CHAPTER 3: Child-Centred Decision Making

Introduction

Phase 2 of the Family Law Act Modernization Project includes a review of child-centred decision making. This review considers the best interests of the child provisions in Part 4 - Care of and Time with Children, and the various mechanisms by which the views of a child can be obtained in family law disputes. For example, current mechanisms used in BC include children providing evidence through letters, affidavits, and judicial interviews, as well as appointing legal representation for a child in family law court proceedings that relate to them.

Reports prepared under sections 202 and 211 of the FLA are also commonly used to obtain and present a child's views in family law matters. For a summary of the feedback received related to these reports, including "Full" Section 211 reports, Views of the Child reports, and Hear the Child reports, please see Chapter 4 – *Children's Views & Parenting Assessments and Reports*.

Early engagement with people with lived experiences, lawyers, and advocates identified the following should be reviewed in the FLA Modernization Project:

- The best interests of the child factors;
- The ways in which a child's evidence can be obtained in a family law dispute; and
- When a children's lawyer is appointed in a family law dispute.

Best Interests of the Child

When making agreements and orders under Part 4 related to guardianship, parenting arrangements or contact with a child, section 37(1) of the FLA requires the parties and the court to consider the best interests of the child only. This was a change from the language in the former *Family Relations Act*, which required the court to only give "paramount consideration" to the best interests of a child in making those types of decisions.

Under the FLA, in order to determine the best interests of the child, the court must consider all of the child's needs and circumstances, including the factors listed in section 37(2):

37 (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:

(a) the child's health and emotional well-being;

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

(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 the person's 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 the person's 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.

In addition, section 37(3) clarifies 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.

And, section 37(4) restricts the court's ability to consider a person's conduct to only situations where the conduct substantially affects one of the listed factors in section 37(2), and only to the extent that it affects the factor.

Section 38 requires a court to consider a number of factors when assessing section 37(2) (g) and (h) related to the impact of any family violence:

Did you know?

Family violence considerations have been part of the best interests of the child analysis in family law in BC since 2013. Family violence includes both violence directed toward a child, as well as violence directed toward another person but that the child witnessed. Exposure to family violence is an adverse childhood experience that can have life-long impacts on a person.

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

(a) the nature and seriousness of the family violence;

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

(e) whether the family violence was directed toward the child;

(f) whether the child was exposed to family violence that was not directed toward the child;

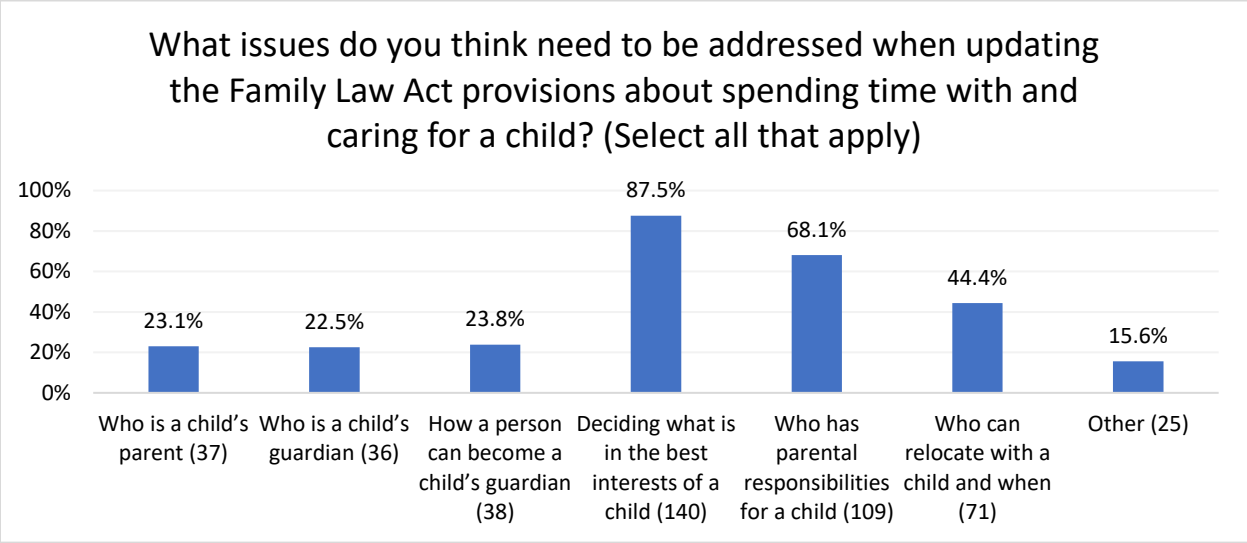
(g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;

(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;

(i) any other relevant matter.

Given the importance of determining the best interests of a child in decisions related to caring for and spending time with a child, it is significant that it was the issue identified by survey respondents as most needing to be addressed in updating the care of and time with children provisions of the FLA (See Figure 3-1).

Figure 3-1: Survey Responses: Issues Needing to be Addressed in FLA Update



Considering the Best Interests of the Child

Several themes emerged in the survey results related to the best interests of the child in family law disputes. Based on people's lived experiences, failure to consider or not adequately considering the best interests of a child was identified as the biggest concern when determining who would have responsibility for caring for a child in a family law dispute. Survey feedback highlighted two specific best interests of the child factors which seemed to be resulting in the most concerns for those with lived experience in family law disputes: (1) the history of the child's care, and (2) family violence.

Failing to consider or not adequately considering the history of the child's care was a common theme, as feedback suggested that 50/50 parenting time was often ordered regardless of the history of care. Stability in safety, housing and parenting was identified as an important factor that ought to be considered when determining the best interests of a child.

What Was Said:

> *"Child has always been mainly with me, I do all the actual parenting, make all decisions, take to all appointments, shopping, absolutely everything but because it's automatically a 50/50 system dad gets equal time even though he doesn't do even 10% of the work in raising the child."*

> *"Dad has been absent for 9 months and prior to legal action in and out of the kids lives randomly, now he is wanting 50/50 stating it is best for the kids. The children do not want this and he is dismissive of their views."*

"It seemed to me that the arbitrator defaulted to 50:50, regardless of the history of the child's care (which was 80% me parenting), history of child abuse (from dad to my kids), etc."

