

CHAPTER 3: Child-Centred Decision Making

Introduction

When making agreements and orders about who will care for and spend time with a child, such as guardianship, parenting arrangement, contact or relocation decisions, [section 37 \(1\)](#) of the *Family Law Act* (FLA) requires the parties and the court to consider the best interests of the child only.

The FLA provides a non-exhaustive list of factors that must be considered when determining the best interests of the child in these decisions ([section 37 \(2\)](#) and [38](#)). Included in the list are “the child’s views, unless it would be inappropriate to consider them.” Examples of how to obtain a child’s views in BC include children sharing their views in mediation, as well as through letters, affidavits, judicial interviews, and appointing a lawyer for a child in family law court proceedings. Additionally, children’s views can be obtained through various types of reports. Proposed changes related to reports are discussed separately in Chapter 4 - *Children’s Views and Parenting Assessments and Reports*.

Based on analysis and feedback, the Ministry of Attorney General (the Ministry) intends to propose policy changes that will better reflect the diversity of children and families in BC, as well as emphasize the importance of children having a voice in family law matters that affect them in the following ways:

- adding best interests of the child factors that require the court and parties to consider:
 - a child’s cultural, linguistic, religious and spiritual background; and
 - the needs of a child with disabilities.
- adding a list of factors the court must consider when determining the best interests of an Indigenous child;
- clarifying that a child must be given an opportunity to share their views in the decision-making process of issues that affect them;
- authorizing a court to appoint a children’s lawyer in more cases when it would be in the child’s best interests; and
- facilitating an Indigenous child having a person from their community advocate for them in matters under the Act, such as an Elder, Matriarch, or other respected person chosen by the community.

Key Changes and How They Help Families

Best interests of the child factors:

Proposed change: Add the following two new factors that must be considered when determining the best interests of a child in family law decisions:

- the child's cultural, linguistic, religious and spiritual upbringing and heritage; and
- the needs of a child with disabilities.

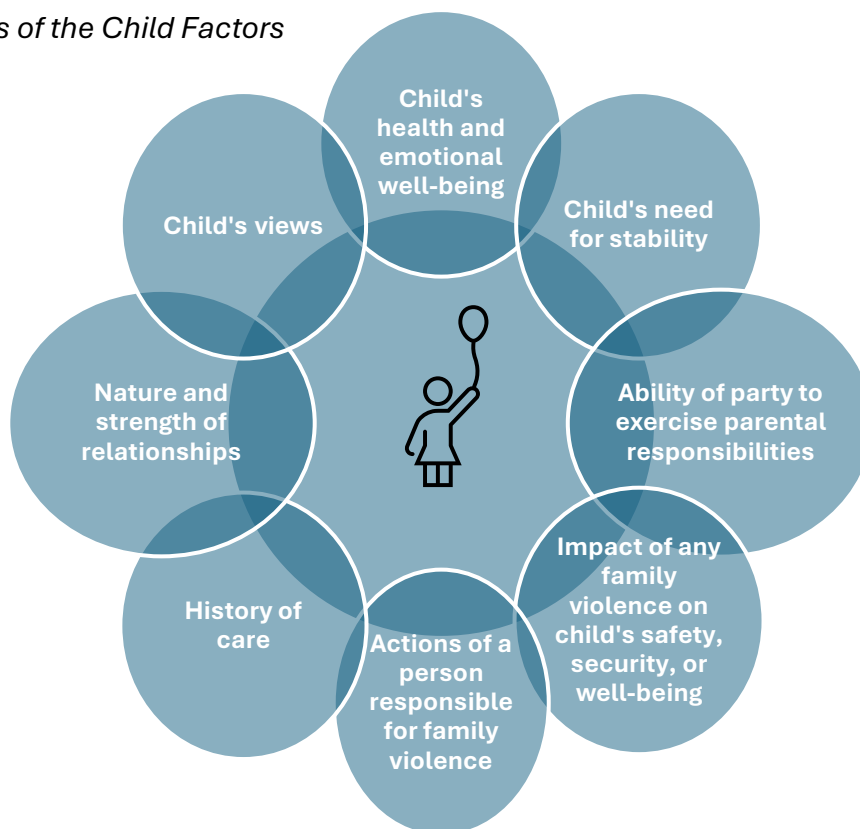
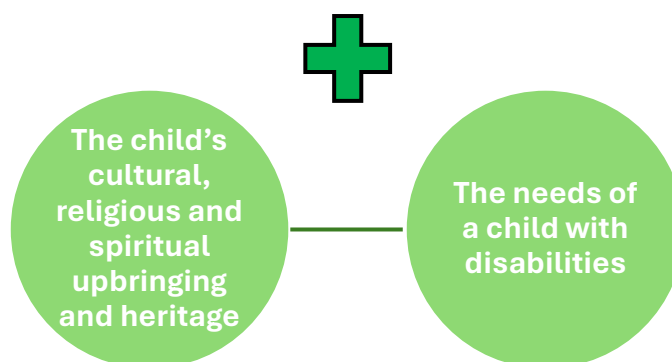
How this helps families: The unique needs of children from diverse backgrounds and children with disabilities will be considered in family law decisions that affect them.

