

# Children's Best Interests in Parental Separation.....It All Depends Who You Ask?...

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# OUTLINE

- **Legal Context: Depends on Gatekeeper**
  - CRC context
- **Pros and cons of children's participation in the separation process.**
- **What does the research say about children's participation? .....children's best interests are served when they have a say in parental separation but NOT make the decision.**

# UN Convention on Rights of Child

## Art. 12

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

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial ... 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.

# Judicial Support

**“ The *Convention* is very clear; *all* children have these legal rights to be heard... It does not make an exception for cases involving high conflict, **including those** dealing with domestic violence, **parental alienation**, or both... Obtaining information of all sorts from children, including younger children, on a wide range of topics relevant to the dispute, can lead to **better decisions** for children that have a greater chance of working successfully... **Children have legal rights to be heard during all parts of the judicial process... If the child does wish to participate then there must be a determination of the method by which the child will participate.**”**

<sup>4</sup> *B.J.G. v. D.L.G.*, 2010 YKSC 44, per Martinson J.

# Children's Participation... Where are we?

- Huge progress over past 20 years, but.....
- Lack of clarity of definition for children's participation
- Lack of clear legal frameworks and follow up with children
- Cultural barriers and adult resistance
- Adults lack awareness & understanding of children's capacities & needs

# **WHY ARE CHILDREN'S BEST INTERESTS IMPORTANT TO LISTEN TO?**

**BECAUSE CHILDREN HAVE RIGHTS?**

**BECAUSE IT IS IMPORTANT TO THEM TO BE  
CONSULTED?**

**BECAUSE THEIR VIEWS ARE IMPORTANT TO  
DECISION-MAKING?**

# BENEFITS OF LISTENING TO CHILDREN

- Most children do **NOT** want to make decisions
  - Understand difference between “voice & choice”
  - If say that they want to decide, its also significant and needs to be considered (realistic estrangement alienation vs maturity?)
  - **Usually have important perspective even if no preference**

# ARGUMENTS FOR AND AGAINST

- ▶ Children's rights theorists see children as persons vs. property, subjects vs. objects of social concern, participants vs. social problems (Atwood, 2003; Elrod, 2007; Woodhouse, 2000).
- ▶ Most children want to have a say, they understand the difference between providing input into decision-making and making the final decision (Kelly, 2002; Neale & Smart, 2001; O'Quigley, 2000).
- ▶ Children themselves rate their participation rights as important on issues relating to their family post-separation (Birnbau & Saini, 2012a 2012b, *in press*; Taylor, Smith & Nairn, 2001).

# ARGUMENTS FOR AND AGAINST

- ▶ Emery (2001), Warshak (2003) argue that children need to be protected from the dispute as it places them in the middle.
- ▶ Children cannot be expected to understand or assimilate relevant information (Taylor, Smith & Tapp 1999).
- ▶ Children may be manipulated by one parent or the other to take sides.
- ▶ Children may feel caught in the middle and end up telling one parent or the other what that parent wants to hear.