Secondly, a significant amount of survey feedback indicated that family violence was not adequately considered when determining the best interests of a child. Responses from people with lived experience with family violence provided common examples of ways that family violence considerations were deficient in family law decision-making concerning children, including:

- Parties were often advised by professionals not to mention family violence in the dispute
- The decision-maker did not consider family violence directed toward the other parent, even if it was witnessed by the child
- The decision-maker prioritized the other parent's relationship with the child over evidence of family violence when determining the best interests of a child

What Was Said:

"... I was directed by all levels not to bring [family violence] up or focus on it as I would risk losing my child..."

"... My lawyer basically said there was no point bringing [family violence] up as the law didn't really recognize family violence much."

"... all doctors, lawyers, mediators, family coaches, etc. told me not to speak of the violence."

"Court seemed to place more importance on the other parent having a relationship with a child and they do the child's emotional or physical well-being"

"Many judges still regularly simply say things like "The child did not see what the father did to the mother so I am not considering the abuse." I am part of a group of over 5000 single moms and we are collectively horrified by how women who have been abused are treated in court. There are certainly some trauma informed judges who are a gift to the family law system, but many judges simply contribute to further traumatizing women."

"The law gives parenting time to the abusive parent, often who has physically hurt the mother and/or child, mentally abuses them, displays substance abuse, and the child is powerless to get away. It's tragic."

"If an adult is abusive to another adult, they are not capable of caring for a child. Specifically, where there are recurring patterns and most often the children become weaponized. The family violence needs to be properly analyzed to show who is the aggressor, not label it high conflict and punish both parents or split the difference."

Parental Alienation

Related to both history of a child's care and family violence, many concerns were raised in the survey feedback about parental alienation. In survey responses to a question about whether family violence was adequately considered in the family law dispute, many respondents indicated that if they had alleged family violence, the other party often accused them of parental alienation. When parental alienation claims were made, some respondents commented that the court then forced children to spend time with the abusive parent.

What Was Said:

"... we are in court and the issues of family violence (which in my case was psychological, emotional, towards and in the presence of the children, and intentionally damaging property) are all being dismissed and not brought to light because this violence is hard to have solid evidence. And the dad is now trying to minimize the voice of the children ... because he knows they will speak the truth, so he is using the common tactic of allegations of parental alienation to dismiss the family violence that has occurred."

"The children's claims of neglect, emotional, psychological and physical abuse were dismissed on the grounds that they were 'too young' or that I had coached them into reporting such things (parental alienation was alleged instead of acknowledging the abuse going on.)"

"Once family violence is said then other party falsely claims alienations and then the kids views and voices are not considered at the highest level that it should be."

"Currently there is a detrimental trend of children and victims speaking out about family violence and it being dismissed and the litigation path altered due to the false allegations made after the fact of parental alienation."

"There is a huge trend of false alienation claims that is too common tactic that makes judges dismiss the family violence."

"The term 'alienation' should NEVER apply to rape or abuse. Kids and mothers lose their lives, stop using the term alienation (created by pedophile)."

"Currently there is a detrimental trend of children and victims speaking out about family violence and it being dismissed and the litigation path altered due to the false allegations made after the fact of parental alienation."

"Making false claims of parental alienation in order to distract from family violence is family violence."

"View of the child is irrelevant when parental alienation is happening."

On the other hand, a few survey respondents suggested that parental alienation was an issue in their family law disputes that should be seriously considered when making decisions.

What Was Said:

"It has been 6 years of disagreements, and concerns that my ex-wife was working on alienating our children against me."

"He was a baby when she ran away with him. There was a lot of alienation and no recourse for her not following court orders."

"Naming parental alienating behaviours (PABs) as a form of family violence (i.e. coercive control) was not done by the courts."

Some suggestions were offered on how to respond to concerns of parental alienation allegations broadly or in specific cases. For example, there were suggestions that more training and education on family violence is needed for family justice professions, including judges and lawyers. Another suggestion was to add parental alienation as a factor to be considered when determining the best interests of a child and whether there is family violence. Other respondents suggested that the FLA be clarified further to emphasize that there is no presumption of equal parenting.

What Was Said:

"I would like to have judges be educated on intimate partner violence and family violence we can put as much as we want in writing but until this happens it will be the same problem. Each community should partner with anti violence organizations or obtain training."

"Just because a person is the child's parent does not mean they have the child's best interests at heart. Parental alienation is a factor that needs to be considered."

"I think the act itself is fine, however, it remains commonplace for most courts to act on the presumption that 50/50 parenting time is in the best interest of the child (even in some cases where there is family violence!). This directly conflicts with the Act itself."

"A seized judge (or, better yet, a team of judges within an integrative psycho-judicial system) would have better served a high conflict situation like ours."

"Parental alienation is real and needs to be brought into account in the Family Law Act."

"More in depth understanding of trauma informed care for lawyers and judges. Shocking how damaging they are."

"Training and accountability for judges to take coercive control and domestic violence seriously. No repercussions reinforces the behavior, how many primary care givers must die before we take the early signs of domestic violence seriously."

From youth's perspectives, the youth who responded the Youth's Perspective's survey felt that they should have a say in their relationships and they should not be forced to spend time with a person, especially if they do not feel safe with them.

What Was Said:

"Do not force reunification when there is family violence."

