Legal Representation for Children

The Child Welfare Toolkit

A Joint initiative between the Factor-Inwentash Faculty of Social Work and the David Asper Center on Constitutional Rights, Faculty of Law, University of Toronto

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Introduction

This toolkit was funded by The Law Foundation of Ontario and developed with input from key partners in the child welfare and child protection sectors. It synthesizes current legislation, case law and social science research regarding the practice of child protection. The goal is to help ensure that judicial decisions are aligned with evidence from the social science literature to better understand how to act in accordance with the best interest of children involved in the child welfare system and their families. This resource is made available to practicing child protection lawyers and various actors within the child welfare sector through the cwrp.ca.

This brief focuses on legal representation and participation of children in the context of proceedings involving family disputes about parenting time and decision-making responsibility following separation and child protection. There is a dearth of empirical research on the impact of legal representation and participation of children in child protection proceedings. Some research exists to support the conclusion that a significant number of children in family and child protection proceedings would like to be more substantially engaged with systems decisions. The bulk of the scholarship in this area is not empirical but reflects a growing consensus that a child rights approach requires greater participation by children in decisions affecting them to be consistent with the United Nations Convention on the Rights of the Child.

Section1: The Case Law

Legal Issues

1. When is legal representation available for children?
2. What is the role of the lawyer when representing children?
3. Should we have guidelines for lawyers who represent children?

Legislation

In child protection proceedings, the court has statutory authority under section 78(3) of the *Child, Youth and Family Services Act* (CYFSA) to direct legal representation to be provided for the child. Section 78(4) of the *CYFSA* sets out the criteria where legal representation is deemed to be desirable to protect the child's interests. In Ontario, children's involvement in legal proceedings is predominantly facilitated by the Office of the Children Lawyer (OCL). In the family context, the OCL may become involved in a parenting dispute through request by court order under sections 89(3.1) and 112 of the *Courts of Justice Act* (*CJA*). Unlike the child welfare context, there are no statutory criteria guiding the appointment of a lawyer to represent children in family disputes, and the OCL has discretion to accept or reject the court's request for their involvement in family proceedings. Once the case has been accepted, the OCL may provide a lawyer to represent the child pursuant to section 89(3.1) of the *CJA* with or without the assistance of a clinician or a clinician to meet with the family and conduct a parenting investigation and complete a Children's Lawyer Report, or to prepare a Voice of the Child Report pursuant to section 112 of the *CJA*.

The United Nations Convention on the Rights of the Child

In 1989, the United Nations adopted the Convention on the Rights of the Child (the Convention). As a ratifying party of the Convention, Canada has committed to recognizing the rights of children, although the Convention has not been fully incorporated into domestic law (Bala & Houston, 2015). Even without specific incorporation, however, Canada's domestic legislation is presumed to conform with international law (*R. v Hape*, 2007 SCC 26).

Children's right to have legal representation is enshrined in Article 3(1) and Article 12 of the Convention:

> Article 3(1) – In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.
>
> Article 12(1) – State parties shall assure to the child who is capable of forming his or her own views the right to express 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.
>
> Article 12(2) – For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial 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.

Guidance on the interpretation of Article 12 can be found in *General Comment No. 12: The right of the child to be heard*, which was published by the Committee on the Rights of the Child in 2009 (United Nations, 2009).

The child's right to express and have their view given due weight under Article 12(1) is subject to the threshold requirement of capacity to form one's own views. The threshold is a low one; capacity is not determined by age and does not require a child to have comprehensive knowledge of the matter (Bala & Houston, 2015). This broad interpretation of capacity is consistent with the Committee's view that a full implementation of Article 12 requires recognition of the range of ways through which very young children express their views (Martinson & Tempesta, 2018). The weight given to a child's views depends on both the child's age and maturity, which refers to the ability to understand

and express views on a matter in a reasonable and independent matter (Bala & Houston, 2015). If the child is capable of forming their own views in a reasonable and independent manner, the decision-maker must consider the views of the child *as a significant factor in the settlement of the issue* (General Comment 12, para. 44); Martinson & Tempesta, 2018; *SK v DG*, 2022 ABQB 425).

Article 12(2) further provides that children have the right to participate in "any" proceedings affecting them. In Canada, this right has been recognized in the following contexts: family disputes after parental separation, child welfare, health, adoption, juvenile justice, child victims and witnesses, immigration and refugee claims, and education (Bala & Houston, 2015).

The relationship between Article 12 and Article 3(1) is important to underscore. Article 3(1) sets out the best interests of the child as a primary consideration. While some commentators have suggested that safeguarding children's best interests sometimes requires prioritizing Article 3(1) over their right to participate, the Committee has rejected this notion. According to the Committee, Articles 12 and 3 are mutually reinforcing – the best interests of the child are promoted where their views are heard and considered (Bala & Houston, 2015). In *M.A.A. v D.E.M.E.*, an appeal of an international family law return order, the Court of Appeal for Ontario confirmed the child's right to participate as "fundamental to family law proceedings". Citing the UNCRC, the Court held that a determination of best interests must incorporate the child's views.

