

CHILDREN'S VOICES IN ACCESS AND CUSTODY DECISIONS:

THE NEED TO RECONCEPTUALIZE RIGHTS AND EFFECT TRANSFORMATIVE CHANGE

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CITED: (2007) 12 Appeal 48-72

"Well, obviously it's just stupid not to ask the kids because the whole thing is about the kids. The whole thing".

– Belinda, 16 years old ¹

"Children speak in a highly distinctive voice, if we dare listen".²

INTRODUCTION

Custody and access decisions have a profound effect on children's lives, and consequently both B.C. and federal statutes direct courts to make custody and access determinations according to the best interests of the child. The B.C. family law system superficially appears child-centric, primarily concerned with the protection and promotion of children's interests during familial breakdown. However, the legal system currently fails to ensure that children have an opportunity to participate meaningfully in custody and access decisions. By neither encouraging nor valuing their voices, the family law system marginalizes and excludes children, contrary to their best interests.

The B.C. family law system cannot achieve "true and complete justice"³ without meaningful inclusion of children's voices in judicial processes. Achieving such meaningful inclusion requires both the creation of opportunities for children to share their concerns, feelings and interests and a transformative change to the family law system so that children's views can be

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- 1 Megan Gollop, Nicola Taylor & Anne Smith, "Children's perspectives of their parents' separation" in Anne Smith, Nicola Taylor & Megan Gollop eds., *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 134 at 155 [Gollop *et al.*].
 - 2 Barbara Woodhouse, "Hatching the Egg: A Child-Centered Perspective on Parents' Rights" (1993) 14 *Cardozo L. Rev.* 1747 at 1783 [Woodhouse, "Hatching the Egg"].
 - 3 Justice Claire L'Heureux-Dubé, "Children and the Law: Voices Unheard" in *Supreme Court of Canada: Seventh International Appellate Judges Conference and Sixth Commonwealth Chief Justices Conference*, (Ottawa: Minister of Public Works and Government Services, 1996) 135 at 137.

heard. Hearing children demands two fundamental changes. First, it requires that those tasked with listening to children have the training and experience to understand what children say. Second, hearing what children say necessitates valuing a broader array of interests. Children speak in terms of relationships, interdependence and care, and the legal system is unable to hear them so long as it continues to give priority to abstract, individualistic rights.

Although I focus specifically on B.C.'s legislative and judicial context, my argument draws upon literature from Canada, the United States, England, and New Zealand, given that the problem of children's exclusion from meaningful participation in custody and access decisions extends beyond B.C. borders. It stems more broadly from liberal ideology that values autonomous and rational citizens, and promotes and protects the rights the individual. I argue that without reconceptualizing the dominant rights framework, the family law system will be unable to serve children's best interests.

Part I of this article outlines the nature and extent of the problem of children's exclusion, demonstrating that the family law system serves and protects adult priorities at the expense of children's interests. Part II provides several justifications for the inclusion of children's voices and participation in custody and access decisions, concluding with the assertion that although rights are the means to protect and advance children's claims, the dominant rights discourse necessarily excludes children from its ambit. Without reconceptualizing the dominant rights framework, the inclusion of children in the family law system will, at best, be marginal and, at worst, damaging to children and their families. Part III offers a reconceptualization of rights that emphasizes interdependent relationships and caregiving. Part IV discusses how a new conception of rights demands transformative change to the family law system and provides some suggestions in this regard. Part V presents concluding remarks, reiterating why it is important to listen to children in custody and access determinations, and summarizes the transformative change that is required in order to hear what children have to say.

PART I –The Problem of Children's Exclusion

CHILDREN'S VOICES IN B.C. FAMILY LAW PROCEEDINGS

In Canada, custody and access proceedings are subject to concurrent federal and provincial legislation. Married couples can opt to have either the federal *Divorce Act* ("DA") or the B.C. *Family Relations Act* ("FRA") apply to custody and access determinations on marital breakdown; whereas, common law partners are restricted to the application of the *FRA*.⁴ Section 24(1) of the *FRA* makes the best interests of the child the paramount consideration in custody and access decisions.⁵ In determining the child's best interests, the court is not obliged to consider the views of the child and will only do so where it is "appropriate",⁶ although the *FRA* provides no guidance as to precisely when it is appropriate to hear children's views. Under the *DA*, the court must *only* take into consideration the best interests of the child "as determined by reference to the condition, means, needs and other circumstances of the child".⁷ However,

4 *Divorce Act*, R.S.C., c. 3 (2nd Supp.) [DA]. Subsection 2(1) defines spouse as either of two persons who are married to each other. Subsection 16(1) permits a court of competent jurisdiction to make custody and access decisions on application of either or both spouses; *Family Relations Act*, R.S.B.C. 1996, c. 128 [FRA]. Subsection 1(1) defines a spouse as a person who is married to another or, for the purposes of custody and access decisions, a person who has been living in a marriage-like relationship with another for two years.

5 *FRA*, *ibid.*, s. 24(1). In determining the best interests of the child the court must consider the following factors: the health and emotional well being of the child including any special needs for care and treatment; if appropriate, the views of the child; the love, affection and similar ties that exist between the child and other persons; education and training for the child; and the capacity of each person to whom guardianship, custody or access rights and duties may be granted to exercise those rights and duties adequately.

6 *ibid.*, s. 24(1)(b).

7 *DA*, *supra* note 4, s. 16(8).

the DA makes no reference to the need to consider children's views in determining what is in their best interest.

Because the legislation does not demand that judges consider and attach weight to children's views, these views may not be heard, or if heard, may not be accorded much, if any, significance. The jurisprudence indicates that courts must consider children's views in three situations: when a material change in circumstances, such as relocation, warrants a variation of an initial custody and access order;⁸ in an initial custody and access application where the custodial parent intends to relocate;⁹ and if the child is a teenager.¹⁰ In all of these situations, judges use their subjective discretion to decide how they should ascertain children's views and what weight they should attach to them. In the case of teenagers (ages thirteen to eighteen), courts have held that for a custody order to be practical, it must reasonably conform to the teenager's wishes,¹¹ concluding that there is high risk that a teen will simply not comply with an order that is contrary to his or her wishes. Because it is a matter of discretion as to whether the court will take the views of those children yet to reach their teens into account, only some of these children are able to make their views known and have them considered. Generally, courts are unlikely to consider the views of children aged twelve and under as a determinative factor in custody and access decisions.¹²

In B.C., the court can ascertain children's views in two main ways: legal representation and judicial interviews. The literature and case law frequently refer to three key models of legal representation for children: an *amicus curiae*, who is a neutral officer of the court responsible for ensuring that all relevant information is brought before the judge; a litigation guardian who is appointed to present his or her determination of the child's best interests; and a child advocate who presents and advances the child's wishes and concerns.¹³ Additionally, on the court's recommendation, the Attorney General can appoint a lawyer to be a family advocate.¹⁴ Children are not the family advocate's clients; rather the family advocate acts more like a litigation guardian who determines and advances children's best interests.¹⁵ In B.C., superior courts can, through their *parens patriae* jurisdiction, appoint an *amicus curiae*, litigation guardian or child advocate, or recommend that the Attorney General appoint a family advocate.¹⁶

Judicial interviews provide another method of determining children's views, although the effectiveness of this method is questionable. In *L.E.G. v. A.G.* ("*L.E.G.*"), Martinson J. acknowledges the limitations of judicial interviews as a means to ascertain and serve children's best interests: judges are not trained to interview children in a manner that allows them to assess a child's real wishes; judges lack knowledge of childhood development; they may not be able to

8 *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

9 *Nunweiler v. Nunweiler*, 2000 BCCA 300.

10 *O'Connell v. McIndoe* (1998), 56 B.C.L.R. (3d) 292 (B.C.C.A.) [*O'Connell*]; *Borgstrom v. Borgstrom*, 2004 BCSC 605 [*Borgstrom*]; *Shanmugarajah v. Shanmugam*, 2005 BCSC 286 [*Shanmugarajah*].

11 *O'Connell*, *ibid.* at para. 13; *Shanmugarajah*, *ibid.* at para. 30; *Borgstrom*, *ibid.* at paras. 72-77; *L.R.H. v. A.K.H.*, 2003 BCSC 1201 at para. 105.

12 See the following cases as examples of judicial discretion leading to divergent results as to whether or not judges seek children's views and if so, what weight, if any, they attach to them: *S.E.D. v. G.S.D.*, 2002 BCSC 373; *Sam v. August*, [1998] B.C.J. No. 2879 (B.C.S.C.); *Knitsch v. Knitsch*, [1995] B.C.J. No. 1577 (B.C.S.C.); *Jespersen v. Jespersen* (1985), 48 R.F.L. (2d) 193 (B.C.C.A.); *Innes v. Innes*, 2005 BCSC 771; *Alexander v. Alexander*, (1986), 3 R.F.L. (3d) 408 (B.C.C.A.); *C.H.J. v. C.D.J.*, 2004 BCSC 692; *Vedo v. Vedo*, [1994] B.C.J. No. 46 (B.C.S.C.); *J.L.S. v. K.J.S.*, 2003 BCSC 161; *Tomlin v. Tomlin* (1992), 69 B.C.L.R. (2d) 363 (B.C.S.C.).

13 These three models are summarized well in *Dormer v. Thomas* (1999), 65 B.C.L.R. (3d) 290 (B.C.S.C.) at paras. 44-45 [*Dormer*]; see also Ronda Bessner, *The Voice of the Child in Divorce, Custody and Access Proceedings* online: Department of Justice Canada <<http://dsp-psd.communication.gc.ca/Collection/J3-1-2002-1E.pdf>> at 2.4.

14 *FRA*, *supra* note 4, s. 2(1).

