation in protection

proceedings and to encourage broader input by children through legal counsel.

3. Representation on Behalf of Children

(a) Legal Counsel

The Strobridge case[11] sets out a detailed review of the role of counsel for the child in Ontario. The experience in Nova Scotia has been somewhat different, most notably because of the role that the Office of the Official Guardian has played in Ontario, however, there are some important comparisons which must be drawn.

The first consideration of counsel for the child must be whether the child has the capacity to provide instructions. If at some point in the proceeding the lawyer is uncertain as to the child's capacity to provide instructions, then the lawyer must advise the Court of the lack of capacity.

Again, this issue can be dealt with at the interim hearing but this is not always necessarily the case as the lack of capacity may only become apparent at a later stage in the proceedings or, indeed, may only become an issue if it is clear that there is going to be a contest between the child's wishes and the agency plan or the position that the parents are going to be taking with respect to a finding or disposition.

A great deal of debate has taken place over the issue of whether counsel for the child must put forward the wishes of the child as the child's advocate, similar to any other solicitor/client relationship that the lawyer has, or whether the lawyer is permitted to take a position that may be contrary to the stated intentions of the child, if the lawyer feels that such a contrary position is in the best interest of the child.

This issue was recently dealt with by the Ontario Court of Justice in the case of Official Guardian vs. M. (S)[12]. In that case the issue was whether counsel for the child was permitted to continue to act for that child as a lawyer in the traditional sense where the child was too young to instruct counsel. It is important to note that the case was decided under the Ontario legislation, however, in the annotation to the case, Professor James G. McLeod suggests that the comments made would appear to apply equally to representation of children in custody and access cases.

The Court held that the lower Court did not err by allowing the child's counsel to make representations on behalf of the child at the hearing without having received instructions from the child and without a legal guardian having been appointed for the child.

The debate continues concerning the role of child's counsel. More judicial clarification and definition is needed. The traditional view was articulated by Abella, J. in the case of Re W.[13] where she stated as follows:

> "I am persuaded that essentially the role of the lawyer for the child is no different from the role of the lawyer for any other party. He or she is there to represent a client by protecting the client's interests and carrying out the client's instructions..."

And further, Abella J. stated:

> "In the case of a child who is capable of coherent expression, the lawyer's role in representing the child's wishes does not preclude the lawyer from exploring with the child the merits or realities of the case, evaluating the practicalities of the

> child's position and even offering, where appropriate, suggestions about possible reasonable resolutions to the case. Offering advice is part of the lawyer's obligation to protect the child's interests."

Certainly a lawyer would have great difficulty balancing ethical considerations in a situation where the lawyer receives instructions but decides that those instructions run contrary to the best interests of the child.

The handbook on Legal Ethics and Professional Conduct contains rules for conduct of lawyers. A lawyer must at all times respect confidentiality between himself and his client (Chapter 5). Also, a lawyer must provide a high quality of service (Chapter 3), as well as honesty and candor when advising clients (Chapter 4). A lawyer has a duty to avoid conflict of interest (Chapter 6) and must represent the client as an advocate (Chapter 10). Lawyers would be well advised to consult their handbooks before venturing into unchartered waters under a notion that they are best able to determine what might be in the best interests of their child client.

That is not to say that a lawyer should not critically examine the evidence being presented and, as a result of his own investigations, evaluations, and understanding of the law, critically advise the child client as to their legal position and put forward recommendations as to what course of action should be taken. As always, the final decision should rest with the client so long as they are able to instruct counsel properly.

His Honour Judge Timothy T. Daley in a recent article[14] poses the dilemma for the lawyer. I refer to Paragraph 224 as follows:

> "The Anglo-Canadian tradition has generally insisted that the lawyer

> represent the interests of his client exclusively, whether or not he believes in the position put forward by the client, provided he does not mislead the Court. But Re C. and Re W. put forward a different position taking into account the nature of the wardship hearing. Where the child is competent to express his or her wishes, the lawyer is obligated to put those wishes and views before the Court. If the child cannot give express instructions but has views and preferences, counsel is required to put these before the Court. The problem comes when the lawyer feels the instructions, preferences or views of the child are not in the best interests of the child. Under this circumstance, counsel would express not only the wishes of the child but counsel's personal views as well."

(b) Amicus Curiae

The amicus curiae is a person who is appointed as a representative of the Court with respect to a particular issue. Courts have appointed persons, usually lawyers, as amicus curiae in cases where the Court requires the services of an independent person including representation for a child.

The role of amicus curiae differs from that of the lawyer as the amicus curiae is appointed by the Court and on

behalf of the Court to put forward evidence with respect to a particular issue to be determined, i.e. what result would be in accordance with the best interests of the child.

