

# The Rights of Children and Youth in Family Law Matters

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Neither the *Divorce Act* nor the *Family Law Act* talk about parenting after separation in terms of the rights of *parents, guardians* or *spouses*. While adults who fit into these categories are entitled to ask for orders about decision-making and parenting time, if they can't reach an agreement about those things on their own, decisions about parenting after separation must be made taking into account only the best interests of the children, including the children's views and preferences.

In a family law dispute about parenting after separation, the people who hold the rights are the children. It's *children* who have the right to be raised and cared for in the best possible way, and it's children who have the right to the best possible arrangements for their parenting after their parents separate.

## Introduction

The rights children and youth have in family law disputes can be boiled down into two categories: the *human rights* children and youth have, under Canada's human rights laws and the United Nations Convention on the Rights of the Child <sup>[1]</sup>; and, the *legal rights* children and youth have as people who are impacted by their parents' dispute, under the federal *Divorce Act* and the provincial *Family Law Act*. Of course, it's important to remember that in British Columbia a "child" is someone who is younger than 19, the age of majority in this province under the aptly-named *Age of Majority Act* <sup>[2]</sup>. As a result, someone who is a *child* can also be a parent, a guardian or a spouse. The rights of youth who are parents, guardians or spouses are the same rights that adults have who are parents, guardians or spouses.

The human and legal rights of children and youth are just as important as the human and legal rights of adults, perhaps even more important because of the vulnerability resulting from their age. However, it's really important that adults remember that the human and legal rights of children exist for the benefit of children. I have too often seen parents running the "rights" of their children up the flagpole in their family law dispute, trying to use their children's rights to benefit their own position in court or before an arbitrator. This happens most frequently when parents are engaged in an extraordinary degree of conflict with each other.

It is important to recognize and honour children's human and legal rights. It's also important to make sure that parents don't use children's rights just as a way of getting what they want in their legal dispute.

In this section, we'll talk about the human and legal rights of children and youth, and how those rights relate to family law disputes between their parents.

## The UN Convention on the Rights of the Child

Children's basic human rights are described in the United Nations Convention on the Rights of the Child <sup>[3]</sup>. This international agreement was passed by the United Nations General Assembly — the parliament of the United Nations — in 1989 and was signed by Canada in 1991. The convention has the force of law in Canada, and Canadian laws must be interpreted and applied in a way that fits with the rules and requirements of the convention.

The convention describes the basic human rights that all children have, the same way that human rights are described in British Columbia's *Human Rights Code* <sup>[4]</sup> and in the federal *Canadian Human Rights Act* <sup>[5]</sup>. In addition to the rights that adults have, the convention says that children also have the right to:

- be free from physical and mental violence, abuse and mistreatment,
  - be protected from exploitation,
  - know and be cared for by their parents,
  - access information and receive an education,
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- an adequate standard of living, and
- health care and adequate nutrition.

Article 3 of the convention talks about making decisions according to the best interests of children:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Perhaps most importantly, at least from a family law perspective, article 12 talks about children's right to express their views and preferences to those who are making decisions about their care:

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

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

This rule applies to criminal, civil and other court cases, including family law cases, adoption cases, child protection cases and cases about wills and estates. In a 2010 decision of the Yukon Supreme Court, *B.J.G. v. D.L.G.* <sup>[6]</sup>, the court talked about how the convention applies in family law cases, and said that:

"There is no ambiguity in the language used. The Convention is very clear: all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation"

That's a pretty strong statement. The judge continued and said that, under the convention, children have the right to:

- be informed, at the beginning of the process, of their legal right to be heard,
- be given the opportunity to fully participate early and throughout the process, including being involved in judicial case conferences, settlement conferences, and court hearings or trials,
- have a say in the manner in which they participate in the process, so that they participate in a way that works effectively for them,
- have their views considered in a substantive way, and
- be told about both the result reached and the way in which their views have been taken into account.

However, the number of times these things don't happen is much, much greater than the number of times they do.

## **The Divorce Act**

The federal *Divorce Act* talks about parenting after separation in terms of *decision-making responsibility* and *parenting time*. If you look carefully at how the act defines these two terms, you can see that these aren't about the rights of parents but the rights of children and youth to be raised well. Section 2(1) of the act defines "decision-making responsibility" as "the *responsibility* for making significant decisions about a child's well-being." It defines "parenting time" as the time that a *child* spends in the care of a spouse, not the time that a *spouse* spends with their child.