15 *Gareau v. Supt. of Family and Child Services for British Columbia et al.* (1986), 2 B.C.L.R. (2d) 268 at 271; *Dormer*, *supra* note 13 at paras. 50, 51.

16 *Dormer*, *ibid.* at para. 52.

obtain accurate information in one short meeting; and being interviewed in chambers may be a formidable and inherently stressful experience for children.¹⁷

Although courts appear to have many avenues to ascertain children's views, in reality, this is not the case. Cutbacks to legal assistance for families have resulted in the Attorney General refusing to appoint family advocates despite judges' recommendations. As stated in *D.S. v. P.S.*:

Unfortunately, as has often been the case in recent years the abdication by the Crown of its moral and ethical responsibility to children by providing assistance to the Court in a family matter where the Court has concluded that a family advocate would be beneficial leaves the Court in the difficult position of trying to ensure the protection of the rights of [children] while at the same time ensuring that the hearing is conducted fairly and impartially for all the parties.¹⁸

In *L.E.G.*, after speaking about the importance of a child-centred approach and the notion that each child is entitled to individual justice in child custody cases,¹⁹ Martinson J. claims that children are adversely affected by the current climate of scarce resources, which have limited the utility of professional reports, reduced the use of family advocates and strictly curtailed legal aid to parents and children.²⁰ Martinson J. writes:

The effect of these cutbacks may be to deny access to justice to families and to deny children the individual justice to which they are entitled. It would be unfortunate if the courts find themselves in the position where judges are resorting to a judge interview because it is the only option available, rather than because it is the method that is in the best interests of the child whose future is at stake.²¹

In *B.C.*, the family law system does not ensure that children have the opportunity to voice their concerns, needs and interests. Although courts must make custody and access decisions in the best interests of the child, judges may not hear children's views or, if heard, may not accord them much, if any, weight. Thus, despite the profound effect that custody and access decisions have on children's lives, children can be peripheral to family law proceedings.

DOES THE FAMILY LAW SYSTEM SERVE CHILDREN'S BEST INTERESTS?

There exists a serious gap between the perspectives of the legal system and those of the children it seeks to serve. In reporting on her twenty-five year longitudinal study on the impact of divorce on children, Dr. Wallerstein claims that the legal system has not succeeded in serving or protecting children's interests.²² According to Dr. Wallerstein, the children in her study, now adults, would be astonished to hear that anyone in the legal community had considered their best interests.²³ Although the study was based on children's experience of divorce in the United States, L'Heureux-Dubé J. of the Supreme Court of Canada has referred to Dr. Wallerstein's work as elucidating broader trends about the impact of familial breakdown on children and the

17 *L.E.G. v. A.G.*, 2002 BCSC 1455 at paras. 25, 26 [*L.E.G.*].

18 *D.S. v. P.S.*, 2004 BCSC 354 at para. 112.

19 *L.E.G.*, *supra* note 17 at paras. 39, 42.

20 *Ibid.* at paras. 57, 58.

21 *Ibid.* at para. 59.

22 Judith Wallerstein & Julia Lewis, "The Long-term Impact of Divorce on Children: A First Report from a 25-year Study" (1998) 36 *Fam. & Conciliation Courts Rev.* 368 at 369.

23 Judith Wallerstein, Julia Lewis & Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (New York: Hyperion, 2000) at 312 [Wallerstein *et al.*].

law's inadequate response to children's needs.²⁴

Although children are arguably the ones most influenced and affected by custody and access decisions, they are, for the most part, rendered invisible and voiceless in legal proceedings. L'Heureux-Dubé J. argues that "adultism"²⁵ mars the judicial process through its assumptions that children are incapable of voicing their own views, and that their perspectives are less important than those of well-intentioned adults who claim to know what is in children's best interests. L'Heureux-Dubé J. insists that the legal system wrongly assumes that children's claims are better voiced and their interests better served through surrogate representation by parents and/or the state.

It is highly questionable whether parents have the ability to adequately convey children's views and interests during the custody and access disputes that unfold during the tumultuous time of separation or divorce.²⁶ In a study on children's perspectives of their parents' separation, Gollop, Taylor and Smith found that children did not receive much support during their parents' separation, were not given adequate explanations of what was happening to their families, and that the majority had no input into access and custody determinations.²⁷ The authors explain that parents, because they are in the midst of pain and upheaval themselves, are unable to attend to their children's best interests.

O'Connor, in her review of research on children's voices in custody and access decisions, is skeptical that either parents or the state can ascertain children's best interests without the opportunity for children to share their perspectives.²⁸ O'Connor reviews studies that show that parents' capacity to assess their children's needs diminishes during the divorce period; post-parenting agreements frequently ignore children's needs but satisfy those of their parents; separation agreements that work well when children are younger often do not work when children are older, but remain inflexible to suit parents; and courts tend to base decisions more on the quality of parents as individual persons rather than on the quality of the child-parent relationship.²⁹ Without finding ways to involve children meaningfully, custody and access decisions will continue to reflect adult priorities rather than children's best interests.

The strong judicial trend for joint custody orders³⁰ serves as a good illustration of how custody law serves adult interests at the expense of children's best interests. Several authors claim that there is no scientific or psychological evidence to conclusively support the notion that joint custody is in children's best interests.³¹ Fitzgerald argues that the trend towards joint custody reflects the power of adult lobby groups rather than children's interest.³² The contemporary prominence and influence of the father's rights movement on custody law provides a specific example of one such lobby group. According to Smart, the fathers' rights movement promotes equal shares, or shared parenting, as being in the best interest of the child and the best way

24 See for example *Young v. Young*, [1993] 4 S.C.R. 3 at paras. 106-107 and L'Heureux-Dubé J., "A Response to Remarks by Dr. Judith Wallerstein on the Long-term Impact of Divorce on Children" (1998) 36 Fam. & Conciliation Courts Rev. 384.

25 L'Heureux-Dubé *supra* note 3 at 137.

26 Bessner, *supra* note 13 in her introduction.

27 Gollop *et al.*, *supra* note 1. The authors' study focused on children and young people's perspectives about their family's efforts to maintain relationships and contact between children and both of their parents after their parents' separation. They conducted interviews with 106 children and young people from seventy-three New Zealand families.

28 Pauline O'Connor, *Voice and Support: Programs for Children Experiencing Parental Separation and Divorce* online: Department of Justice Canada <<http://canada.justice.gc.ca/en/ps/pad/reports/2004-FCY-2/index.html>> at 34-35.

29 *Ibid.* at 34-35.

30 See Susan Boyd, *Child Custody, Law, and Women's Work* (Oxford: Oxford University Press, 2003).

31 Pauline Tapp & Mark Henaghan, "Family law: conceptions of childhood and children's voices – the implications of Article 12 of the United Nations Convention on the Rights of the Child" in Anne Smith, Nicola Taylor & Megan Gollop eds. *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 91 at 100. See also Wendy Fitzgerald, "Maturity, Difference, and Mystery: Children's Perspectives and the Law" (1994) 36 Ariz. L. Rev. 11 at 56-59.

32 Fitzgerald, *ibid.* at 58.

to equalize relationships between mothers and fathers.³³ Smart states that in current custody debates, “children are constantly invoked but they are not required to speak”.³⁴

Courts do not know if children want to be shared equally or how shared parenting arrangements work over the course of childhood because children’s views are often not sought. Although equal share arrangements may be politically compelling in that they satisfy the demands of both parents, Smart, in her follow-up study of children who were part of shared parenting orders, found that equal shares may become less ideal for children as their lives change.³⁵ Smart found that equal sharing could be successful for children provided that: the children were partners in the enterprise; parents kept checking to ensure their children were happy with the arrangements; and parents were willing to consult, be flexible and change arrangements as children matured. In cases where parents were unable to involve their children in the aforementioned ways, shared parenting was not in children’s best interests. Smart concludes that striving for principles of political and legal equality between men and women in custody law, which are adult priorities, can be detrimental to children whose needs and interests often go unrecognized.³⁶

One of the reasons adult interests and priorities prevail is because the legal system attributes little legal meaning to children’s experiences and views. L’Heureux-Dubé J. explains that the voice of those under the age of majority is, in and of itself, considered immature and legally irrelevant.³⁷ In her view, “children are disabled as a class” because the legal system assumes that children, lacking the requisite cognizance to know what is best for themselves, are legally incompetent to voice their own interests.³⁸

Because children have yet to attain full legal personhood, it has been easy for the legal system to define children’s needs in terms of adult priorities under the guise of protecting children’s best interests. Fitzgerald aptly characterizes children’s legally disabled status when she writes:

We cannot know, finally, how children perceive the world and their place in it, why and how they bond with each other and adults, why their priorities are “childish” and what that means. Unable to understand, we denigrate the child’s perspective as uneducated or immature, imagining the child’s perspective as an inferior version of our own. Fortified in our superiority, we then feel justified in ignoring children’s perspectives and substituting adult purposes for them.³⁹

Rather than being in their best interests, ignoring children’s perspectives perpetuates a legal system that gives priority to the interests of adults.

Without explicit statutory direction for judges to ascertain children’s perspectives and attach significant weight to them, custody and access decisions may be made without a true understanding of the individual child that comes before the court; this is the antithesis of the best interests of the child principle.

33 Carol Smart, “Equal shares: rights for fathers or recognition for children?” (2004) 24(4) *Crit. Soc. Pol’y* 484 [Smart, “Equal Shares”]. Smart explains that the fathers’ rights movement in England is composed of fathers and/or those who advocate for fathers’ rights who believe that the courts lean too much in favour of mothers and give insufficient attention to the significance of fathers in the lives of children after divorce. Although Smart’s study is based on the fathers’ right movement in England, her study is applicable to Canada where the father’s rights movement holds similar beliefs and advocates for joint custody; See Boyd, *supra* note 30, for the influence of the fathers’ rights movement on custody and access law in Canada.