Legal Findings

1. Legal Research Methods

Search for jurisprudence was conducted in Westlaw (a subscription resource) and CanLII (an open source), using the terms: legal representation, role of lawyer for child, children's lawyer, office of the children's lawyer, guardian *ad litem*, children's evidence, child's views and preferences. Cases were examined to determine if they applied to the legal issues through their headnotes and excluded if they did not address legal representation for children or communication of their views and preferences. Preference was given to cases from 2017 to 2021 in order to assess courts' response to the legislative change to the CYFSA, though older precedents were also included in the analysis. Given the cross-over of principles respecting the representation of children's views and wishes in both the child welfare and family law context cases in the latter context have been included where the principles have been applied to child welfare proceedings. The search for social science literature revealed significant legal commentary on the legal representation of children and their participation in court proceedings. This commentary was used to supplement both the legal findings and the social science.

2. Jurisprudence

Overview of Children's Legal Representation in Ontario

The OCL has been described as the most expansive child representation program in Canada (*Ontario (Children's Lawyer) v Ontario (Information and Privacy Commissioner*,[OCL v Ontario] (ONCA, 2018). The OCL is a well-established, independent law office within the Ontario Ministry of the Attorney General that provides children with representation in family disputes and child protection cases, as well as in property and civil proceedings (McSweeney & Leach, 2011). The OCL is comprised of in-house lawyers and social workers, as well as a panel of lawyers and clinicians in private practice who provide services in family cases (Bala & Birnbaum, 2018).

When the OCL provides a lawyer for a child in family and child protection cases, it independently represents the interests of the child who is the subject of the proceeding (OCL v Ontario). To fulfill this role, a lawyer will meet with the child, their parents, and relevant collateral contacts. Where it is possible to determine the child's views, the lawyer adopts a position consistent with those views before the court (McSweeney & Leach, 2011). Where a clinician is assigned to assist a lawyer in a family proceeding, the clinician and lawyer will typically work together to meet with the child and parties. The lawyer will always be present for meetings with the child-client and the privilege that exists between the lawyer and the child extends to the clinician (see *Catholic Children's Aid Society of Toronto v SSB*, ONSC 2013). Subject to the consent of the child, the clinician may provide evidence to the court regarding the child's views and circumstances.

The history of children's legal representation in Ontario traces back to the nineteenth century. The OCL, then known as the Office of the Official Guardian, was first established in 1881 to safeguard the property interests of children. By 1975, the province began appointing lawyers to represent children in custody and access disputes. In an effort to provide direction for lawyers appointed to represent children, the Law Society of Ontario formed an Advisory Committee, which advised children's lawyers to maintain a traditional solicitor-client relationship with the child as much as possible (Bala & Birnbaum, 2019). This is the approach taken by the OCL when legal representation is the service provided. Child's counsel will take a position consistent with the child's views. As noted by the Court of Appeal in *Ludwig v Ludwig*, when ascertaining those views, the lawyer will consider the independence, strength and consistency of the child's expressed preferences to ensure the position taken accurately reflects the child's perspective (OCA, 2019). The position advanced on behalf of the child may be different from that of the parties (*Office of the Children's Lawyer v Catholic Children's Aid Society of Toronto*, ONSC, 2020).

Children's Right to Legal Representation in the Canadian Context

The Supreme Court of Canada has not provided any guidance on the right of a child to legal representation in child welfare proceedings. There is a patchwork of legislation and government supports for legal representation for children across the country, with the OCL and *CYFSA* providing the most robust legal support to child participation. However, the right to legal representation was held to be a constitutional right under section 7 of the *Canadian Charter of Rights and Freedoms* in *New Brunswick (Minister of Health and Community Services) v G. (J.)* where a parent was unrepresented and both the state and the children had legal representation (SCC, 1999). The majority of the Court held that the failure to provide state funded legal counsel infringed the parent's right to security of the person and their right to a fair hearing. In *Catholic Children's Aid Society of Toronto v M.C.* the Ontario Court of Justice held that the child's section 7 rights would be infringed if their grandparent, who was seeking to participate in the child welfare proceedings, was denied state funded legal counsel (OCJ, 2018). Despite these decisions, the legislation and judicial interpretation in respect of the child's right to counsel have not found such a constitutional right for legal representation for children and instead have affirmed the court's discretion to determine both representation and standing dependent upon the circumstances (*Justice for Children and Youth v J.G.*, ONSC, 2020). However, the Court in that case determined that a child has the right to seek his own counsel in a family law proceeding without a court order or parental permission.

Right of the Child to Express Their Views

A helpful starting point for understanding the Canadian position on the rights of children to express their views is *G.(B.J.) v G.(D.L.)*, a case regarding an existing custody and child support order decided by the Yukon Supreme Court (2010). The parents brought an application to vary the existing order, but the evidence did not include information about the views of their 12-year-old child. The court raised the issue of whether it should hear from the child and answered in the affirmative, citing Canada's legal obligations under the UNCRC. In her reasons for the decision, Martinson J. identifies two separate but related rights to be heard under the UNCRC – the right of children to express their views so as long as they are capable of forming them, and the right to have those views be given due weight according to their age and maturity. Decision makers have much flexibility in determining the weight to be assigned to a child's views, as the question of weight is ultimately based on the best interests of children principle (YKSC, 2010) – although see *SK v DG*, 2022 ABQB 425, at para. 257.