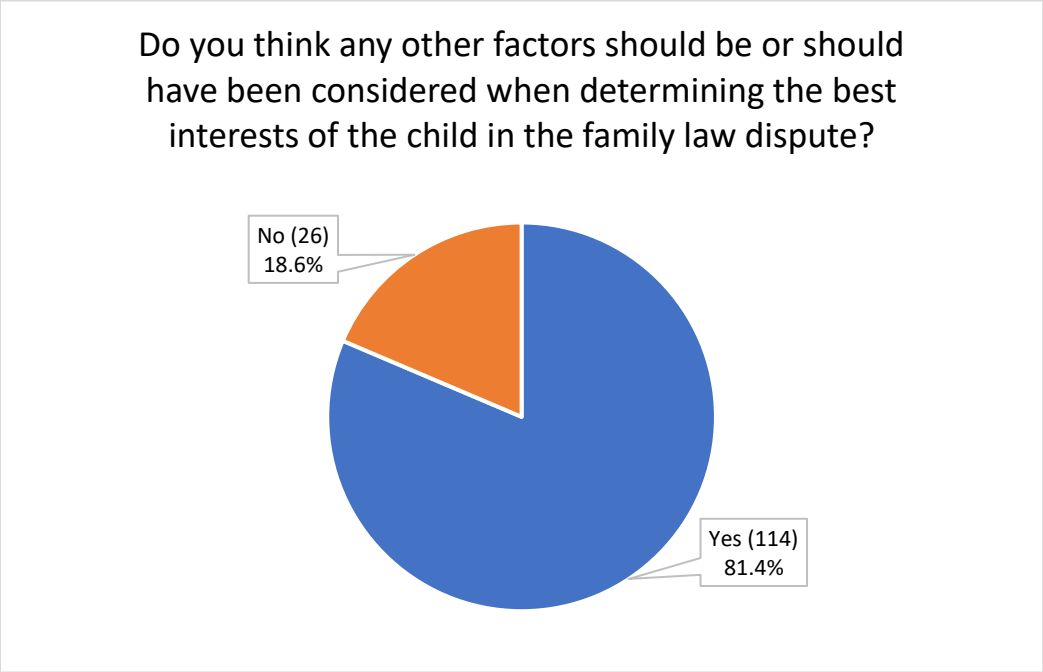
"…no forced therapy with dad if there is family violence. Ten and over should be able to decide if there is family violence where to love and who they want to see, this will result in better healing for the child."

"…I should be able to choose not spending time with an abusive and scary parent."

Best Interests of the Child Factors

The public engagement feedback suggested some changes may be needed to the current list of factors that must be considered when determining the best interests of a child in section 37 (2). Figure 3-2 demonstrates that 81.4% of survey respondents felt that other factors should be or should have been considered in a family law dispute in which they were involved.

Figure 3-2: Should Other Best Interests of the Child Factors Be Considered?



Many suggestions were offered in both the written and survey feedback on what factors should be added, amended or removed. The suggestions are summarized in the Table 3-1 below.

Table 3-1: Suggestions for Best Interests of the Child Factors

Current BIOC Factors	Feedback Suggested Changes
(a) the child's health and emotional well-being;	Add that not following a professional's instructions (e.g., the child's doctor or counsellor's instructions) is contrary to the child's best interests.
(b) the child's views, unless it would be inappropriate to consider them;	Remove the qualifier of "unless it would be inappropriate to consider" the child's views.
	Add that the obligation to consider the child's views must be ongoing and should be age-appropriate

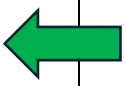
(c) the nature and strength of the relationships between the child and significant persons in the child's life;	
(d) the history of the child's care;	Add a requirement for parents who suddenly become interested in parenting a child after separation to explain their change of interest.
	Add a requirement to also consider future plans for the child's care.
	Add a specific requirement to consider who in the past has performed and who in the future is going to perform the specific responsibilities of giving the child their medications, taking them to appointments, and meeting with the doctors, specialists and counsellors, especially if the child has a disability.
(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 the person's responsibilities;	Add a requirement that where a parent's parenting skills or self-regulation is found to be wanting, the parent must show how they have "taken responsibility and evolved to the point of overcoming the problem."
	Add a requirement to consider who will actually be caring for the child when they are in the person's care (for example, the parent themselves or a nanny).

(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;	Add a requirement to consider whether the person responsible for family violence has acknowledged, expressed remorse, taken accountability for or takes steps to address the family violence.
	Add a requirement to consider the safety of the parent experiencing family violence, as the child's safety is intertwined with the caregiver's safety.
(h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;	Add a requirement to consider whether the person responsible for family violence has acknowledged, expressed remorse, taken accountability for or takes steps to address the family violence.
(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;	Specifically add a requirement to consider the guardian's conduct in following court orders. The cost of obtaining legal advice and litigation is a hardship on families. The FLA should add pressure on and stricter penalties for guardians who do not adhere to court orders, including failing to provide financial disclosure or make child support payments.
	Parental alienation, where one parent is undermining the child's relationship with the other parent is a factor that should be considered.
(j) any civil or criminal proceeding relevant to the child's safety, security or well-being.	Evidence of criminality or that a parent may be violent or unfit ((e.g., Ministry of Children and Family Development (MCFD) investigations, criminal records, past protection orders) should be considered, including allegations regardless of whether they led to convictions.

OTHER FACTORS	
A child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage.	Add this as a specific best interests of the child factor, rather than only a parental responsibility.
A child's Indigenous identity and culture.	Add that the court must consider a child's Indigenous identity and culture.
	Do not add specific factors to determine the best interests of an Indigenous child only, as it is sufficient to add "a child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage" instead.
The importance of preserving cultural connections and relationships with groups and communities.	Add this factor which was identified as being important for children from all cultural backgrounds, including maintaining connections with multiple cultures if their family is from multiple backgrounds.
	Some mixed feelings about adding this factor as it could already be covered under another potential new factor – each guardian's willingness to support the development and maintenance of the child's relationship with the other guardian.
The needs of a child with disabilities.	Add that the court must consider the unique needs of a child with disabilities.

	Some mixed feelings about adding this factor as it may already be covered under the existing s. 37 (2) (a), "the child's health and emotional well-being." However, there could be value in specifying certain situations, such as a parent's willingness to accept a disability and support care for it.
The importance of housing.	Add consideration for a child experiencing housing instability and recognition of impacts on the child's connection to a parent facing housing instability if they are separated. Specific guidance for considering the best interests of a child when moving schools should also be added.
Divorce Act s. 16 (3) (c) each spouse's willingness to support the development and maintenance of the child's relationship with the other spouse.	The FLA should not adopt a factor similar to s. 16 (3) (c) of the *Divorce Act*, as doing so could result in it being 'weaponized' (i.e., be used against a parent who wants to relocate or who makes allegations of FV).
	If the FLA adopts this factor, it should be qualified in cases of family violence to ensure it is only necessary insofar as it is consistent with the best interests of the child and should be interpreted in a manner that is consistent with the other parent's history of parenting.
	The FLA should adopt this factor to address incidents of parental alienating behaviours.