34 Smart “Equal Shares”, *supra* note 33 at 485.

35 *Ibid.*

36 *Ibid.* at 500.

37 L’Heureux-Dubé, *supra* note 3 at 136.

38 *Ibid.*

39 Fitzgerald, *supra* note 31 at 98.

PART II –The Case for Children’s Inclusion

There are several compelling reasons that justify the inclusion of children’s voices in custody and access decisions. I organize and discuss these reasons under five headings: the effects on children; changing sociological views of children; principles of equality, dignity and respect; international commitments and the recommendations of domestic law reports; and effective legal decisions.

EFFECTS ON CHILDREN

Excluding children from meaningful participation in custody and access decisions can have a negative impact on them. There is evidence to suggest that children can feel more distressed, insecure, rejected and angry if they are not involved in such decisions.⁴⁰ The Special Joint Committee on Child Custody and Access concluded that not involving children in custody and access decisions “could have ‘dire consequences’ for the child with ‘long-term mental health and other negative implications’”.⁴¹

Conversely, involving children in custody and access decisions may lead to positive outcomes for them. Extensive research suggests that perceived control over or involvement in decision making corresponds to positive mental health.⁴² Including children’s voices in decision making contributes directly to their well-being, adjustment and, by implication, the child’s best interests.⁴³ Referring to sociological evidence, Tapp and Henaghan state that, “[b]eing heard develops feelings of self-esteem, competence and relatedness which are vital to citizens in a democracy and may help children to cope with stressful situations”.⁴⁴ Self-esteem contributes to developing resilience.⁴⁵ Additionally, listening to children and considering their views may help children cope more effectively with divorce or separation.⁴⁶

Including children in custody and access determinations may also increase children’s competency and independence. Children can become competent if they are allowed to participate more fully in decisions that affect them; participation may allow maturation as part of a cultural process.⁴⁷ Woodhouse argues that including children in decision making, even before they are entirely competent, plays a crucial role in educating children for independence.⁴⁸ Underlying this view is a belief that children are not passive objects, but rather, are social actors who can and do participate in constructing their own knowledge.

40 Joan Kelly, “Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice” (2002) 10 Va. J. Soc. Pol’y & L. 129; *L.E.G.*, *supra* note 17 at para. 20; Gollop *et al.*, *supra* note 1; Christine Davies, “Access to Justice for Children: The Voice of the Child in Custody and Access Disputes” (2004) 22 C.F.L.Q. 153.

41 As quoted by Bessner, *supra* note 12 in her introduction.

42 Kelly, *supra* note 40; *L.E.G.*, *supra* note 17 at para. 20.

43 O’Connor, *supra* note 28 at 27.

44 Tapp & Henaghan, *supra* note 31 at 95.

45 O’Connor, *supra* note 28 at 35.

46 Kelly, *supra* note 40.

47 Carol Smart, “Children and the Transformation of Family Law” (2002) 49 U.N.B. L.J. 137 at 151 [Smart, “Family Law”].

48 Barbara Woodhouse, “Talking About Children’s Rights in Judicial Custody and Visitation Decision-Making” (2002) 36 Fam. L.Q. 105 at 119 [Woodhouse, “Children’s Rights”].

CHANGING SOCIOLOGICAL VIEW OF CHILDREN

Changing sociological views of childhood similarly suggest that children should be involved in custody and access decisions.⁴⁹ Whereas older theories of child development viewed children as progressing through concrete predetermined stages towards rationality, the sociology of childhood views childhood as a social construct, suggesting that how childhood is culturally defined affects children's participation in society, and that adult social power, rather than biology, determines the boundaries between childhood and adulthood.

The sociology of childhood also views children as active in the construction and determination of their own lives as opposed to passive creatures subject to universally predictable stages of development. Rather than conceptualizing children as vulnerable objects of social and legal concern, children are seen as social actors—subjects in their own right. Thus, children's own views and understandings are the key concern rather than those of parents and professionals.

Sociologists are now examining the ways that children construct meaning as active participants in their own development. As Freeman writes, "Our understanding of children as agents will increase the more we give them a voice".⁵⁰ In their study of factors important to children after their parents' separation, Gollop, Taylor and Smith conclude that their study "reinforces the view that children's capacity to understand and participate has been underestimated".⁵¹

The current legal system is based on antiquated notions of child development. Tapp and Henaghan claim that "[t]he legal system's conceptions of childhood have more to do with the needs of the system and society as perceived by adults than with children's rights or current research evidence on children's capabilities and interests".⁵² Similarly, Smart asserts that the legal system does not envisage a participating child that can speak for his or herself, but rather views a child as an adult in the making, an object of social concern.⁵³ Smart claims that this ignores the ways in which children are able to participate in decisions that affect their lives.

From a sociological perspective, increasing children's participation in custody and access decisions by providing opportunities for them to express their concerns, needs and interests assists their development and maturation as responsible social actors. As social actors, children are worthy of being treated by the law as equally deserving of concern and respect.

PRINCIPLES OF EQUALITY, DIGNITY AND RESPECT

Equality, dignity and respect are fundamental values that Canada seeks to protect and promote through its legal regime. As acknowledged by the Supreme Court of Canada, equality has long been an important feature of Western thought "into which [people] have poured the deepest urgings of their heart[s]".⁵⁴ The principle of equality rests on the moral footing that fundamental to a truly free and democratic society is the belief that all persons be treated with equal concern and respect.⁵⁵ Equality and human dignity are inextricably linked, and the Supreme Court of Canada has held that the purpose of the equality guarantee in the Canadian

49 This subsection on the sociology of childhood is based on the work of the following authors: Michael Freeman, "The sociology of childhood and children's rights" (1998) 6 *Int'l J. Child. Rts.* 433; Nicola Taylor, "The Voice of Children in Family Law" (1998) 18 *Child. Legal Rts. J.* 2; Anne Smith & Nicola Taylor, "The sociocultural context of childhood: balancing dependency and agency" in Anne Smith, Nicola Taylor & Megan Gollop eds. *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 1; Smart, "Family Law", *supra* note 47; Tapp & Henaghan, *supra* note 31.

50 Freeman, *supra* note 49 at 443.

51 Gollop *et al.*, *supra* note 1 at 155.

52 Tapp & Henaghan, *supra* note 31 at 97.

53 Smart, "Family Law", *supra* note 47 at 150.

54 *Law Society B.C. v. Andrews*, [1989] 1 S.C.R. 143 at para. 20 [Andrews].

55 *Ibid.* at para. 34.

Charter of Rights and Freedoms ("Charter") is to prevent the violation of human dignity.⁵⁶ The Court has interpreted s. 15(1) of the *Charter* as recognizing the "fundamental importance and the innate dignity of the individual ... [and] the intrinsic worthiness and importance of every individual".⁵⁷ Accordingly, the Court has reflected that "[h]uman dignity means that an individual or group feels self-respect and self-worth" and is "harmed when individuals and groups are marginalized, ignored, or devalued".⁵⁸ Moreover, the equality guarantee in the *Charter* is concerned with protecting and promoting human dignity in order "to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration".⁵⁹

Children are intrinsically valuable and important members of society who deserve to be treated with equal concern and respect. Family law proceedings harm children's dignity by marginalizing their voice in custody and access determinations. L'Heureux-Dubé J. insists that the legal treatment of children should be about acknowledging children's views and treating them with "equal concern, equal respect and equal consideration".⁶⁰ Further, she believes that "the judicial process will not achieve true and complete justice" until it recognizes, through listening to and considering children's views, that children are "worthy of understanding and respect".⁶¹

Giving children an opportunity to voice their views is a step towards treating them with greater respect. Tapp and Henaghan write that, "if it is the child's well-being that is paramount, at the very least the child deserves to be heard and treated with respect as an individual".⁶² According to several authors, children want to be heard in decision making processes that affect them.⁶³ For example, the vast majority of youth participating in a federal, provincial and territorial study on child custody, access and support wanted services and legislation to provide a way for their voices to be heard in decisions affecting them.⁶⁴ Similarly, Kelly points to several studies that support the view that children want to participate in some democratic manner in the divorce process.⁶⁵

Although children want to participate in custody and access decisions, they do not necessarily feel that they should have the ultimate say. In speaking with children about their families after divorce, Smart found that the majority of the children she studied did want a voice in the determinations and did want to understand what was occurring, but did not want to be forced to make custody and access decisions themselves.⁶⁶ Smart concludes that children do not assume that having a voice means that they should determine the outcome; what children wanted was recognition, not control. Similarly, in their study of children and adult's views of children's best interests, Thomas and O'Kane asked children aged eight to twelve years to rank,

56 *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 51 [Law].

57 *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 67.

58 *Law*, *supra* note 56 at para. 53.

59 *Ibid.* at para. 51.

60 L'Heureux-Dubé, *supra* note 3 at 138.

61 *Ibid.* at 137.

62 Tapp & Henaghan, *supra* note 31 at 108.

63 Smart, "Family Law", *supra* note 47 at 152; Kelly, *supra* note 40 at 151; Nigel Thomas & Claire O'Kane, "When children's wishes and feelings clash with their 'best interests'" (1998) 6 *Int'l J. Child. Rts* 137.

64 Custody and Access Project of the Federal-Provincial-Territorial Family Law Committee, *Final Federal-Provincial-Territorial Report on Custody and Access and Child Support: Putting Children First*, online: Department of Justice Canada <<http://www.justice.gc.ca/en/ps/pad/reports/flc2002.html>> [Putting Children First]. This committee was initiated at the request of the Deputy Ministers Responsible for Justice. It consulted with family law professionals, parents, advocacy groups and interested Canadians, conducted extensive research, and engaged in federal, provincial and territorial discussions in order to make recommendations to improve the custody, access and child support regimes in Canada.

