

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN ONTARIO, CANADA

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Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Ontario, Canada.

Key words: child participation; family law; child protection; children's rights; justice system; Ontario; Canada

Answers to questions for AIMJF comparative study on children's participation in child protection proceedings

(note: family proceedings are different, and these answers only address child protection proceedings)

Applicable legislation: *Child, Youth and Family Services Act, 2017*

Note on this law: It is rights-based and it states in its Preamble that "the aim of the Child, Youth and Family Services Act, 2017 is to be consistent with and build upon the principles expressed in the United Nations Convention on the Rights of the Child".

By defining that such a situation concerns the child, does he/she become a party to the proceedings? Does he/she have the right to legal representation by a lawyer? Are there limits to the intervention of this lawyer in comparison with the other parties? The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests?

In the province of Ontario, Canada, children are not full parties to the child protection proceeding. Children who are 12 years and older receive notice of a child protection proceeding concerning them and they are allowed to be present at the hearing, unless the court finds that being present will cause the child emotional harm. In that case the child will not receive notice of the proceeding and will not be permitted to be present in court. A child who is younger than 12

years will not receive notice of the proceeding, and will not be allowed to be present, unless the court feels that the child is capable of understanding the hearing and will not suffer emotional harm by being present. In that case, the court will order that the child receive notice of the proceeding.

Whether or not children receive notice of the proceedings, they may be represented by a lawyer, but this is not systematic. In Ontario, there is an Office of the Children's Lawyer (OCL), part of the Ministry of the Attorney General, that represents children in family law, child protection and civil matters. The OCL has panels of specialized lawyers and clinicians (social workers). In child protection matters, a child is not automatically represented by a lawyer. This is the case only if the court orders the OCL to assign a lawyer to a child. Representation by a lawyer is deemed necessary when the best interests of the child (BIC) cannot be ascertained through other means. Representation is particularly desirable in the following cases: 1) there is a difference of views between the child and a parent or a children's aid society (CAS), and the CAS proposes the child to be placed; 2) the child is already in the CAS's care and no parent appears in court; 3) the child is in CAS's care and is in need of protection because of physical or sexual abuse, emotional harm or serious risk to the child's development; 4) the child is not permitted to be present at the hearing.

The OCL lawyer has full power to act for the child as if he/she were a party to the proceedings.

The lawyer from OCL represents the child's views and preferences. The lawyer must meet the child more than once, preferably in different settings. This allows the lawyer to contextualize the child's views, and ascertain the consistency, independence and strength of those views. The lawyer can also gather information from third parties. If a child is too young to clearly express their views, OCL's position will be based on information gathered on the interests of the child (not the lawyer's opinion of the child's BIC).

Each OCL lawyer receives training and is supervised by OCL.

How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional? If it is another professional, can you identify it and specify its responsibilities, please?

In child protection cases the child does not usually participate in court proceedings. Children older than 12 are permitted (see previous response). In practice, children rarely come, except older adolescents (15-16 years). Adolescents who attend the proceedings will usually be given the opportunity to address the judge if they want or the judge may ask them some questions or seek to engage with them.

If the child is represented by lawyer (see previous response), they will participate through that lawyer as the lawyer puts forward the child's views and preferences.

Otherwise, the court will weigh all the evidence brought to him/her to establish the views of the child and take that into account in determining the child's best interests. This could include evidence from parents, psychologists, teachers, social workers, etc.

If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specially prepared for children about its participation? Can you share it with our members?

For a child who is notified of the proceeding and is permitted to participate in the hearing, participation is voluntary. Many children who would be allowed to come prefer not to participate, or if they come the first time, they may prefer not to do so in subsequent hearings, as the proceeding can be seen as boring from a child's perspective.

If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? If there are doubts about what the child really wants or if his/her opinion is really expressed, what's the solution in your country?

If a lawyer is appointed, then that is an indirect way of participating. Otherwise, the judge will see the views of the child in the evidence (testimonies, affidavits, reports: so oral or written statements) (see previous responses).

A judge would be allowed to meet with the child in chambers, while the child is accompanied, at least with the lawyer if he/she is represented, and a support person possibly. However, this rarely takes place. It depends on jurisdictions. In some Ontario jurisdictions judges who hear child protection cases are not specialized and do not feel prepared to meet with a child. In other

jurisdictions, judges hear mostly child protection cases, and have become specialized through practice. They may be more likely to meet with a child in chambers.

In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? How? When the opportunity to participate in the child is offered, what is the extent of options available to the child? I mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?

As mentioned, there is generally no direct participation. A child who receives notice of proceedings can attend that proceeding (see previous responses). A child who attends a hearing has the rights as the other parties, and can present evidence. As mentioned, there may also be more informal exchange between the judge and the child in the courtroom.

How is the courtroom where participation takes place? And the formalities of the child's participation in front of the judge? Is the participation taking place in the regular courtroom or in the office? Who is present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?

Regular courtroom. During the COVID-19 pandemic, all hearings are online (through Zoom).

As mentioned, a "judicial interview" in the judge's chambers is possible, but not frequent. It depends on how specialized the judge is in child protection proceedings, and how comfortable they are with meeting with the child.

Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it?

Questions are asked by the lawyer if one is appointed to the child. In that case the lawyer interviews the child during meetings before the hearing (see previous answers).

Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights

of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?

The child is usually not questioned in court. The child does not testify (very rare), and there is no audition of the child. As mentioned, the judge may address the child if he/she is present.

Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?

Generally no. If a child is in the courtroom, they are not asked to leave.

Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? What's the weight given to the child's opinion? Is it the age a criteria? Which one? If the child's degree of maturity is taken into account, how is this maturity assessed? By whom? What are the criteria considered?

The child's opinion is one of the factors that must inform the determination of the best interests of the child. Due weight is given to those views in accordance with the child's age and maturity. However, in child protection cases, the child's security is of course paramount.

How is the decision communicated to the child? Are there any protocols for this communication? If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that?

There are no special protocols for communicating decisions to the child, and the child cannot go back to the judge for clarifications.

Does the child have the right to appeal the decision?

Children who have legal representation, or children who receive notice of a proceeding, or those who have applied for review of their status (possible for children 12 and older), can appeal a court order. This means that generally children over the age of 12 can appeal, as well as children who are under 12 in some circumstances, especially if they are represented by a lawyer.