Divorce Act s. 16 (6) 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.	The FLA should not adopt this provision as it "arises from a long-standing assumption that children need a relationship with both of their parents, and more specifically, their fathers, to thrive," which "often has the effect of minimizing the harms arising from a child's relationship with an abusive parent". Further, to the extent that this assumption "factors into a court 's analysis, it can be used to discourage or punish a parent who seeks to protect their child from family violence."
A child or a child's family member must be able to exercise their rights without discrimination, including discrimination based on sex or gender identity or expression (similar to s. 9 (3) (b) and (c) of *An Act respecting First Nations, Inuit and Métis children, youth and families*).	The FLA should adopt this consideration in determining the best interests of a child.
	The FLA should not adopt a consideration similar to s. 9 (3) (b) and (c) of *An Act respecting First Nations, Inuit and Métis children, youth and families* as doing so could potentially open the door for a father to argue that not ordering equal parenting time is discriminatory towards men.
	The FLA should not add this consideration as, for example and based on experience, it suggests that a parent opposed to hormone blockers, could be left with less parenting time, even if they were supportive of their child's gender identity and transition (which is dynamic). It seems that the existing s. 37 (2) (a), "the child's health and emotional well-being" covers this issue more broadly. For example, there is research that the court could consider suicide rates for cases where parents are deciding on gender

	expression options. The suggested language seems more politically-motivated, whereas the actual best interests of the child issues are already covered in s. 37 (2).
Whether a parent has a mental illness or substance abuse disorder 	A parent's mental illness or substance abuse should be a factor considered when determining the best interests of a child. In particular, a child should not be forced to go with a parent with a mental illness or substance abuse disorder.

Weight

The feedback was mixed on whether any factors should be given more weight than others when considering the best interests of a child. One written response suggested that the history of the child's care and family violence should be prioritized, and stronger language should be added to emphasize that family violence is inconsistent with and undermines the best interests of a child. Some survey feedback suggested that a child's views or preferences on a matter should be of upmost importance or should even be determinative after a child reaches a certain age.

Some suggested that maintaining an Indigenous child's connection to their culture is the most important factor for an Indigenous child, while others suggested that it should be equally weighted with the other factors.

Unique Best Interests of the Child Factors

Engagement feedback suggested that unique lists, or unique factors within existing lists of best interests of the child factors, should be established specifically for Indigenous children and children with disabilities.

For an Indigenous child, feedback pointed to best interests of the Indigenous child factors which have recently been established in other child protection-related legislation, such as the federal *Act respecting First Nations, Inuit and Métis children, youth and families*, as well as BC's *Adoption Act* and *Child, Family and Community Service Act*.

Did you know?

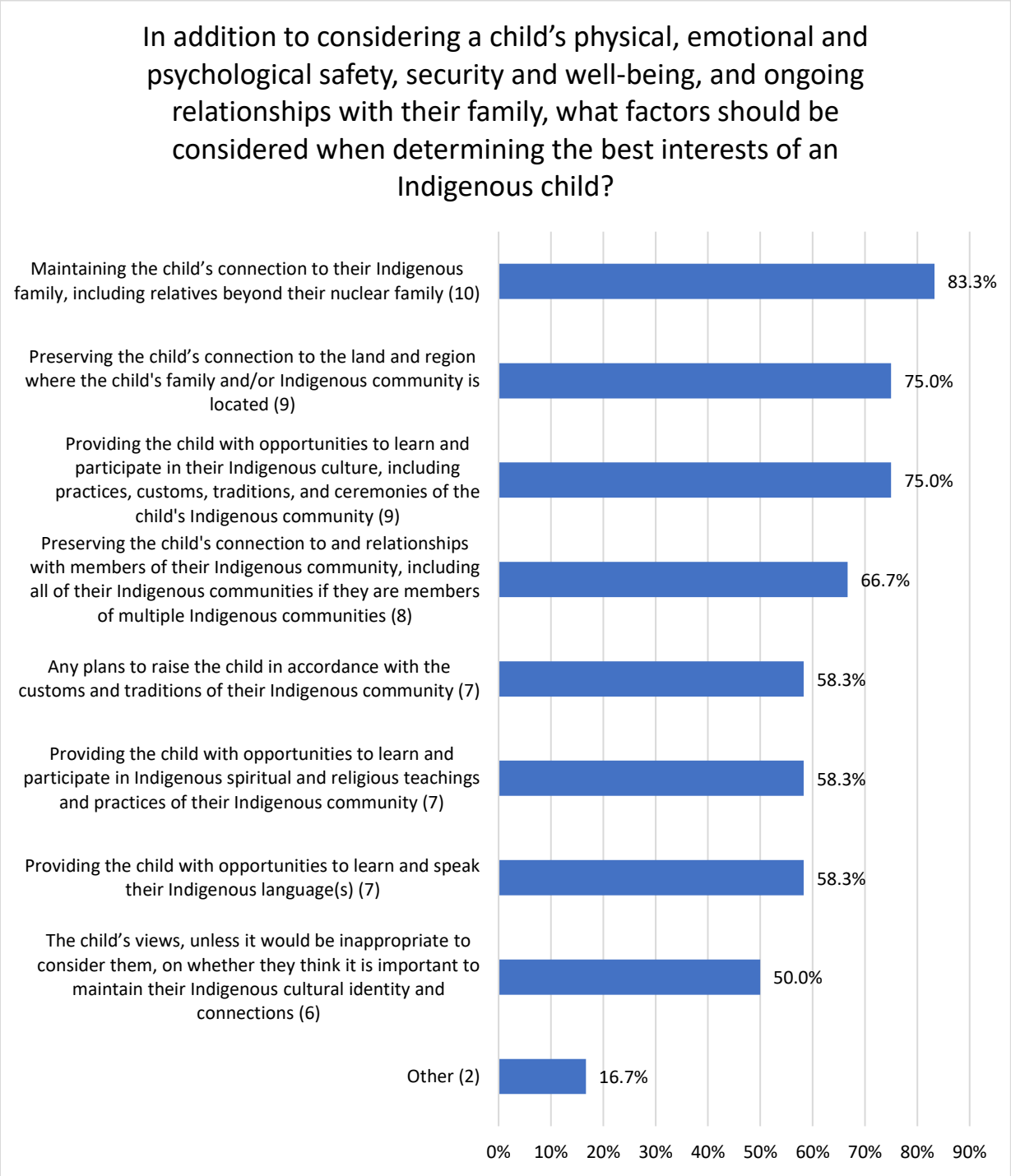
There are at least five different lists of best interests of the child factors that could apply to a child in deciding their family situation in BC. Different lists apply depending on whether the child's parents are divorcing or separating, whether there are child protection concerns, whether the child is Indigenous or whether the child is being adopted.