65 Kelly, *supra* note 40 at 151.

66 Smart, "Family Law", *supra* note 47 at 152.

in order of importance, a number of reasons why children should be involved in decision making. Children consistently put at the top of their lists: “to be listened to”; “to let me have my say”; “to be supported”, and at the bottom: “to get what I want”.⁶⁷ Interestingly, when social workers completed the same ranking exercise, many put “to get what I want” at the top of their lists.⁶⁸ Although adults may perceive that the inclusion of children’s voices equates with allowing children to become the decision-makers, it appears that what many children actually want is an opportunity to express their views and be heard, not the power to ultimately make custody and access decisions.

Society’s belief in equality and human dignity demands that the legal system accord children equal respect and consideration because of their intrinsic worth and importance. Children are currently marginalized and devalued by a legal system that views their interests and concerns as coterminous with parents and the state, and assumes that children are incapable of expressing their needs, and that adults can better represent their best interests. Children’s perspectives are neither more nor less correct than those of their parents; they are however, different, and thus, valuable to the legal system in constructing an accurate picture of what is in the best interests of the children. Woodhouse questions why we should accept that the child’s construction of parenthood and family is flawed and the adult’s is correct.⁶⁹ Similarly, Thomas and O’Kane explain that there exists an unspoken assumption that children’s criteria for making decisions are necessarily defective or inferior to those of adults.⁷⁰ They claim that adults do not have a monopoly on wisdom, and that there is evidence to suggest that children may be better and more consistent judges than adults of what is important in their lives.

It is possible that the lack of space in the legal system for children’s voices is attributable to the reluctance of adults to relinquish power. Tapp and Henaghan question whether our unwillingness to provide opportunities for children’s voices to be heard and considered stems from a concern that it will erode adult power.⁷¹ The reason we value, protect and promote equality and human dignity is to prevent the exercise of one group’s power to the detriment of another. As Woodhouse articulates, rights and responsibilities replace raw power as a means of ordering social interactions.⁷² If the legal system is to reflect the importance of equality and human dignity, it must be more than a vehicle to promote and protect the interests and concerns of powerful adults, and should elicit, consider and value children’s voices.

INTERNATIONAL COMMITMENTS AND THE RECOMMENDATIONS OF DOMESTIC LAW REPORTS

Both Canada’s international commitments and the recommendations of federal and provincial law reports provide justification for involving children meaningfully in custody and access decisions. Canada is a signatory to the United Nations *Convention on the Rights of the Child* (“CRC”).⁷³ According to Article 12 of the CRC, children have an internationally recognized legal right to participate in custody and access decisions:

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.

67 Thomas & O’Kane, *supra* note 63 at 147.

68 *Ibid.*

69 Woodhouse, “Hatching the Egg”, *supra* note 2 at 1810.

70 Thomas & O’Kane, *supra* note 63 at 151.

71 Tapp & Henaghan, *supra* note 31 at 91.

72 Woodhouse, “Children’s Rights”, *supra* note 48 at 120.

73 *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 (Ratified by Canada 13 December 1991).

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.⁷⁴

Although the *CRC* makes capacity central to a child's right to have a voice, rather than their inherent worth and value as an individual, by signing the *CRC*, Canada has committed to providing those children who can express their views with the opportunity to have a voice in custody and access decisions.

Additionally, several federal and provincial law reports have recommended that children should be meaningfully included in custody and access determinations. The Special Joint Committee on Child Custody and Access recommended that it is in the best interests of children to have an opportunity to be heard when parenting decisions affecting them are being made. It also recommended that separate counsel for children may be necessary to protect their best interests.⁷⁵ The federal, provincial and territorial report on child custody and access, *Putting Children First*, recommended that parents and the courts have access to information on children's perspectives.⁷⁶ Similarly, the B.C. Taskforce recommended that family law policy makers carefully consider the findings of the final report by the International Institute for Children's Rights and Development on children's participation in custody and access decisions.⁷⁷ It also recommended that the justice system find better ways of determining children's best interests and involving children more meaningfully in family court processes.⁷⁸

The B.C. family law system has not served children well through its exclusion of their perspectives. Both the *CRC* and domestic law review bodies recognize that either children have a right to participate in custody and access decisions or that the best interests of the child principle mandates children's inclusion. Including children in legal processes will expand how the court conceptualizes the issues that come before it, resulting in a more complete legal analysis. Ultimately, a broader legal analysis will result in more effective court orders for children.

EFFECTIVE LEGAL DECISIONS

By listening to and hearing children, courts can learn from children's difference and consequently may make decisions more suited to their best interests. In her interviews with parents and children from divorced families, Smart became acutely aware of how different the experience of the same divorce was for children and their parents.⁷⁹ According to Smart, even the most caring parent found it difficult to see the divorce from the standpoint of his or her child.

74 *Ibid.*, Art. 12.

75 Special Joint Committee on Child Custody and Access, *Recommendations 3 and 4*, online: Department of Justice Canada <<http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm>>. This Committee, composed of members of the Senate and the House of Commons, examined and analyzed issues relating to custody and access arrangements after separation and divorce. It assessed the need for a more child-centred approach to family law policies and practices.

76 *Putting Children First*, *supra* note 64, Recommendation 11.

77 This report can be found at <<http://www.iicrd.org/familycourt/FinalMCP.htm>>. The International Institute for Children's Rights and Development conducted a project that involved: interviews with young people, lawyers, judges and service providers who have experience in B.C. family court processes; a review of research and good practices; identifying existing strengths supportive of young people's meaningful participation as well as the gaps; and suggestions to bridge these gaps.

78 Family Justice Reform Working Group, *A New Justice System for Families and Children*, Recommendation 16, online: B.C. Ministry of Attorney General <http://www.bcjusticereview.org/working_groups/family_justice/final_05_05.pdf> [*B.C. Taskforce*]. The B.C. government instructed the Family Justice Reform Group to explore the possibilities for fundamental reform of the B.C. family law system. It examined reports on family law issues conducted over the last three decades in B.C. and elsewhere. The Group concluded that the adversarial system does not work well for families.

79 Carol Smart, "From Children's Shoes to Children's Voices" (2002) 40 *Fam. Ct. Rev.* 307 [Smart, "Children's Shoes"]. In this article, Smart provides insights into how children she and her colleagues have interviewed in the United Kingdom across a number of projects saw post-divorce family life.

Smart writes that “seen through the eyes of a child, the family can look like a very different place to one presented by a parent. ... There are parents’ families and children’s families and accounts of both are equally valid”.⁸⁰ Smart insists that the court system must acknowledge that people stand in different relationships to one another within families, and must accord the same legitimacy to children’s experiences and perspectives as those of adults.

Feminist legal theory explicitly considers and values diverse perspectives based on the premise that the exclusion of disadvantaged groups has led to bias and incompleteness in legal analysis and legal institutions. As such, feminist legal theory can shed valuable light on the problem of children’s exclusion and the importance of including children’s perspective in legal decision making. Fineman explains that feminist legal theory challenges notion that the law is a neutral, rational set of rules that is unaffected by the perspectives of those who wield power.⁸¹ As Fineman articulates, excluded groups have different views and experiences that make our consideration and understanding of legal issues more complete and complex. A theory of difference can, on the same basis, make children’s participation central to more legitimate and effective legal decisions regarding their best interests.

Many have argued that providing children with opportunities to voice their concerns, interests and needs will expand the relevant issues and enhance the effectiveness of legal decision making.⁸² L’Heureux-Dubé J. writes that “children have the right to require of us a better understanding of who they are”,⁸³ just like any other disenfranchised group. If the legal system excludes children’s perspectives and experiences, then the court, which aims to protect and serve children’s best interest, may make incorrect decisions. In her article on what the ‘immigrants of exclusion’ can offer the legal system, Menkel-Meadow writes that the

‘truth’ may be found with the statistical ‘outliers’, that the margin may be the core, the periphery may be the center, and the excluded may be the included. At the very least, the truth as we know it may be much more multifaceted than the ‘included’ are willing to acknowledge. Previously excluded voices, by providing innovation and change, can counteract the stagnation and bankruptcy of the status quo.⁸⁴

The inclusion of children’s voices can challenge legal assumptions and biases about families and thus has the potential to benefit children and their parents. Menkel-Meadow aptly states that “[s]uch is the lesson of the knowledge of exclusion—that each time we let in a new excluded group, that each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing”.⁸⁵ The inclusion of children’s voices may reveal the inadequacies of the current legal framework with respect to family disputes and facilitate more effective decision making.

80 *Ibid.* at 308.

81 See Martha Fineman, *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (London: Routledge, 1993) at 24–8, for comments on feminist legal theory.

82 Smith & Taylor, *supra* note 49 at 13–14; Henaghan & Tapp, *supra* note 31 at 85; Freeman, *supra* note 49 at 443; Thomas & O’Kane, *supra* note 63 at 152; Jo Bridgeman & Daniel Monk, “Introduction: Reflections on the Relationship Between Feminism and Child Law” in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 1 at 9.

83 L’Heureux-Dubé, *supra* note 3 at 137.

84 Carrie Menkel-Meadow, “Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law” (1987) 42 U. Miami L. Rev. 29 at 34.

85 *Ibid.* at 52.

RIGHTS FOR CHILDREN

There are strong reasons for providing opportunities for children's voices to be heard in custody and access decisions. Inclusion acknowledges children's ability to construct and convey their understanding and may contribute to positive mental well-being. Society's belief in the innate worth of every person and the importance of according equal value, respect and consideration to every individual demands that the legal system attach greater weight to children's perspectives. Both the international recognition of children's rights to participate in decisions that affect their lives and the potential for children's inclusion to lead to more complete legal analyses and more effective custody and access decisions provide strong legal justifications for children's participation.