The amicus curiae is rarely used in this Province although there is no reason why the Court in its exercise of parens patriae jurisdiction could not appoint amicus curiae in custody and access dispute cases, child maintenance cases and other areas where an independent, impartial voice is needed.

Judy N. Boyes and Peggy Walden in a recent article[15] examine the use of the amicus curiae in custody litigation in Alberta. They conclude as follows:

> "The main disadvantages of the amicus system are delay and cost. It can take several months for the investigation to be completed and if further psycological assessments are required, the delay can be doubled. As suggested above, one party could seek to secure the appointment of an amicus in order to create such delay and maintain a favourable status quo. However, the delay may be of benefit in that it supplies some "cooling off time" and allows the parties to clear their minds.
>
> The cost of funding the Office of the Amicus Curiae may, unfortunately, have led to its demise. In cases where a Government amicus has been appointed, there is no cost to the parties in the dispute. This has resulted in a substantial cost to the Alberta Government. It is argued that this

> cost is paid by all Albertans through taxes and that this should not continue. Opponents of the Office of the amicus argue that parties in custody disputes should be required to pay their own legal costs, even for an amicus, as parties in other private disputes are forced to bear their own legal costs for the appointment of any expert.
>
> For the past twenty four (24) years the amicus curiae and the Office of the amicus have provided invaluable services to the Courts and children in Alberta. Counsel and Judges alike have commended the amicus for a job well done. The recent proposal to "replace" the function of the amicus curiae with mediation projects will deny children the important mechanism of representation in the Courts. Any apparent cost savings will be lost in the increased costs of trials where no amicus' report is available to assist in arriving at a settlement in a bitterly contested custody dispute. The loss of the ability to appoint an amicus in the majority of cases where the parties cannot afford to appoint a private one cannot be in the best interests of the children of Alberta."

The right of the Court through its parens patriae

jurisdiction to appoint independent counsel for the child was confirmed by the Supreme Court of Canada in Beson vs. Director of Child Welfare (Newfoundland)[16]. The amicus has full authority to conduct his own investigation, employ experts as needed, call evidence and make specific recommendations. The amicus is not bound to ascertain the wishes of the child, except insofar as they may relate to the child's best interest.

(c) Guardian

The Court may, on its own motion, or on the motion of any party, order the appointment of a guardian ad litem for a child who is the subject of a protection proceeding[17]. Payment of the fees of guardians is provided for in the Act[18]. Procedures pertaining to the appointment of guardians are set out in Family Court Rule 5.06.

Normally a guardian ad litem will be appointed in the discretion of the Court in cases where the child is under twelve (12) or if over the age of twelve (12), is unable to instruct counsel or the Court deems it unnecessary that the child have separate legal representation. If a child is made a party to the proceeding, then the presumption follows that the child is able to instruct counsel.

The role of the guardian is to ascertain the best interests of the child and to bring forward all evidence including independent assessments which would support that disposition which would appear to favour the best interests of the child.

The recent case of Ramsay vs. Family and Children Services of Kings County[19], a decision of the Nova Scotia Court of Appeal, held, inter alia, that a guardian ad litem involved in protection proceedings may, if so qualified, give expert evidence with respect to the child's best interests.

4. Placing the Child's Wishes Before the Court:

There are many ways in which a child's wishes can be placed before the Court. Listed below are some of the ways in which this can be accomplished. The list is not intended to be exhaustive. I am indebted to His Honour Judge R.J. Williams of the Dartmouth Family Court for providing me with a copy of his paper entitled "Wishes and Evidence of Children: a Discussion" from which I have borrowed liberally.

(a) Testimony of Child

The Supreme Court of Canada in the recent decision of R. vs. Khan[20] has made it unnecessary in many cases of abuse against children to have a child testify as to his or her wishes, however, depending upon the age and maturity of the child and the strength of those wishes, this option is still available. The Court can still provide safeguards in terms of excluding others from the courtroom when the child testifies, including parents. Reference should be made to the relevant provisions of the Canada Evidence Act[21].

(b) Bill C-15[22]

Recent amendments have been made to the Criminal Code of Canada and the Canada Evidence Act which provide for testimony of child witnesses by use of a screen or in areas other than a courtroom or by closed circuit television or video tape. Also, the requirement of corroboration has been eliminated and children are permitted to give unsworn testimony. These provisions do not yet apply to proceedings under provincial legislation, however, it will make little difference in light of the Khan decision.

(c) Section 39(11) of the Act

Section 39(11) of the Act allows the introduction of "credible and trustworthy" evidence on an interim hearing. This Section permits the introduction of evidence which might otherwise be considered hearsay so long as it meets the two fold test of being credible and trustworthy.