### **Hearing the views of children**

When the court makes decisions about decision-making responsibility and parenting time, section 16 of the *Divorce Act* says that "the court shall take into consideration only the best interests of the child," and "give primary consideration to the child's physical, emotional and psychological safety, security and well-being." Section 16(3) says that "in determining the best interests of the child, the court shall consider all factors related to the circumstances of the child," and then provides a list of eleven specific factors that the court must consider; another eight factors are listed in section 16(4) that need to be considered when family violence is an issue. The section 16(3) factors include:

- (e) the child's views and preferences, giving due weight to the child's age and maturity, unless they cannot be ascertained

As you can see, this factor supports the obligation under article 12 of the United Nations Convention on the Rights of the Child to give children and youth "the opportunity to be heard" in legal disputes affecting their interests.

It also creates something that lawyers call a "rebuttable presumption." A *rebuttable presumption* means that something is presumed to happen unless someone can show why that thing shouldn't happen. The presumption, in this case, is that a child's views will be taken into account when deciding what is in their best interests. Someone who doesn't want the child's views to be taken into account can *rebut* the presumption by proving that the child's views "cannot be ascertained." But without that rebuttal, the law *requires* children's views to be heard and considered when making decisions about their best interests. Children have the right to be heard in disputes between their parents about decision-making responsibility and parenting time.

### **Making decisions that are in children's best interests**

The other best-interests factors in section 16(3) that have to be considered when the court makes decisions about children are these:

- (a) the child's needs, given the child's age and stage of development, such as the child's need for stability;
- (b) the nature and strength of the child's relationship with each spouse, each of the child's siblings and grandparents and any other person who plays an important role in the child's life;
- (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse;
- (d) the history of care of the child;
- (f) the child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage;
- (g) any plans for the child's care;

(h) the ability and willingness of each person in respect of whom the order would apply to care for and meet the needs of the child;

(i) the ability and willingness of each person in respect of whom the order would apply to communicate and cooperate, in particular with one another, on matters affecting the child;

(j) any family violence and its impact on, among other things,

(i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and

(ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child; and

(k) any civil or criminal proceeding, order, condition, or measure that is relevant to the safety, security and well-being of the child.

When family violence is an issue, the court must also consider additional factors, listed in section 16(4), to assess the impact of family violence on the best interests of the child under section 16(3)(j). Section 16(7) provides one final factor to consider, in all cases when the court makes decisions about children, and says that:

In allocating parenting time, the court shall give effect to the principle that a child should have as much time with each spouse as is consistent with the best interests of the child.

Children have the right to be raised as well as possible, while their parents are together and after they separate. Parenting apart can be challenging, but the fact that a child's parents have separated doesn't deprive the child of their right to good parenting. The best-interests factors described in the *Divorce Act* are more than a simple shopping list. If you think about them, each factor is vitally important to the quality of life and the quality of care of children whose parents are living apart. They're not a shopping list, they're a guide to parenting after separation.

Remember that it's the children who have the right to be raised and cared for in the best possible way, and it's the children who have the right to the best possible arrangements for their parenting.

## ***The Family Law Act***

The provincial *Family Law Act* takes the same child-centred approach as the *Divorce Act*, using the terms *parental responsibilities* and *parenting time*. Like the *Divorce Act*, the *Family Law Act* also says, at section 37(1), that when making decisions about parenting after separation, "the parties and the court must consider the best interests of the child only." The *Family Law Act* provides a list of specific factors to consider at section 37(2). The factors that must be considered when family violence is an issue are listed in section 38.

It's important to know that the duty to make decisions that are in the best interests of children falls on both judges and parents under section 37 of the *Family Law Act*. (Section 19.10(6) imposes the same duty on arbitrators.) Parents have this duty whether they're resolving their disagreements in court or trying to negotiate a resolution out of court.