Children have a legitimate claim to have their voices heard. Legal rights are the means by which individuals have their claims recognized and protected. Rights, as opposed to interests, provide people with legally enforceable claims from which they are entitled to take action.⁸⁶ According to Brennan, at the core of the notion of rights is the idea that rights warrant respect from others and can be the basis for making claims against them.⁸⁷ To admit that children have an interest in custody and access proceedings does not ensure that they have any legally recognized claim to have their interests and concerns represented and protected. Thus, the recognition of children's rights is essential to ensuring that the court, in making custody and access decisions, listens to and hears their voices. However, rights, as traditionally conceived, are ill-suited to children who are dependent and still in the process of developing rational capabilities. Herein lies the problem. To be treated with equal concern, respect and consideration requires that children have rights, but the prerequisites for such rights are independence, autonomy and capacity—all attributes that children lack. Rather than admit that children do not have rights, many children's rights theorists have attempted to resolve this problem in either of two ways. Child liberationists claim that there is no difference between children and adults and thus, no difference in the rights to which they are entitled. In contrast, child protectionists insist that children have certain rights, including those protecting welfare, but not others such as agency rights.

Neither child liberationists nor child protectionists provide an acceptable solution because neither takes issue with how the problem is defined. According rights to children so that they can make claims that are as worthy of attention as the claims of adults is only problematic if the legal system conceives rights in a particular way. The dominant conception of rights is the primary problem, and must be critiqued and challenged in order for children's voices to be heard and respected. Including children in our rights discourse both illuminates the narrow and impartial construction of the dominant conception of rights, and expands rights discourse in a manner that benefits children as well as adults. Reconceptualizing rights is a prerequisite to any discussion on how the judicial process can incorporate children's voices. How we conceptualize children's rights affects the solutions we propose to the problem of their exclusion. Without reconceptualizing the dominant rights framework, the inclusion of children will be marginal at best, and at worst damaging to children and their families.

86 H.T.G. Andrews & Pasquale Gelsomino, "The Legal Representation of Children in Custody and Protection Proceedings: A Comparative View" in Rosalie Abella & Claire L'Heureux-Dube eds., *Family Law: Dimensions of Justice* (Toronto: Butterworths, 1983) 241 at 242–244.

87 Samantha Brennan, "Children's Choices or Children's Interests: Which do their Rights Protect?" in David Archard & Colin Macleod eds., *The Moral and Political Status of Children* (New York: Oxford University Press, 2002) 53 at 54.

PART III –The Reconceptualization of Rights

TRADITIONAL THEORIES OF CHILDREN'S RIGHTS

Western rights have their genesis in liberal theory's fundamental goal to change the status of the individual from a subject of the monarch to an autonomous citizen of the state.⁸⁸ The vehicle of individual rights is the means by which citizens restrict the state's authority. Liberal theory considers capacity, reason and autonomy as the necessary attributes of citizenship. To have liberty, one must be able to exercise it; according to liberal theory, this requires rationality and competency.

Traditional rights theorists deny children rights because they feel children lack the reason and freedom to act in accordance with their own will.⁸⁹ Through education of their intellect, children's rationality can emerge; thus, liberal theory views children as citizens in waiting, beings who do not yet possess the requisite capacity for citizenship. Liberal theory premises the acquisition of rights on the capacity to reason and compel other citizens and the state to respect one's autonomy. According to Arneil, liberal theory defines children in terms of what they lack and constructs them as the opposite or negative form of adult; thus, children are viewed as "becomings" worthy of protection rather than beings in their own right.⁹⁰

Because the dominant rights ideology denies children rights, theorists have attempted to articulate a rationale for according rights to children. Two principal schools of children's rights theorists have emerged: child protectionists and child liberationists.⁹¹ Child protectionists view children as dependent, vulnerable and in need of protection because of their different physical and mental capabilities. According to child protectionists, children have welfare rights—those that pertain directly to their well-being, such as sustenance, shelter and education—but not agency rights to act according to their own judgment. Brighouse explains that because children lack rational capabilities, authoritative adults are morally charged with discerning and protecting children's best interests.⁹² Because children are dependent, vulnerable and incapable, their rights are limited and their views can at most be consultative.

Child protectionists argue that children have an equal right to have their basic interests protected and promoted but do not have an equal voice in matters bearing on their interest.⁹³ Implicit in this view is the belief that children are persons, but not full ones. Children are persons in that they have moral and legal claims to have their interests and needs met and protected; however, they are not persons in that they are not permitted to exercise the full range of rights and bear the full burden of responsibilities that we accord adults. Schapiro writes, "[f]ull personhood . . . has to be conceived as a condition of autonomy, a condition in which a creature is fully subject to her own authority, such that her actions and beliefs constitute exercises of that authority".⁹⁴ Schapiro justifies society's paternalistic attitude towards children on the basis that children are emerging persons, that childhood is a "condition in which the personhood of the person, her capacity to have a mind and voice of her own, is as yet ill constituted".⁹⁵ Given that children are not yet capable of governing themselves in a rational manner, adults are obliged to

88 See Barbara Arneil, "Becoming versus Being: A Critical Analysis of Child in Liberal Theory" in David Archard & Colin Macleod eds., *The Moral and Political Status of Children* (New York: Oxford University Press, 2002) 70 at 70–71.

89 For an expansion of this argument, see Katherine Federle, "On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle" (1993) 42 De Paul L. Rev. 983 [Federle, "Reconceiving Rights"].

90 Arneil, *supra* note 88 at 71–75.

91 See Bessner, *supra* note 12, at 1.2, and Katherine Federle, "Rights Flow Downhill" (1994) 2 Int'l J. Child. Rts. 343 at 351–352 [Federle, "Rights Flow Downhill"] for an overview of child protectionists and child liberationists' views.

92 Harry Brighouse, "How Should Children Be Heard?" (2003) 45 Ariz. L. Rev. 691.

93 See Tamar Schapiro, "Childhood and Personhood" (2003) 45 Ariz. L. Rev. 575 for an elaboration of this view.

94 *Ibid.* at 588.

95 *Ibid.* at 589.

protect children from their own “cognitive and volitional wantonness”.⁹⁶

According to child liberationists, self-determination is the root of children’s liberation from oppression, and children’s rights can only be realized when children have autonomy to decide what is best for themselves.⁹⁷ Child liberationists believe that even young children have the capacity to make decisions. Because it is difficult to draw the line between competency and incompetence, child liberationists subscribe to the view that all children are competent and should have the same political and legal rights as adults.

In addition to these two main camps of children’s rights theorists, there are those who situate themselves in between, advocating for a gradualist model of children’s rights. Brennan is one such advocate. She explains that there are two types of rights: those that protect choices (agency rights) and those that protect interests (welfare rights).⁹⁸ Brennan asserts that because children lack the capacity to reflect critically and rationally on their choices, we rightfully deny them agency rights. Brennan insists that we view children as would-be choosers, who begin as individuals with interests that they are unable to protect and advance to full-fledged autonomous choosers who have the capacity to decide what is best for themselves. Thus, children gradually move from having rights that primarily protect their interests to having rights that primarily protect their choices.

However, child protectionists, child liberationists and those who advocate a gradualist model of children’s rights remain embedded in the dominant rights ideology. The notion of capacity as a prerequisite to rights is the central organizing principle of both traditional liberal theorists as well as children’s rights theorists.⁹⁹ According to liberal theory and children’s rights theorists, a full-fledged rights-holder is an autonomous, rational and thus, competent individual who can compel performance of his or her right. Child protectionists deny children rights on the basis of their incompetency and child liberationists accord children rights because they are conceived as competent. In her gradualist model, Brennan relies on capacity to determine when children can acquire rights to protect their choices. If rights are contingent on a particular characteristic, such as capacity, then having rights is an exclusionary practice; claims made by those without the requisite capacity need not be recognized nor protected.¹⁰⁰ Consequently, it is logical to conclude that children do not have equal rights, and are not full legal persons because of their diminished capacity. By emphasizing capacity as being central to full-fledged rights recognition, children’s rights theorists do not question the legitimacy of the dominant rights discourse and do not provide a convincing rationale for the protection and promotion of children’s interests.

As discussed, a rights discourse that rests on a central premise of capacity results in children’s exclusion from the legal system as persons in their own right. Thus, it is necessary to reject capacity as an organizing principle of rights if children’s rights are to have meaning and value. In defining rights in terms of individual autonomy, rationality and competence, traditional rights discourse—of which children’s rights theorists are a part—favours certain attributes to the exclusion of others and thus offers varying, socially selected degrees of legal protection. Because traditional rights discourse, by definition, excludes children, some have argued that a child-centric family law system should emphasize responsibilities rather than rights.¹⁰¹ However, because rights are the primary means by which the justice system recognizes and protects interests, rights remain important to children. If we want to take children’s needs and interests

96 *Ibid.* at 590.

97 See Bessner, *supra* note 13 at 1.2.

98 Brennan, *supra* note 87.

99 Federle persuasively articulates this argument in Federle, “Reconceiving Rights”, *supra* note 89, and Federle, “Rights Flow Downhill”, *supra* note 91.

100 Federle makes this point in Federle, “Rights Flow Downhill”, *supra* note 91.

101 See e.g. Katharine Bartlett, “Re-expressing Parenthood” (1988) 98 Yale L.J. 293 and Woodhouse I, *supra* note 2 at 1842.

seriously and have the legal system recognize their claims equally with other moral claims, it is necessary to make claims in the language of rights.¹⁰² Rather than dismiss rights as the domain of autonomous and competent actors, we must expand our conception of rights to recognize and value other attributes.