(d) Section 96(1) of the Act

Section 96(1) of the Act permits the introduction of a record of proceedings from any proceeding pursuant to the Children and Family Services Act or any other legislation respecting the child who is the subject of the proceeding or any other child in the care and custody of the parents. This provision is generally used by an agency to permit introduction of a transcript of prior proceedings concerning the same child or proceedings concerning other children in the same family. Reference should also be made to Family Court Rule 21.11(1) as well.

(e) Expert Evidence or Assessment

The most common way of introducing a child's evidence is by way of a social worker or assessor who is retained by the Court or the parties. In protection proceedings this kind of evidence is also introduced through the case-worker.

Needless to say, the complexities of separating the wishes of the child from the best interests of the child will be given more weight by the Court if the assessor has the opportunity to examine all of the evidence and circumstances.

The wishes of the child will be one factor to be considered in preparing an assessment, however, the entire family dynamic must be given close scrutiny by the assessor.

The Foote case[23] ruled as admissible the unsworn and uncorroborated statements of a child with respect to allegations of sexual abuse. The British Columbia Court of Appeal held in that case that the Court in the exercise of its parens patriae jurisdiction could admit the hearsay evidence of a child through another witness.

Expert testimony can be used for the purpose of providing opinion evidence with respect to issues before the Court. Presumably, this would include the evidence of a social worker or an independent assessor who has been retained to determine the wishes of a child.

(f) Interview of Child by Judge

There is considerable debate with respect to the issue of whether the Court should interview children and, if so, the circumstances in which that interview should take place, particularly in custody and access cases. This issue will be covered in the discussion paper which is being prepared by Her Honour Judge Deborah Gass for this conference.

(g) Use of Other Evidence

It is possible to call other witnesses with respect to the state of mind of a child witness[24].

5. Conclusion:

The Courts have reserved a parens patriae jurisdiction to make decisions in the best interests of children. When evaluating the best interests of children, one of the factors that must be considered is the wishes and preferences of the children.

Within the adversarial system, special rules have existed historically requiring corroboration of child testimony and

placing other limits on the admissibility and credibility of such evidence. Until recently statements made by children to a third party were considered hearsay.

Children within the legal system have had very few rights independent of those of their parents. For better or worse, times are changing. The Courts and legislatures are giving children a greater presumption of competence.

We, both as professionals who may deal with children from time to time in our practice, and as parents, must be responsive to the changes that are taking place. We must ensure that children clearly understand our roles as adults within the Court system.

Children can be empowered to become more full participants in our legal system. It would seem preferable to change the system to adapt to the special needs of children rather than to exclude them from the process. A child should not be helpless and vulnerable within a legal system which is vested with the authority (and responsibility) of making decisions in that child's best interests.

Patrick L. Casey

FOOTNOTES

1. King vs. Mr. and Mrs. B. (1985) 1 S.C.R. 87(sub. nom. King v Low) (S.C.C.).
2. Children and Family Services Act, S.N.S. 1990, c.5, Section 2(2) and Section 42(1).
3. Children and Family Services Act, S.N.S. 1990, c.5, Section 36(1).
4. Children and Family Services Act, S.N.S. 1990, c.5, Section 38(1).
5. Child and Family Services Act, S.O. 1984, Section 39.
6. Child and Family Services Act, S.O. 1984, Section 64(4) and Section 39(6).
7. 8 C.F.L.Q. 43.
8. Children and Family Services Act, S.N.S. 1990, c.5, Section 37(1).
9. Children and Family Services Act, S.N.S. 1990, c.5, Section 37(2).
10. See Family Court Rules, Rule 21.08.
11. Strobridge vs. Strobridge (1992) 42 R.F.L. 3(d) 154.
12. Official Guardian vs. M.(S.) (1991) 35 R.F.L. (3d) 297.
13. Re W. (1979) 13 R.F.L. (2d) 381.
14. In Whose Best Interest? The Child Welfare Agent Before the Court 8 C.F.L.Q. 215.
15. The Life and Death of the Amicus Curiae in Custody Litigation in Alberta 8 C.F.L.Q. 81.
16. (1982) 2 S.C.R. 716.
17. Children and Family Services Act, S.N.S. 1990, c.5, Section 37(3).
18. Children and Family Services Act, S.N.S. 1990, c.5, Section 37(4).
19. Unreported S.C.A. No. 02735.
20. (1990) 59 C.C.C. 3(d) 92.
21. Canada Evidence Act, R.S.C. 1985, c.C-5, as amended.

FOOTNOTES CONT'D

22. S.C. 1987, c.24 (R.S.C. 1985 (3rd supp.), c.19).
23. (1988) W.D.F.L. 799(CA).
24. Re Harris et al (1976) 28 R.F.L. 181 (Ontario P.C.).