The intended changes ensure the unique needs of children from diverse backgrounds are considered when making family law decisions that affect them (see Figure 3.1).

Currently, while the FLA does not include these factors, a child's culture, language and religion are captured in other legislation where the best interests of the child must also be considered, such as in making child protection and adoption decisions, as well as family law decisions under the federal [Divorce Act](#).

Engagement suggested that the FLA should also explicitly require consideration of the unique needs of a child with disabilities when determining what is in their best interests. The needs of a child with disabilities are complex and decisions can have more profound effects on the child and the family. For example, medical decisions or the child's living environment can have more serious impacts on a child with disabilities than on other children.

Although there was engagement feedback supporting the addition of family violence-related best interests of the child factors, the current factors for assessing family violence remain consistent with current understandings of family violence and the impact it has on children.

Figure 3.1 – New Best Interests of the Child Factors*Best Interests of the Child Factors**New Factors*

Proposed changes do not include explicitly addressing parental alienation in the best interests of the child analysis nor are there proposed changes that would prohibit an allegation of parental alienation. As discussed further in Chapter 5 - *Family Violence and Protection Orders*, a focus on education and training on alienating behaviours and the misuse of these allegations in cases involving family violence is considered more effective than a legislative ban. Underlying violence related to parental alienation is already captured in the best interests of the child factors that must be considered. The court is in

the best position to consider how to address evidence of family violence related to claims of parental alienation in each individual case.

Best interests of the Indigenous child factors:

Proposed change: Add a separate list of factors the court must consider when determining the best interests of an Indigenous child in making family law decisions under [Part 4](#), in addition to the factors already set out in the FLA.

How this helps families: The unique needs of Indigenous children will be considered in family law decisions that affect them.

Indigenous perspectives:

Engagement made clear that Indigenous family networks, values and priorities in raising children are unique from colonial concepts and are not currently reflected in the FLA. For example, the importance of culture, language, traditions, spirituality, and connections to the Indigenous relatives, community and land, was specifically highlighted in engagement feedback as being crucial to raising Indigenous children. However, these Indigenous family priorities and values are not currently included in the FLA's best interests of the child factors.

Engagement feedback strongly encouraged the development of unique factors to be considered when making decisions related to Indigenous children under [Part 4](#) of the FLA, in addition to the current best interests of the child factors. Ensuring that best interests factors specifically reflect the needs and priorities of Indigenous children will help lead to family law decisions that align with the Indigenous child's family and community values and that they can support as the family navigates new issues that may arise.

Some of these concepts may be captured if, as recommended above, the Act requires consideration of: "The child's cultural, linguistic, religious and spiritual upbringing and heritage." However, adding a separate list will allow for more tailored factors to be considered for Indigenous children, acknowledging unique aspects of Indigenous families as well as the effects of colonialism and intergenerational trauma.