EXPANDING OUR CONCEPTION OF RIGHTS

A new conception of rights has the potential to not only benefit children, but also adults as it seeks to accord moral and legal significance and value to a broader array of human characteristics. Minow states that developing a theory of children's rights holds promise for a new conception of rights generally.¹⁰³ Unlike Minow, I do not intend to develop a theory of children rights, rather I argue for a broader reconceptualization of rights *generally*, not just for children specifically. As noted above, attending to the voices of excluded groups can "offer new ways of knowing"¹⁰⁴ that can benefit the legal system as a whole. By focusing on children's voices, our rights discourse can be expanded and enriched.

Gilligan's work on psychological theory and moral development provides an apt illustration of how attending to excluded voices can enrich our current ways of knowing.¹⁰⁵ Gilligan found that the emphasis of male perspectives in psychological theory and moral development, and the accompanying omission of women in existing models of human development, has led to a limited conception of the human condition. Gilligan argues that the silence of women in the "narrative of human development"¹⁰⁶ distorts its stages and sequences. According to Gilligan, two different moralities emerge from studying male and female development: the morality of rights with its emphasis on individuals and separation; and the morality of responsibility with its emphasis on connection and relationships. Gilligan argues that by favouring one morality at the expense of the other, our conception of adulthood is out of balance in that it favours separateness of individuals over connection with others, and the autonomous life of work over the interdependence of love and care.¹⁰⁷ Gilligan claims that including women in the study of human development changes the entire account, broadening our understanding of human development, which is beneficial to males and females alike.¹⁰⁸ Similarly, including children in our rights discourse can expand our conception of rights in a manner that benefits both children and adults. Rather than speaking of a specific category of children's rights, it is important to reconceptualize rights more generally, to change the entire account so that rights protect and promote a broader array of attributes.

Feminist scholarship also has much to offer a new, more inclusive conception of rights because it has brought to light diverse perspectives that have questioned the presumed neutrality of legal analysis and institutions. Many feminists have criticized the liberal construction of the individual, autonomous, rational rights-holder as giving greater weight to certain characteristics, frequently associated with males, and making invisible other attributes, mostly associated with females.¹⁰⁹ Through a feminist lens, it becomes apparent that the rhetoric of traditional rights discourse is problematic because it excludes relationships, interdependencies and care in

102 Arneil, *supra* note 88 at 86.

103 Martha Minow, "Rights for the Next Generation: A Feminist Approach to Children's Rights" in Rosalind Ekman Ladd ed., *Children's Rights Re-visioned: Philosophical Readings* (Belmont: Wadsworth Publishing Company, 1996) 42 at 44.

104 Menkel-Meadow, *supra* note 84 at 34.

105 Carol Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1993).

106 *Ibid.* at 25.

107 *Ibid.* at 17.

108 *Ibid.* at 25.

109 Minow, *supra* note 103; Bridgeman & Monk, *supra* note 82; Gilligan, *supra* note 105; Bartlett, *supra* note 101.

favour of separate, autonomous, capable individuals.¹¹⁰ Instead of an individual conception of rights that preserves distances between people, I advocate a collective conception of rights that permits and promotes relationships.

If we begin with children as they are, not as “constructed reflections of an adult citizen”,¹¹¹ the central issue is not authority, status or rights traditionally conceived, but rather care. Gilligan popularized the notion of an ethic of care. She argues that justice requires not only an ethic of rights but also an ethic of care where relationships, interdependency and caring are valued and protected. She writes:

The morality of rights is predicated on equality and centered on the understanding of fairness, while the ethic of responsibility relies on the concept of equity, the recognition of differences in need. While the ethic of rights is a manifestation of equal respect, balancing the claims of other and self, the ethic of responsibility rests on an understanding that gives rise to compassion and care.¹¹²

Interdependency and the need for care are central to children's lives. Children do not “identify the family as a site of legal rights, they [see] it—to varying degrees—as an arena of emotions, care, security, closeness and love”.¹¹³ Because children depend on families for physical and emotional well-being, focusing on children highlights the importance of interdependent relationships and the primacy of care and responsibilities.

For children, respect, interdependence and reciprocity of concern are central to family life.¹¹⁴ Smart's research on children's perspectives of their families leads her to conclude that:

‘Family’ represents a constructed quality of human interaction or an active process rather than a thing-like object of detached social investigation. If we see family in this way, and certainly the children we interviewed seemed to, it is hard to see the wisdom in seeking to resolve family strife through the simple regulation of space and time rather than emphasizing the qualities of relationships.¹¹⁵

Viewed in this way, families are organisms.¹¹⁶ Caregiving in families is supported by relationships of mutuality and interdependence. A concern with relationships focuses attention on attachment, connection and interdependence between children and adults.¹¹⁷ From an ethics of care perspective, the resolution of family law problems depends on contextualizing the dispute in terms of responsibility and caring, which involves addressing the concerns and attending to the needs and interests of all those involved.

Legal theory that is inattentive to the relationships of care and connection between people cannot adequately address the issues families face. Woodhouse writes that “[l]aw tends to displace a child's concrete experience of care with an adult's abstract conception of right”.¹¹⁸ For

110 See Minow, *supra* note 103 at 50–52, for an elaboration of this argument.

111 Arneil, *supra* note 88 at 88.

112 Gilligan, *supra* note 105 at 164–165.

113 Smart, “Equal Shares”, *supra* note 33 at 499.

114 Hilary Lim & Jeremy Roche, “Feminism and Children's Rights: The Politics of Voice” in Dierdre Fottrel, ed., *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (Cambridge: Kluwer Law International, 2000) 51 at 72 [Lim & Roche, “The Politics of Voice”]. In their article, Lim and Roche refer to research conducted in the United Kingdom that supports this point.

115 Smart, “Children's Shoes”, *supra* note 79 at 317–318.

116 Woodhouse, “Hatching the Egg”, *supra* note 2 at 1761.

117 Bridgeman & Monk, *supra* note 82 at 15, similarly articulate this point.

118 Woodhouse, “Hatching the Egg”, *supra* note 2 at 1810.

family law to respond effectively to children, the law must take seriously the activity of caregiving and the interdependencies between family members. Law needs to reconceptualize parenthood from entitlement to responsibility, autonomy to connectedness, and self to others.¹¹⁹ The best interests of the child principle should be primarily concerned with how the interests of the parent and the child link together in relationships.¹²⁰

Focusing on children highlights the importance of placing moral and legal value on relationships, interdependence and care. Traditional rights discourse's concern with individual autonomy ignores the interdependencies of family relationships, and consequently, does not enable the protection and promotion children's best interests. As Woodhouse states, "[w]e encourage families in trouble to atomize into units with independent claims of right, rather than coalescing around children's concrete needs".¹²¹ A child-centred perspective would place children, not parents, firmly at the centre of moral and legal concern and would evaluate parents' authority and obligations through the lens of children's needs and experiences.

Although attaching moral and legal significance to relationships, interdependency and care is essential to promoting and protecting children's best interests, it is equally imperative that the legal system be attuned to power dynamics within familial relationships. An emphasis on interconnectedness without a concomitant assessment of power will be inadequate to protect and promote children's interests.¹²² The legal system denied equal rights to other excluded groups, such as women and minorities, because it constructed them as lacking capacity.¹²³ Historically excluded groups succeeded in their rights claims by reconstructing themselves from weak, incompetent individuals in need of protection to competent, autonomous actors worthy of rights. Children cannot redefine themselves as equally competent to adults so "powerful elites"¹²⁴ decide which children's claims will be recognized.

In this way, feminist concerns about the importance of relationships and interdependence can also mask the power that women hold over children. The feminist argument that adults are also interdependent misses a fundamental distinction between the different relationships that adults and children have, namely, that children have no choice because of their incapacity and immaturity, and thus, need adults to care for them. An account of rights that emphasizes interdependent relationships without an assessment of power is a sophisticated version of rights discourse that still places capacity at the centre.¹²⁵ It is necessary to reconceptualize the meaning of having and exercising rights so as not to disadvantage children. This requires a need to recognize the state of being itself, and not simply capacity, as significant for rights protection.

A conception of rights that does not sufficiently attend to power may disadvantage children. Guggenheim's endorsement of framing claims on children's behalf in terms of their interests rather than their rights demonstrates this point.¹²⁶ Guggenheim argues that adults will never give children anything adults do not want them to have so it is more effective for child advocates to focus on children's interests rather than suggest that adults are obliged to give rights to children. Rather than challenge a conception of rights that privileges powerful adults, Guggenheim accepts that the legal system will always be adult-centric and that the best strategy for getting legal and political systems to respond to children's claims is to pursue the protection and promotion of those interests that most closely align with adult interests and values.

119 Bartlett, *supra* note 101 at 298–300.

120 *Ibid.* at 302–304 for an elaboration of this argument.

121 Woodhouse, "Hatching the Egg", *supra* note 2 at 1812.

122 Federle, "Rights Flow Downhill", *supra* note 91 at 364–367, makes a compelling argument in this regard.

123 *Ibid.* at 357–360; Bridgeman & Monk *supra* note 82 at 13.

124 Federle, "Rights Flow Downhill", *supra* note 91 at 365.

125 Federle, "Rights Flow Downhill", *supra* note 91 at 361–362.

126 Martin Guggenheim, "Maximizing Strategies for Pressuring Adults to do Right by Children" (2003) 45 *Ariz. L. Rev.* 765.

As I have argued, such an approach is problematic in the family law context as it has led to the valuing of adult priorities over children's best interests.