## Hearing the views of children

The section 37(3) best-interests factors include:

- (b) the child's views, unless it would be inappropriate to consider them

Like the *Divorce Act*, this provision also supports the obligation to hear from children and youth under the Convention on the Rights of the Child. Like the *Divorce Act*, it also creates a rebuttable presumption that the children's views will be heard. Someone who doesn't want the child's views to be taken into account can *rebut* the presumption by showing that it would be "inappropriate to consider" the child's views. Otherwise, the law *requires* children's views to be heard and considered when making decisions about their best interests.

## Making decisions that are in children's best interests

The other factors listed in section 37(2) are these:

- (a) the child's health and emotional well-being;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

Section 37(3) also says that:

An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

Like the *Divorce Act*, the *Family Law Act* provides a few additional factors that judges — just judges — must consider to help them assess the impact of family violence under section 37(2)(g) and (h). These factors are listed in section 38.

Again, remember that children have the right to be raised as well as possible, while their parents are together and after they separate. Each of the best-interests factors listed in the *Family Law Act* is vitally important to the quality of

life and the quality of care of children whose parents are living apart. They're an excellent guide to parenting after separation.

Remember that it's the children who have the right to be raised and cared for in the best possible way, and it's the children who have the right to the best possible arrangements for their parenting.

### **Children's involvement in court proceedings**

The *Family Law Act* says a few more things about children and youth and their involvement in court proceedings, because the provincial governments control court processes in their province and the *Family Law Act* is a provincial law. The *Divorce Act* doesn't say anything about how or if children should participate in court proceedings beyond the requirement in section 16(3)(e) that their views and preferences be heard in court proceedings.

First, section 201(1) of the *Family Law Act* says that a young person can start or defend a family law case, without needing the help of an adult, if they are:

- 16 years of age or older,
- a spouse, which means that they are married or have lived with someone else in a "marriage-like relationship" for at least two years, or for a lesser amount of time if they've had a child with that person, or
- a parent.

Second, section 202 of the *Family Law Act* allows the court to decide how information from a child should be received when it has to decide what is in the best interests of that child:

In a proceeding under this Act, a court, having regard to the best interests of a child, may do one or both of the following:

- (a) admit hearsay evidence it considers reliable of a child who is absent;
- (b) give any other direction that it considers appropriate concerning the receipt of a child's evidence.

This section allows the court to consider evidence from other people about what a child has said to them, speak to the child themselves, ask that a mental health professional or a lawyer prepare a non-evaluative views of the child report, or even make special arrangements about how the child could come to court to give evidence. In cases where family violence is an issue, for example, the special arrangements the court can make include having the child appear in the courtroom by video, having the child give evidence from behind a screen, and limiting who can ask the child questions and the sort of questions they can ask.

Finally, the court can appoint a lawyer to represent a child in a dispute between the child's parents under section 203 of the *Family Law Act*, and then give directions about how the lawyer will be paid:

(1) The court may at any time appoint a lawyer to represent the interests of a child in a proceeding under this Act if the court is satisfied that

- (a) the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the best interests of the child, and
- (b) it is necessary to protect the best interests of the child.

(2) If the court appoints a lawyer under this section, the court may allocate among the parties, or require one party alone to pay, the lawyer's fees and disbursements.

This section is a bit challenging, to be honest. The two-part test that has to be met before the court appoints a lawyer for a child or youth — the conflict between the parents must be so severe that it impairs the parents' ability to act in

their child's best interests, and the appointment must be necessary to protect the child's best interests — can be very difficult to meet. (Besides, the parent asking for a lawyer to be appointed has to admit that their own capacity to act in their child's best interests is impaired, not just that of the other parent!) As a result of this difficult test, not to mention the cost of paying for yet another lawyer, lawyers are rarely appointed to act for children.

## Resources and links


### Legislation

- *Family Law Act*
- *Divorce Act*
- United Nations Convention on the Rights of the Child <sup>[1]</sup>
- *Canadian Human Rights Act* <sup>[5]</sup>
- British Columbia's *Human Rights Code* <sup>[4]</sup>

### Links

- Society for Children and Youth of BC's Child and Youth Legal Centre <sup>[7]</sup>
- BC's Representative for Children and Youth <sup>[8]</sup>
- Hear the Child Society <sup>[9]</sup>
- Legal Aid BC <sup>[10]</sup>

*This information applies to British Columbia, Canada. Last reviewed for legal accuracy by JP Boyd, 3 July 2022.*

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## References

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