Engagement feedback emphasized that a child's Indigenous cultural connection is important and can be developed and fostered whether or not the child lives within their Indigenous community. For example, a child can still connect with their Indigenous community and learn and participate in their culture, language, practices, customs, and traditions in urban centres where there may be groups or programs, as well as through the use of technology.

Feedback also emphasized that consideration should be given to an Indigenous child's views and preferences as to how they connect with their community, culture, and language. The weight given to the child's views may vary based on the child's age.

Furthermore, decision-makers need to be aware of distinctions between Indigenous communities and their culture, language, traditions, practices and customs when making decisions about what is best for an Indigenous child. For example, while one Nation may practice Potlatch, another may practice Powwow. Caution should be exercised to ensure that evidence considered about the ways in which an Indigenous child may connect with their community and culture is indeed the ways of their community and culture, and not those of other Nations or Indigenous communities.

Feedback and analysis suggest that a consideration of the best interests of an Indigenous child with respect to decisions made under [Part 4](#) of the FLA should include the following:

- a. cultural continuity, including the transmission of languages, cultures, practices, customs, traditions, ceremonies and knowledge of the child's Indigenous community;
- b. the development of the child's Indigenous cultural identity, including the child being able to practise the child's Indigenous traditions, customs and language;
- c. the preservation of the child's connections to the child's Indigenous community and the region where the child's family and Indigenous community is located;
- d. the child being connected to family, including people who are considered to be relatives by the child or by the child's Indigenous community in accordance with that community's customs, traditions or practices.

The Ministry intends to recommend that the court be allowed to consider the child's views, preferences and interests, in connecting with their culture, community and family, and may consider the age of the child in doing so.

Views of a child:

Proposed change: Emphasize the importance of considering a child’s views in family law decisions that affect them by:

- requiring the views of a child to be considered in all family law decisions in which the best interests of the child are determinative under [Part 4](#) of the FLA.
- explicitly allowing the views of a child to be obtained and considered not only in court proceedings but in any family dispute resolution process including during mediation or other consensual dispute resolution.
- allowing the court to consider a child’s preferences for how they share their views, as well as whatever support they need to share their views.

How this helps families: Ensuring that a child must be given an opportunity to share their views on issues that affect them will lead to better informed decisions in family law matters.

Currently, the views of a child are a factor in determining what is in the best interests of a child when making family law decisions, unless it would be inappropriate to do so. Engagement feedback, including from youth who had lived experience with family law matters, indicated that youth are often not given an opportunity to share their views or to share them in an appropriate way.

These changes will require that the views of a child will be considered in all family law decisions that rely on the best interests of the child.

The proposed changes will direct families and the court to consider a child’s views, taking into account the child’s age and maturity, rather than asking whether it is inappropriate to obtain the child’s views.

This change aligns with the *Divorce Act*. The best interests of the child factors set out in [section 16 \(3\)](#) of the *Divorce Act* implies that a child’s views must always be considered, although the court may give “due weight to the child’s age and maturity, unless they cannot be ascertained.” This is also consistent with [Article 12](#) of the *UN Convention on the Rights of the Child*, which states that a child has a right and must be given the opportunity to express their views in all matters that affect them, giving due weight to the child’s age and maturity.²

Obtaining the views of a child in a way that is culturally and developmentally appropriate and comfortable for the child can help:

² Noel, Jean-Francois, *The Convention on the Rights of the Child: [Overview - The Convention on the Rights of the Child - Topics in Family Law: A Collection of Articles](#)*, modified December 21, 2022.

- families resolve outstanding issues and avoid the escalation of conflict,
- lead to informed decisions that will have lasting effects and can better endure changing family situations without needing to return to court, and
- the child feel more engaged in the process of making decisions that affect them.

Research has shown that child participation is important to good decision-making in family law and contributes to the child's well-being,

While a court order might sometimes be necessary to ensure the child has a meaningful opportunity to share their views, clarifying in the Act that the views of a child can also be obtained through agreement of the parties will help reduce the cost and delay to parties by avoiding the need for a court order and encourage including the views of the child earlier.