Indigenous Perspectives: Best Interests of the Indigenous Child Factors

In speaking with Indigenous people with lived experience, one of the themes that emerged was that it is vital for every Indigenous child to grow up with their culture. For an Indigenous child, culture is something that begins at birth, is nurtured through their lifetime, and is passed down from generation to generation. It was therefore suggested that the FLA's best interests of the child factors should emphasize the need for Indigenous children to stay connected with their culture. This should include maintaining connections to the culture of all sides of their family, when making family law decisions that relate to the child. However, there were mixed views on whether maintaining an Indigenous child's connection to their culture is more important than other best interests of the child factors, such as the child's health and emotional well-being, the child's views, and the impact of any family violence on the child.

Figure 3-3 summarizes the factors that survey respondents felt were most important to consider when determining the best interests of an Indigenous child in FLA decisions.

Figure 3-3: Best Interests of an Indigenous Child Factors



For a child with disabilities, some feedback supported a separate list of best interests of the child factors because these considerations are more complex and not all disabilities are the same. It was specifically noted that in determining parenting arrangements for a child with disabilities, consideration needs to be given to who has been giving and who is

going to give the child their medication, take them to appointments and meet with their doctors, specialists, and counsellors.

Other feedback suggested that separate lists or factors should not be established, as specific best interests of the child factors for Indigenous children and children with disabilities can be captured by more general factors. It was suggested, for example, that adding a requirement to consider "a child's cultural, linguistic, religious and spiritual upbringing and heritage, including Indigenous upbringing and heritage" would sufficiently capture considerations for an Indigenous child.

It was similarly suggested that considerations for a child with disabilities may already be captured under s. 37 (2) (a) "the child's health and emotional well-being," however, it may be helpful for the FLA to specify certain situations, such as a parent's willingness to accept a disability and support care for it.

Children's Evidence

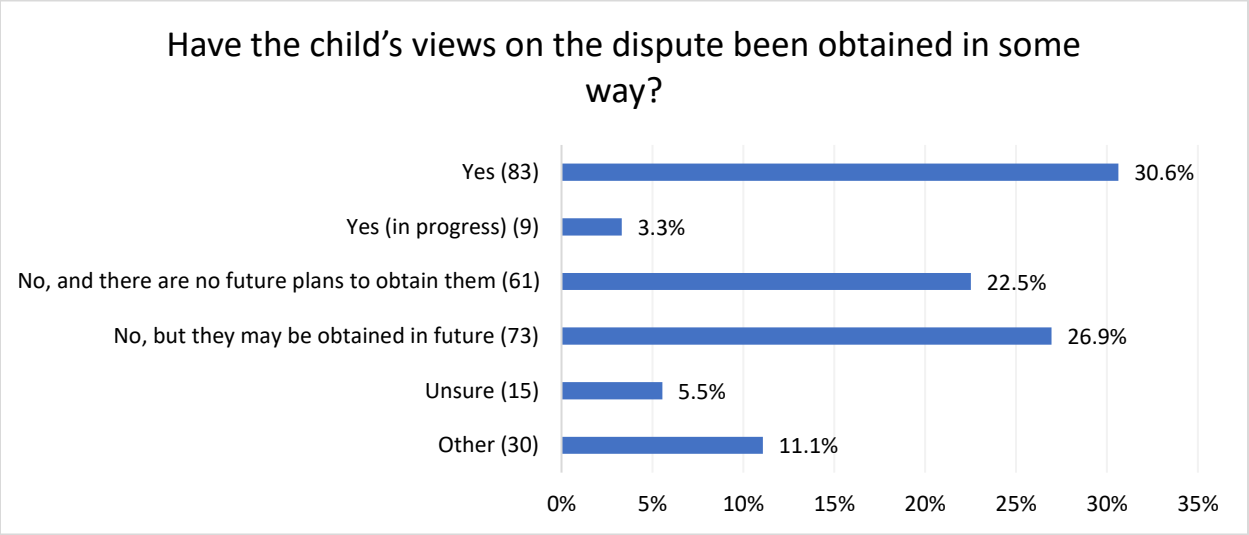
Section 37(2)(b) of the FLA states that a child's views must be considered unless it is inappropriate to do so, but the Act does not provide any mandated or preferred method for obtaining the child's views. Instead, section 202 gives the court the broad authority to admit a child's hearsay evidence as well as make any other order related to receiving a child's evidence:

> **Court may decide how child's evidence is received**
>
> **202** 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.

Section 202(a) of the FLA seems to expand possibilities beyond formal report writers to include evidence introduced by parents, teachers or any other person who may have information to share about a child's opinions and wishes. Section 202(b) of the FLA provides additional flexibility which the courts have used when it would be potentially harmful for children to testify in a high conflict proceeding.

Survey results indicated that a child's views were obtained or will be obtained in some family law disputes, but not all. As depicted in Figure 3-4, 22.5% of respondents said that a child's views were not obtained and that there were no future plans to obtain them in a family law dispute. The most common reasons for not obtaining a child's views were that the child was too young, one party did not want the child's views obtained and that the parties did not want to distress the child.

Figure 3-4: Views of a Child



As depicted in Figures 3-5 and 3-6, based on the results of the Youth Perspectives Survey, only one out of 12 youth who had lived experience with family law disputes said they were able to share their views on family law decisions that were made about them. Of the 11 youth who did not share their views, nine stated that they would have liked to have been able to do so. The most common reasons why the youth did not share their views were:

- They tried but no one listened (72.7%)
- No one asked them (36.4%)
- They were too young (36.4%)

Only 2 youth said they did not want to share their views.