Rights have value because they can mitigate the exclusionary effects of power through access to legal and political structures.¹²⁷ By making legal and political claims, individuals can challenge structures as hierarchical and inequitable which may, in turn, provoke an institutional response that redistributes power and alters existing hierarchies. According to Federle, "rights flow downhill", in that rights shift control and power away from those who have it and towards those that do not, and thus, equalize relationships. Federle states:

To have rights, then, is not dependent upon the capacity to exercise or assert them; rather, these rights prohibit those who already have power from exerting it. In this sense, rights tied to power create zones of mutual respect for power that limit the kinds of things we may do to one another.¹²⁸

From this perspective, rights are essential to children because they provide them with the power to command respect.

Although a new conception of rights must recognize and value relationships, interdependency and care, it must also hold the state of being itself, rather than capacity, as the central organizing principle for rights protection. Focusing on children's existence, as they are with their different needs and concerns, rather than on their incapacities and dependencies, has the potential to shift power from adults to children and redirect the orientation of the current adult-centric legal system to one that is centered on children's best interests. A legal emphasis on interdependent relationships must also account for power dynamics that hierarchically structure familial relationships.

However, feminists have only partially engaged the concept of children's rights.¹²⁹ This lack of engagement can be attributed to concerns that children's rights may threaten women's autonomy by tainting them with children's dependence; that legal protection of children has been a way to control women; and that the father's rights movement has appropriated children's rights rhetoric.¹³⁰ These concerns demonstrate that familial relationships can and have been used to control women and children to serve patriarchal interests.

The legal system can threaten women and children's well-being through a rights discourse that emphasizes interdependent relationships without being attuned to the ways in which power privileges certain family members over others. Because of women's disproportionate responsibilities in caregiving, it is impossible to elevate the status of children without carefully attending to the history of women's status, recognizing that the work of childrearing is still gendered, and empowering children's caregivers.¹³¹ It is important to be attentive to how children's rights may serve and protect certain powerful interests and marginalize and devalue other interests. For example, the father's rights movement has utilized the rhetoric of children's best interests to advance the political and legal interests of fathers.¹³² A conception of rights that does not accord value to relationships, interdependence and caring and does not place sufficient emphasis

127 Federle, "Rights Flow Downhill", *supra* note 91 at 365.

128 *Ibid.* at 366.

129 Hilary Lim & Jeremy Roche, "Feminism and Children's Rights" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 227 [Lim & Roche, "Feminism and Children's Rights"]; Michael Freeman, "Feminism and Child Law" in Jo Bridgeman & Daniel Monk, eds., *Feminist Perspectives on Child Law* (London: Cavendish Publishing Limited, 2000) 19; Lim & Roche, "Feminism and Children's Rights", *supra* note 114.

130 See Lim & Roche, "The Politics of Voice", *supra* note 114 and Lim & Roche, "Feminism and Children's Rights", *supra* note 129.

131 Boyd, *supra* note 30 at 3.

132 Smart, "Equal Shares", *supra* note 33.

on the exercise of power in families risks marginalizing the needs and concerns of children and their primary caretakers.

Thus, listening to and hearing children's voices requires a reconceptualization of rights that attaches value to relationships, interdependence and care, and emphasizes the significance of being, rather than that of capacity. The dominant rights framework protects and promotes the interests of rational, autonomous, capable individuals, and because children are unable to fit in this framework, they are excluded from equal rights protection. Although children's rights theorists attempt to create a space within the dominant rights ideology for children's rights, they remain firmly embedded within the dominant rights framework and its central organizing principle of capacity. In order for the legal system to equally promote and protect children's interests, it is necessary to redefine rights so that the state of being itself is significant and that relationships, interdependence and care have moral and legal value. A rights discourse that emphasizes interdependence and care must also be attuned to relationships of power in order to protect and promote children's needs and concerns and those of their primary caregivers. A new conception of rights demands fundamental change of the B.C. family law system. Only through valuing relationships, interdependencies and care will the legal system be able to hear what children say.

PART IV – Moving Towards Child-Centric Family Law

This section will discuss how a new conception of rights demands transformative change to the family law system in order to provide meaningful solutions to the problem of children's exclusion. It is not my intent to make specific recommendations, such as statutory amendment, but rather, to suggest more broadly what family law in B.C. could look like if guided by a new conception of rights. Including children's voices in family law proceedings not only requires creating the space for them to speak, but also demands more substantive change so that what they say can be heard.

THE NEED FOR TRANSFORMATIVE CHANGE

Meaningful incorporation of children's voices into family law processes will require transformative change. If we do allow children to speak and actually attempt to hear what they are saying, it will be harder to find solutions.¹³³ Including children's perspectives in a meaningful way will alter the entire family law process. However, feminist and critical race scholars have argued that access to processes of power does not necessarily ensure substantive equality.¹³⁴ Similarly, merely including children's voices will not result in the substantive change that is required to actually hear and value what they are saying. If children speak in terms of relationships, interdependence and care, their voices will be difficult to hear in legal proceedings that determine and enforce individual, autonomous rights. Adult interests will continue to take priority unless the system itself undergoes transformative change.

Simply increasing children's involvement in a legal process that is itself flawed will not result in custody and access decisions that are in children's best interests. Smart is hesitant to increase children's participation in legal processes merely because of our discomfort with their exclusion.¹³⁵ She claims that we may need to look at solutions outside of legal forums. Smart argues that a rights framework is problematic because it translates personal and private matters into legal language; reformulates the issues into those relevant to law, not to ordinary people;

133 Smart, "Children's Shoes", *supra* note 79 at 309.

134 Fitzgerald, *supra* note 31 at 91.

135 Smart, "Family Law", *supra* note 47 at 153.

places people in opposition to one another; and removes and isolates individuals from the familial context during the dispute, but forces them to re-enter that context once the dispute is settled. Smart's concerns illustrate that it may be harmful to insert children into an adversarial family law process that is inherently flawed. However, the new conception of rights that I have introduced would require changes to the family law process itself, making it more suitable for children specifically, and families generally.

HEARING CHILDREN'S VOICES

If rights discourse valued interdependent relationships, then custody and access determinations could focus on the quality of relationships as expressed by children and their parents. Boyd's preference for a primary caregiver presumption as opposed to a legal preference for joint custody can be attributed to a desire to have the law recognize and value those "who take responsibility for care for children, largely women", rather than emphasize "paternal claims to care about children".¹³⁶ According to Boyd, privileging actual relationships of care in legal decision making benefits children and their primary caregivers, who are predominantly women. Similarly, Fineman's mother/child dyad metaphor refashions conceptions of family and intimacy by making caregiving and nurturing the core family relationship rather than the sexual relationship between parents.¹³⁷ By constructing caregiving as the central unit of concern, Fineman claims the law will emphasize relationships of caregiving which will result in legal decisions that better support and advance children's interests.

Both Boyd and Fineman state the need for the law to recognize, promote and protect actual relationships of care. As Woodhouse articulates, a child-centred perspective would expose the fallacy that children can thrive while their caregivers struggle.¹³⁸ If the law valued and focused on interdependent relationships, it would be clear that caregivers' needs cannot be severed from those of their children. Boyd points to studies that demonstrate that a child's well-being is intimately connected to the well-being of the child's custodial parent.¹³⁹ Both the mother/child dyad and the primary caregiver presumption seek to protect and promote interdependent relationships to ensure children's well-being.

It is not obvious, with either the primary caregiver presumption or the mother/child dyad, how family law processes would seek out and hear children's voices in custody and access decisions. Without explicitly creating a space for children's perspectives to be voiced and heard, there remains a risk that the legal system better recognizes and protects a primary caretaker's needs and interests but still does not sufficiently consider children's needs. Despite the correlation between a caregiver and a child's well-being, the reasons for including children remain.

In order for the legal system to serve children's best interests, it must value and support relationships of care as well as children's voices. Children must acquire legal standing in family law disputes because standing is the law's primary mechanism for hearing and valuing different perspectives.¹⁴⁰ However, the establishment of legal standing for children would require a fundamental restructuring of legal conflicts. Such a restructuring could benefit both children and their caregivers. For example, if children involved in family law disputes had separate le-

136 Boyd, *supra* note 30 at 157.

137 Fineman, *supra* note 81. Fineman uses the metaphor of the mother/child dyad to emphasize the nurturing unit of the caretaker. She argues that family law's focus on the sexual affiliation between parents, rather than the nurturing relationship between parent and child, deflects serious attention away from children. In her metaphor, the child represents all forms of inevitable dependency—the ill, elderly, disabled, and children. The mother stands for caregivers, who can be male and female alike.

138 Woodhouse, "Hatching the Egg", *supra* note 2 at 1824.

139 Boyd, *supra* note 30 at 132.

140 See Fitzgerald, *supra* note 31 at 99–109, for an elaboration of how according legal standing to children could result in tremendous change to family law.

gal representation, it could relieve parents from the responsibility of promoting children's best interests.¹⁴¹ Free from asserting the best interests of the child, parents could voice their own perspectives and experiences. According to Fitzgerald, parents could voice their hopes and concerns for their child as well as their own personal needs, the depth of the bond they share with their child and the personal effect that separation would have on them as parents. Fitzgerald aptly states:

If the law paid attention to and valued family members' own perspectives, the law might learn to value familial bonds. Courts would entertain, not abstract adult rights or vague state interests, but children's and parents' experience as family members and their very identities as children and parents. Were the law to entertain and value familial bonds, then our jurisprudence of personhood could broaden to include parents in their identities as parents and children in their identities as children. Indeed, under such a broadened view of personhood, children and parents define one another, unable to secure their identities without relationship with each other.¹⁴²

Fitzgerald's quote highlights how a reorientation from individual rights to rights that protect and promote interdependent relationships can assist the court in seeking resolutions that are most likely to preserve familial bonds. The B.C. family law system needs to recast family disputes so the court can hear, from children and their parents, the core issues of custody cases: love, loss, and family relationships. The court can then weigh the relative strengths of and threats to family bonds and make custody and access determinations that respect and promote interdependent relationships and caregiving.