# ARGUMENTS FOR AND AGAINST

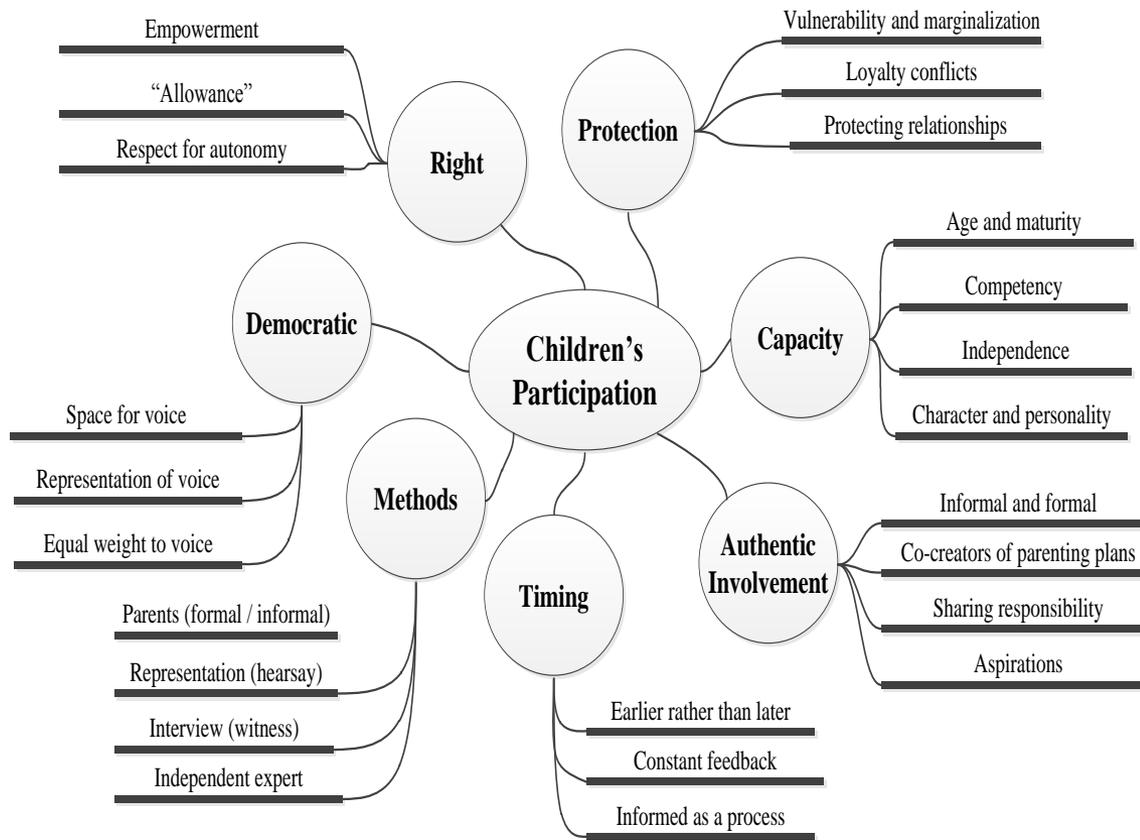
- ▶ Allowing children to participate translates into a more respectful listening of their wishes, needs and interests (Smith, 2007).
- ▶ Children want an opportunity to be heard, and hearing children's views in the family justice system has been known to be beneficial to both the children and their families (Goldson, 2006; Smith, Taylor & Tapp, 2003).
- ▶ Focusing on the needs of children early in the process of litigation can reduce both the intensity and duration of conflict (McIntosh et al., 2000, 2004, 2006, 2007).

## ARGUMENTS FOR AND AGAINST

- Not listening to children may cause more harm than not (Kelly, 2002).
- Meaningful participation can be a protective factor during times of parental separation and/or divorce (Pryor & Rogers, 2001).
- Including the voice of the child can enhance their sense of self-esteem, control over their fate, thereby enhancing their resiliency (Goldson, 2006; Smart, 2003; Williams, 2006).

# Participation In Parental Separation: Global Perspective Outcomes

- n=1,325 children from 11 different countries in 44 studies focused on: (1) how are children informed of parental separation and do they have any input into decision-making?; (2) how are their voices heard post separation?; and (3) what recommendations do children make to allow them to participate? (Birnbaum & Saini, 2012a);
- n=1,525 children from 13 different countries from 5 studies focused on children's experiences in separation/divorce (Birnbaum & Saini, 2012a)



Reasons For Children's Participation in the Context of Parental Separation =  
 Best Interests of the Child  
 (Birnbaum & Saini, 2012)

# QUESTIONS AND CHALLENGES .. .....NO EASY ANSWERS

- What does children's participation really mean? Under what circumstances....alienation, domestic violence, high conflict parental dispute?
- If children's best interests are served by participating in parental separation what about safety, confidentiality, language barriers, cultural factors?

# What Are Some Best Practice Approaches?

- The research states that all children *should* be asked about whether they wish to participate or not.
- All family justice professionals *should obtain* education about how to engage and promote children's participation.
- The research concludes that there *should* be follow-up with children no matter) what method (i.e., legal rep/mental health/judicial interview/mediation is used to elicit their views.

# Thank you for listening



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