Figure 3-5: Youth: Did you share your views?

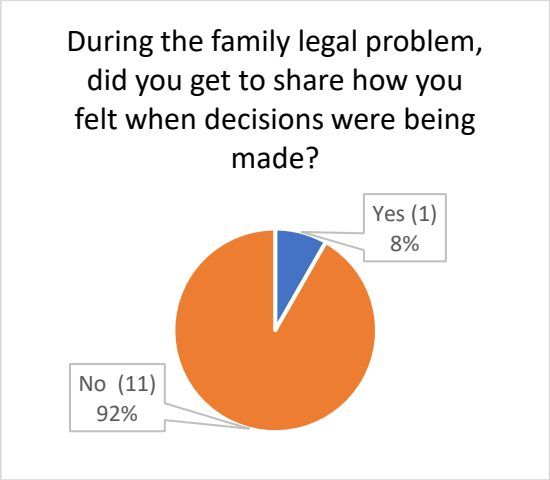
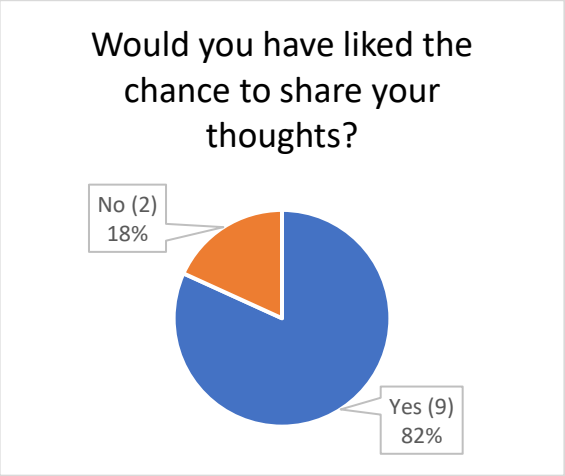


Figure 3-6: Youth: Did you want to share your views?



Written feedback supported that a child's views should be heard in family law proceedings and that having the views of a child present in court and communicated to the judge is an essential part of a family court process. This feedback was echoed in survey results which emphasized that children's views should be heard in a manner that works best for them.

However, there were mixed views on whether the FLA should be amended to ensure this appropriately happens. Some feedback suggested that it would be helpful if the FLA included a non-exhaustive list of factors or even a new part that listed all the mechanisms available for obtaining a child's views that the court should consider. Whereas other feedback suggested that section 202 of the FLA should not be amended as it is sufficiently broad to allow the flexibility to hear the child in a variety of ways.

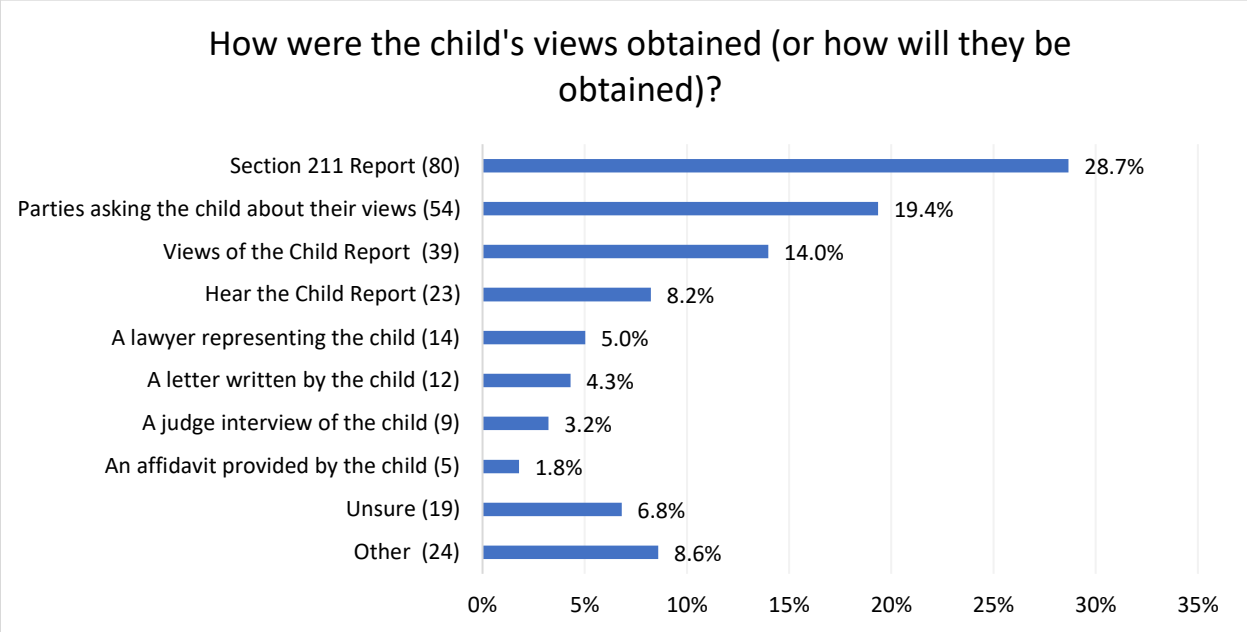
What Was Said:

> *"Children's voices and behaviour should always be considered. Their rights are not second to the parents."*

> *"I believe all children should be asked their views. The court may still decide that what the child wants is not in their best interest but they should be heard."*

Survey results showed that Section 211 reports (see Chapter 4 for more feedback on Section 211 reports) were the most common method for obtaining the views of a child, followed by the parties simply asking the child about their views.