The FLA currently does not suggest or list any particular or preferred method for obtaining the views of a child. This has been identified as a strength of the legislation. The court has broadly interpreted the Act to allow children to share their views in a variety of ways, such as through letters to the court, affidavits, and judicial interviews,³ art or play therapy, or even an interview with a family justice counsellor earlier in the dispute resolution process, before the matter goes to court.

Many factors may go into determining how a child's views will be obtained on a family law matter. However, it is important that proportionality and ensuring the views of a child are obtained in a safe and minimally intrusive way are considered. The current flexibility of the FLA may continue to encourage parties and decision-makers to seek new ways to obtain the views of a child in family law disputes.

Proposed changes do not include adjusting the ways by which the views of a child may be obtained. However, Chapter 4 will highlight proposed changes related to obtaining a child's views through parenting assessments and reports.

It is important for any professional who interviews a child to be trained on how to conduct the interview, particularly if the child has also suffered trauma. This includes judges. The Ministry will explore ways that it can support the courts in developing guidelines and training for those who conduct judicial interviews.

³ Feedback regarding judicial interviews has been mixed. Some people have raised concerns that judges are not best positioned to conduct interviews with children and youth, and others have commented positively on their experience with judicial interviews. It is beyond the scope of this paper to make recommendations about judicial interviews other than to emphasize that any professional who conducts interviews with children and youth needs to be properly trained.

Children's lawyer:

Proposed change: Remove restrictions on the test to appoint a children's lawyer under the FLA to allow for them to be appointed in more cases when it is in the child's best interests.

How this helps families: Allowing more children to participate in family law proceedings by having their own lawyer who can help advocate for children's best interests and ensure the children's views are considered when making family law decisions.

Currently [section 203](#) of the FLA allows the court to appoint a lawyer to represent the interests of a child in a proceeding under the Act. Before appointing such a lawyer, the court must be satisfied that "the degree of conflict between the parties is so severe that it significantly impairs the capacity of the parties to act in the child's best interests," and that the appointment "is necessary to protect the best interests of the child."

Feedback suggests that the current test for the court to appoint a children's lawyer in the FLA is too restrictive. The FLA is currently the only provincial or territorial legislation that requires such a severe degree of conflict between the parties to meet the threshold for the court to order a children's lawyer. Engagement feedback strongly suggested that a children's lawyer can be beneficial to a child and to the parties in resolving family law disputes, but it is too difficult to appoint a children's lawyer under the current FLA test.

The proposed changes will allow for children's lawyers to be ordered in situations where the conflict is not so extreme and will align with other provinces and territories.

Indigenous children's advocate:

Proposed change: Add a provision allowing an Indigenous child to have a person from their community advocate for them in family law matters, such as an Elder, Matriarch, or other respected person chosen by the community.

How this helps families: Allowing an Indigenous child to have a person from their Indigenous community advocate for them in family law matters will help the child share their views and ensure their best interests are considered in a way that aligns with their culture, laws, customs and traditions.

Indigenous perspectives:

In addition to allowing a children's lawyer to be appointed in more family law cases where it is in the child's best interests, the best interests of an Indigenous child need to be considered. The FLA should be consistent with and incorporate elements of the [United Nations Convention on the Rights of the Child](#) and the [Declaration on the Rights of Indigenous Peoples Act](#). Amending the FLA to focus more on the best interests of a child and the best interests of an Indigenous child when determining how a child can participate in family law proceedings will better align the FLA with these commitments.

During engagements, Indigenous peoples with lived experience criticized the FLA for only allowing a lawyer to advocate for an Indigenous child. As Indigenous family networks, values, and priorities are unique from colonial concepts, it is important for Indigenous children to be supported by a person who understands these differences in family law matters, when needed. When it comes to an Indigenous child in a family law proceeding, Indigenous participants said that a more appropriate person to advocate for the child would be someone from their own community, such as an Elder, a Matriarch, or another respected person chosen by the community. Such people are in a better position to share the child's views and advocate for them in a way that aligns with their Indigenous culture, laws, customs, and traditions.