Often those against increasing children's involvement in custody and access decisions argue that children should not have the responsibility of deciding their parents' dispute. However, the inclusion of children's voices does not mean that children should become the decision-makers. Woodhouse claims:

Asking the child question, listening to children's authentic voices, and employing child-centered practical reasoning are not the same as allowing children to decide. They are strategies to ensure that children's authentic voices are heard and acknowledged by adults who make decisions. The hard choices ... call for hard listening to children's needs and experiences.¹⁴³

Judges, not parents or children, are the ultimate decision-makers who must ascertain and consider both parents' and children's perspectives in order to make a fully informed decision. Rather than placing the burden of decision making on children's shoulders, increasing opportunities for children to voice their views enables judges to make decisions in children's best interests. Additionally, seeking children's views on their needs, concerns and interests does not necessarily involve asking a child which parent they would prefer to live with. As Thomas and O'Kane acknowledge, it is important to take into account the emotional context of children's wishes and feelings, and to work with children in a process of explanation and reassurance, rather than simply asking them to make a choice.¹⁴⁴

141 For more information on the advantages and disadvantages of separate legal representation for children, refer to: Bessner *supra* note 13 at 2.0; O'Connor, *supra* note 28 at 53-55; Andrews & Gelsomino, *supra* note 86; Nicola Taylor, Megan Gollop & Anne Smith, "Children and young people's perspectives on their legal representation" in Anne Smith, Nicola Taylor & Megan Gollop eds. *Children's Voices: Research, Policy and Practices* (Auckland: Pearson Education New Zealand Limited, 2000) 110 [Taylor *et al.*]; William Keough, "The Separate Representation of Children in Australian Family Law: Effective Practice or Mere Rhetoric?" (2002) 19 Can. J. Fam. L. 371.

142 Fitzgerald, *supra* note 31 at 104-105.

143 Woodhouse, "Hatching the Egg", *supra* note 2 at 1840-1841.

144 Thomas & O'Kane, *supra* note 63 at 152.

REPRESENTATION OF CHILDREN'S INTERESTS

Several authors have discussed various ways to represent children's interests in the court system.¹⁴⁵ It is beyond the scope of this paper to engage fully with this debate; however, it is important to make a few key points. A welfare model of legal representation, where a lawyer defines and promotes children's best interests, is outdated and unaccountable to children. A guardian *ad litem* and a family advocate operate from the premise that children are under a legal disability, and that adults must determine and represent children's best interests to the court. Both of these methods perpetuate an adult-centric family law system that, as I have argued, serves adult priorities over children's best interests.

Unfortunately, determining what form of legal representation can best bring children's views to the court returns to a discussion of children's competency. However, if one starts from the premise that children are not legally disabled due to their incapacity, but have rights that protect them as full persons and that recognize and value their relationships and need for care, discussions of competency do not threaten children's interests. By involving other professionals such as social workers, and by training lawyers in child development, it will be possible to assess, on an individual basis, whether a child is capable of communicating his or her views.¹⁴⁶ If so, the courts should appoint a child advocate to represent those views. If, however, the child is unable to do so, an *amicus curiae* should gather relevant information to bring forth the child's perspective.

Effective legal representation of children will require more than just appointing lawyers to children.¹⁴⁷ B.C. should develop criteria for the selection, training and remuneration of child advocates in recognition of the different skill set required to work with and for children. In order to prevent the influence of adult parties, the B.C. government should increase legal aid to fund child representation. Additionally, Bessner recommends the establishment of an ombudsperson or child advocacy office that is responsible for informing children of their rights to a lawyer and coordinating training for lawyers. There is also the need for a special code of ethics and a code of practice for lawyers working with children. Taylor, Gollop and Smith, based on their interviews with children and their lawyers about the effectiveness of legal representation, present an insightful draft code of practice for lawyers who work with and for children.¹⁴⁸

MEDIATION

Although some of the aforementioned changes may contribute to a more child-centric model of family law, many have criticized the inability of an adversarial process to deal effectively with family disputes.¹⁴⁹ Indeed, the recent B.C. Taskforce recommends that the province move the family justice system from an adversarial framework to one where mediation and other consensual processes such as collaborative family law are the standard rather than "alter-

145 Refer to note 140; See also *Putting Children First*, *supra* note 64, Recommendation 11.

146 At the Office of the Children's Lawyer in Ontario, lawyers and social workers work collaboratively in order to ascertain children's views and advocate on their behalf. See Rachel Birnbaum & Dena Moyal, "How Social Workers and Lawyers Collaborate to Promote Resolution in the Interests of Children: The Interface between Law in Theory and Law in Action" (2003) 21 C.F.L.Q. 379.

147 See Bessner, *supra* note 13 at 2.7 and 2.8, for detailed recommendations in this regard.

148 Taylor *et al.*, *supra* note 140 at 132. Taylor *et al.* interviewed twenty New Zealand children ages eight to fifteen and twelve lawyers that were appointed to represent them in order to acquire qualitative research data on the effectiveness of legal representation for children. Their research supported the following proposed recommendations for a draft code of practice for child advocates: involve children in deciding upon an appropriate time and setting for meetings; meet with the child; explain the role of a lawyer and define the lawyer-client relationship in language that the child will understand; explain the limits of confidentiality and the fact that information shared by the child will be made available to others; explore options for resolution and explain the implications of each possibility; regularly inform children as cases progress; put children's views before the court; debrief children and advise them of the outcomes of cases; and inform children that they can contact their lawyers if future problems arise.

149 See e.g., Gregory Firestone & Janet Weinstein, "In the Best Interests of Children" (2004) 42 Fam. Ct. Rev. 203.

native” dispute resolution (“ADR”) mechanisms.¹⁵⁰ Although children’s involvement in mediation and other consensual processes is a topic unto itself, given ADR’s increasing prevalence in resolving family law disputes and the potential for ADR to be more attentive to relationships among family members, it is important to make a few brief remarks.

Children’s participation in mediation is contested.¹⁵¹ For example, Emery argues that it is in children’s best interests not to be included in mediation because it places children in the middle of their parents’ dispute and burdens children with the responsibility of making adult decisions.¹⁵² Others speak to the benefits of including children in mediation, including improved understanding, improved relationships with parents, enhanced feelings of competence and self-determination, and increased ability of parents to make decisions in their children’s best interests.¹⁵³

As with children’s involvement in legal processes, the question that should be asked is how mediation can be structured in a way to create space for children to express their views without conveying to children that they are responsible for making the ultimate decision for their families. Children can be involved in mediation in ways that do not harm them.¹⁵⁴ Including children in ADR processes can assist parents to better understand how their marital dispute affects their children. By listening to children’s perspectives, parents can make informed custody and access decisions that can better serve their children’s interests.

PART V – Conclusion

By excluding children from meaningful participation in custody and access decisions, the B.C. family law system serves and protects adults’ concerns rather than children’s interests. The inclusion of children’s voices in custody and access decisions is justifiable on several grounds: increased participation is likely to have positive effects on children; children are social actors who construct their own knowledge; principles of equality, dignity and respect demand that children have the opportunity to voice their views; international commitments and the recommendations of domestic law reports support the inclusion of children’s perspectives; and the incorporation of children’s voices will result in better legal decisions.

In order for the legal system to accord moral and legal significance to children’s claims on par with that of adults, it is necessary to frame children’s claims in the language of rights. However, the dominant conception of rights as the domain of independent, autonomous and capable individuals necessarily excludes children because of their dependence and maturing capacities. Thus, if family law processes are going to serve children rather than marginalize them, a new conception of rights is required. A new conception of rights that places being, rather than capacity, at the centre and emphasizes interdependence, relationships and care while attending to power dynamics within families, will better protect and promote children’s interests.

Meaningful incorporation of children’s voice into family law processes will demand transformative change. Merely increasing children’s participation into a family law system that is flawed will not result in custody and access decisions that are in children’s best interests. Legal standing for children will not only create the space for children to express their views but will

150 *B.C. Taskforce*, *supra* note 78.

151 O’Connor, *supra* note 28 at 40–47; Ernest Sanchez & Sherrie Kibler-Sanchez, “Empowering Children in Mediation: An Intervention Model” (2004) 42 *Fam. Ct. Rev.* 554 [Sanchez & Kibler-Sanchez].

152 Robert Emery, “Children’s Voices: Listening—and Deciding—is an Adult Responsibility” (2003) 45 *Ariz. L. Rev.* 621.

153 *B.C. Taskforce*, *supra* note 78 and Melissa Schoffer, “Bringing Children to the Mediation Table: Defining a Child’s Best Interests in Divorce Mediation” (2005) 43 *Fam. Ct. Rev.* 323 [Schoffer].

154 See Sanchez and Kibler-Sanchez, *supra* note 151; O’Connor, *supra* note 28 at 40–47; and Schoffer, *supra* note 153, for ideas on how to include children in mediation in beneficial and productive ways.

also allow parents to convey their perspectives and experiences. However, effective legal representation requires that lawyers are sufficiently trained to work with children and that codes of ethics and practice guide lawyer's actions. Mediation can provide an effective way to resolve family disputes outside the adversarial system. Children can and should be involved in mediation so that custody and access decisions can reflect their interests and concerns.

Children not only require the space to express their views but they need trained professionals and a legal system that values interdependence, relationships and care so that those in the legal system can hear what children say. The inclusion of children's voices will better enable courts to make custody and access determinations in the best interests of the child.