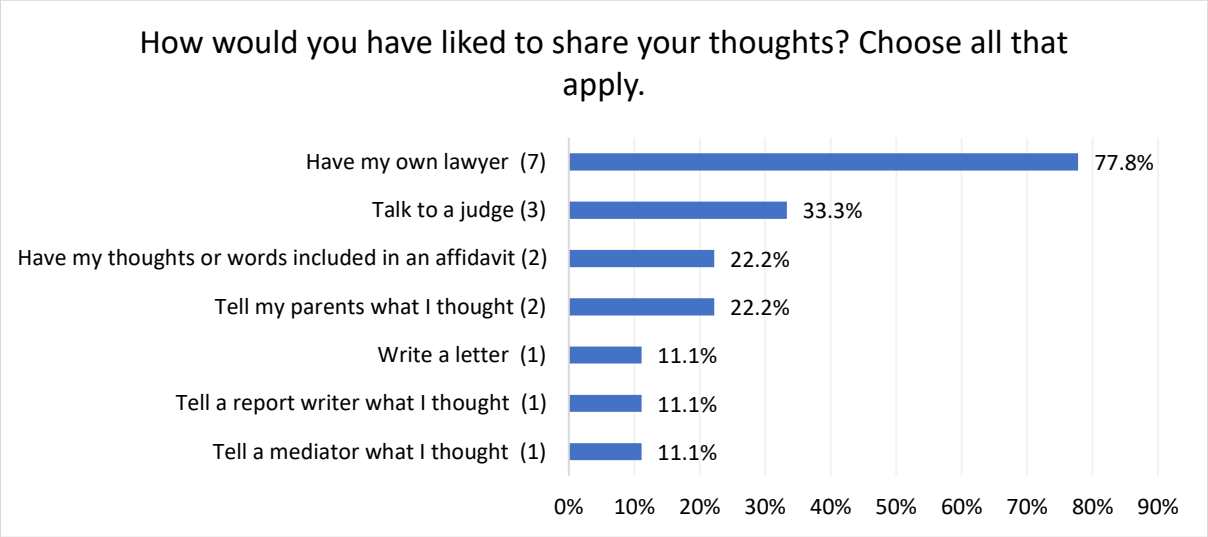
Figure 3-7: How a Child's Views Were Obtained



Some feedback suggested that the child should have more say in how their views are obtained, including requiring the child's expressed consent before providing their views and considering the child's preferences as to how their views will be heard. It was also suggested that the court should be required to consider how a child's views will be heard early in the proceedings.

Based on what we heard from youth who had experienced family law disputes, not only being able to share their views, but how they shared their views was very important to them. For example, in dialogue sessions, youth provided examples of how it was inadequate for a stranger to come to their school to ask them questions about the family law dispute, and then they never saw or heard from the stranger again. The youth felt it was important to establish a connection with the interviewer and to have the person explain the process to them. Based on survey results, the majority of youth said they would have liked to have been able to share their views through their own lawyer (77.8%) or by talking directly to the judge (33.3%)(Figure 3-8).

Figure 3-8: How Youth Would Like to Share Their Views



What Was Said:

> *"Children aged 10 and older need to be appointed a lawyer at the onset of a family law case without permission needed from parents or a judge. The views of a child aged 10 and older need to be more determinative of who they spend time with and live with. The child should be given a choice of how they want to give their views, such as lawyer or letter or affidavits."*

One lawyer suggested that regardless of whether the FLA legislates factors that should be used to assess the reliability of a child's hearsay evidence, there should be attention paid to the legitimacy of such factors and whether they reflect misconceptions, myths and biases regarding children's behaviour and psychology.

Also, it could be beneficial if the FLA stipulated that an Indigenous child have a support person from their Indigenous community present during a judicial interview or allowed an Indigenous child to provide evidence through other processes, such as through art or storytelling.

Affidavits & Letters to the Court

Written feedback indicated that the FLA should provide some parameters around children's affidavits and letters to the court. Some feedback suggested that the FLA should provide guidance on these two methods of providing a child's views. Other feedback suggested that affidavits should only be permitted if the child has received independent legal advice and possibly has reached a particular age, while letters to the court should be prohibited as it is uncertain who wrote the letter and under what circumstances.

Judicial Interviews

Written feedback unanimously stated that there should be guidelines for judicial interviews. Suggestions for guidelines included requiring judges to have specific training and education prior to interviewing children, and requiring judges to clearly define the purpose of the judicial interview and the process the judge will follow in conducting the interview.

Another suggestion was that children should have the right to choose whether or not to participate in a judicial interview.

Survey results indicated that support and training should be provided for judges who conduct interviews with children.

What Was Said:

> *"We need guidance regarding judicial interviews with children! Judges, by default, have zero training on how to engage with children. The FLA could codify a set of guidelines on 'how' and 'when' such interviews should take place."*
>
> *"Additionally, it would be wise for the court system to have a lawyer or other staff person that works with judges to solicit the views of the child by preparing children to meet with a judge, briefing a judge... but in an impartial manner."*

"It should be easier and more common for judges to have a couple meetings with the child to obtain their views."

The Age 12 Cut-Off

The feedback from dialogue sessions and written responses to the discussion paper indicated unanimous support for having no age cut-off to consider the views of a child. Feedback supported that the views of a child should always be considered, although the method for obtaining their views should be age appropriate. For example, for younger children, it was suggested that art therapy or play therapy could be used.

One group suggested that the FLA should include a provision that explicitly recognizes that a child presumptively has the capacity to provide their views and that they should be given the opportunity to do so in accordance with their wishes.

One response indicated experience with lawyers intentionally drawing out family law proceedings to wait for the child to reach the "magical" age 12 cut-off, which was not intended in the FLA and should be considered in this review.

Some survey responses indicated children aged 10 to 12 or older should be able to share their views, while others indicated younger ages or no age limit.

What Was Said:

"Views of a child should be obtained, by default from all children involved ages 5 and older."

"We need to listen to children of all ages, young children know how to express their needs, and we need professionals to really hear them."

"I believe a child of 10 years of age and older are very capable of deciphering their feelings and views. … They should have an instant right to obtain a lawyer if they wish and voice to do so, right now it is shunned upon and it shouldn't be when their lives are at play. The option of judge interview, affidavit, or writing a letter should also be common place and acceptable for children especially 10 and older."

Children's Lawyer

Section 203 of the FLA allows the court to appoint a lawyer to represent the interests of a child in a proceeding under the Act. Before appointing such a lawyer, the court must be satisfied that the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the child's best interests, and that the appointment is necessary to protect the child's best interests. The court may also decide whether one or both parties will be responsible for paying the lawyer's fees and disbursements.

The majority of written and survey feedback suggested that current restrictions to appointing a children's lawyer should be removed under the FLA. Some feedback suggested that the current section 203 test is problematic because it prevents children from having lawyers in many cases where a child wants and would benefit from having their own lawyer. One written response also stated that the current test requiring the court to find that the parents "are not acting in the child's best interests" is unnecessarily stigmatizing and implies moral blameworthiness with respect to the parties' "severe conflict" – a concept that often masks family violence and safety concerns. Some proposed alternatives were that a children's lawyer should be appointed when it is in the child's best interests, or when the court considers it to be appropriate.

What Was Said:

> *"The test for a lawyer is too hard to meet. It requires the child to have been put in a position that neither parent can address their best interests before a lawyer is appointed. By then, too much damage has been done."*
>
> *"Children over a certain age, maybe 12, should have access to a lawyer, at least to get some [independent legal advice] and make their views known, or maybe a social worker advocate."*
>
> *"Children can only gain access to a lawyer if their guardian approves - this should change so that children can advocate for their best interest when needed against their guardian."*
>
> *"Changing when and how a lawyer can be appointed to a child or when a child can retain a lawyer - this should not be based on whether or not a parent can make an application to the court for the child to obtain a lawyer and should not be based upon agreement of both parents."*

Feedback from youth who have had a children's lawyer described positive experiences. In particular, the youth noted that when they had a lawyer, they felt like their voices were heard they were taken seriously, and they better understood the family law process and implications of decisions that were being made about them. For youth who did not have a children's lawyer, many indicated that they would like to have one and to have a one-on-one relationship with a person who could help their voices be heard.

What Was Said:

> *"My parents are getting divorced and I want a say in my life and who I spend time with and where I live. I want a children's lawyer but apparently, I need permission from both parents but by dad is just dismissing me and saying no because he is the one that hurt us."*
>
> *"Make it so that any child 10 years old and older can have full say in who they spend time with and who they want to live with especially when there is abuse. Also, we should be able to get a lawyer, choose our counsellor and not be forced into anything that affects us medically or emotionally."*
>
> *"Yes, I think a child should have a right to and get a lawyer right away at the start of legal stuff so that our voices are heard immediately in cases involving us."*
>
> *"Yes, I was told parents need to agree on a children's lawyer. My dad said no. I think if a child is 10 and over they should be able to get a lawyer if they want without a parents or judges permission."*
>
> *"A children's lawyer should be given to every child at the start of a divorce - we deserve to be heard because this is our lives and safety at stake. Age 12 is a mature age that should be considered to be taken what I want to be ordered."*
>
> *"I should be able to get a lawyer without permission and I should be able to choose not spending time with an abusive and scary parent."*

Some family lawyers suggested that if a children's lawyer is appointed, then the FLA should specify that a child has the rights of a party, unless the court orders otherwise. It was suggested that allowing counsel to fully participate on behalf of the child, while not making the child a party to their parents' legal dispute, will ensure that the child's needs

and preferences do not get diluted by the parents' separate assessments of what is best for the child.

It was noted that a children's lawyer could be especially helpful in cases spanning multiple years as the lawyer could provide the court with ongoing updates on the child's perspectives, which would be more efficient and less expensive than getting updated Section 211 reports. It would also likely be easier on the child who could build a rapport with their lawyer.

What Was Said:

> *"Having a snapshot view at one point of time where parental influence can impact child is not helpful. Legal advocates/ lawyers specifically working solely with child over time with no involvement of parties would provide a much more accurate assessment and representation of the child's view."*

There was some support for the role of a children's lawyer to be set out in the FLA and that the court could specifically appoint a lawyer to fulfill one or more specific roles (for example, to obtain the views of the child or to advocate for the child). However, other feedback cautioned that the FLA should not be amended to include additional criteria that could limit judicial discretion to appoint counsel for the child.

There were mixed views on whether factors the court must consider in deciding whether to appoint a children's lawyer should be added to the FLA. There was some agreement that requiring harm to be proven before a child can have legal representation is not in a child's best interests and represents a marked departure from the approach in other provinces. One suggestion was that the section 203 test should focus on the best interests of the child and whether a child's views are adequately presented to the court. To the extent that the test considers conflict between the parties, it should also consider the presence of family violence and safety concerns.

What Was Said:

> *"Lawyers should be appointed for children in any case involving potential abuse."*
>
> *"Children should have the right to get a lawyer asap when aged 10 and older. More weight needs to be put into their views and forces and costly reunification should not be ordered in family violence cases."*

It was noted that any reforms to section 203 should be accompanied by additional funding for free children's lawyer services through the Child and Youth Legal Centre. Without such funding, a relaxed test under section 203 may either have no practical effect on children's rights to be heard or have the unintended consequence of making family law matters even more unaffordable and detrimental to parents' financial security.

Indigenous Perspectives: Advocate for an Indigenous Child

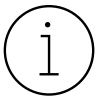
Feedback from Indigenous dialogue sessions supported the idea that an Indigenous child who is the subject of a family law matter should be able to have a person who is a member of their Indigenous community, such as an Elder or a matriarch, support them or advocate for them during the family law proceedings. However, if a person from outside the Indigenous community interviews an Indigenous child, the person needs to have knowledge of the child's community, culture and traditions before the interview begins. Priority should also be given to processes that make the child feel safe and allow the child to share their views without negative outcomes.

What Was Said:

> *"Having child advocates (especially First Nation, Inuit, and Métis advocates) to continuously advocate for the rights of the child would be ideal throughout the Family Law Act."*

Other Child-Centred Decision Making Feedback

Written feedback was received on other issues related to child-centred decision making that were not expressly discussed in the discussion paper. Other feedback related to child-centred decision making suggested:

	There should be legislated limits on requiring parents to disclose their health records such as counselling records.
	FLA should be consistent with and incorporate elements of the *UN Convention on the Rights of the Child* and the *Declaration on the Rights of Indigenous People Act*.
	Judges should have discretion to disregard evidence collected through surreptitious recordings, unless the recordings are being used to disclose a party bringing about or threatening harm to the child or spouse's safety and the recordings do not encroach on the child's rights or perpetuate adverse childhood experiences.

Family Dispute Resolution Practitioners should be required to complete training on obtaining the views of children.