Weight Accorded to Children's Views, Wishes, and Preferences

In both family and child protection proceedings, the child's expressed views and preferences are only one factor considered by the court in determining what is in the child's best interests. While children's views are not the sole determinant of their best interests, they may be given more or less weight depending on the circumstances. An approach that has been taken in assessing the significance of a child's wishes is set out in *Decaen v Decaen*:

> In assessing the significance of a child's wishes, the following are relevant: (i) whether both parents are able to provide adequate care; (ii) how clear and unambivalent the wishes are; (iii) how informed the expression is; (iv) the age of the child; (v) the maturity level; (vi) the strength of the wish; (vii) the length of time the preference has been expressed for; (viii) practicalities; (ix) the influence of the parent(s) on the expressed wish or preference; (x) the overall context; and (xi) the circumstances of the preferences from the child's point of view (ONCA, 2013).[1]

1 It should be noted that *Decaen has been criticized by those representing children for setting to many criteria for giving weight to the views of children, criteria that are not similarly applied to adult positions.*

The court upheld the trial judge's decision to accord little weight to the views and preferences expressed by the 8-year-old twins. In applying the approach cited above, the court added that the views of young children are more likely to be subject to influence and "inconsistent with their best interests" (ONCA, 2013).

Despite this decision, a survey of the case law suggests that there is little consistency on the issue of how much weight to assign to the views, wishes, and preferences of younger children. In *Catholic Children's Aid Society of Toronto v B.(N.)*, the court made a finding with respect to the views and wishes of a two-year-old involved in an application for a Crown wardship order (ONCJ, 2009). By contrast, in *C.(M.A.) v K.(M.)* the court declined to canvass the views and wishes of a five-year-old, citing the child's inability to understand the nature of an adoption application (ONCJ, 2008). However, the court ultimately requested OCL representation for the child pursuant to the decision that direct legal representation would be in the child's best interests. The task of assigning weight to a child's perspective is further complicated in cases where the child has special needs. In *Children's Aid Society of Hamilton v M.C.*, the court found the children involved – the oldest among them being eight-years-old – unable to express their views and wishes because of their age and special needs. The children's position was advanced on their behalf by a family law lawyer, but it is unclear how the children were engaged about their views, if at all (ONSC, 2009). However, it is more likely that the views of older children will inform decisions (see for e.g. *De Melo v De Melo*, 2015 ONCA 598, at para. 12, and *Kincl v Malkova*, 2008 ONCA 524, at para. 3, (although even that is not entirely consistent).

Methods of Presenting Children's Views to the Court

A review of the case law reveals a number of different ways of presenting children's views to the court. In many cases, children's views were presented in the form of an assessment prepared by a clinician (a psychologist, psychiatrist, or social worker). This includes the Voice of the Child Report – an addition to the services offered by the Ontario OCL. Compared to court-ordered assessments, direct legal representation, judicial interviews, and evidence in the form of letters and recordings from the child were much less common.

Children's Out-of-Court Statements

Children's views and preferences are also sometimes communicated by third parties testifying before the court; this could be a parent, teacher or clinician. The transmittal of children's out-of-court statements as evidence of their views is known as hearsay evidence. According to the traditional hearsay rule, this evidence is presumptively inadmissible unless it falls into certain exceptions, which remain presumptively in place"(*R. v Khelawon*, 2006 SCC 57, [2006] 2 SCR 787, at para. 42; *R. v Mapara*, 2005 SCC 23, [2005] 1 SCR 358, at para. 15). In *R v Khan*, a 1991 Supreme Court of Canada decision regarding the admissibility of children's hearsay statements, the court established a principled approach to assessing hearsay evidence and ultimately admitted the children's statements. Specifically, the court established the criteria of necessity and reliability; it must be demonstrated that the child's statement is both "reasonably necessary" and reliable in light of factors such as timing, demeanour, the child's personality, intelligence, and understanding, and the absence of any reason to expect fabrication in the statement (SCC, 1991). With respect to children's testimony, McLachlin J. advocated a flexible approach to the application of the hearsay rule, stating that children's statements may be admitted where necessity and reliability are satisfied.

Consistent with the approach established in *R v Khan*, Canadian courts have generally relaxed the threshold for the admission of hearsay evidence in parenting cases, recognizing that this is often the easiest and most practical way of putting a child's views before the court. In *Stefureak v Chambers*, Quinn J. summarizes the approach to admitting hearsay in the form of a child's out-of-court statements as follows:

> "Necessity" can be satisfied where it would not be appropriate to call the child as a witness. "Reliability" can be established if the statement under consideration (or a similar utterance) was made to more than one person and those persons will testify (ONSC, 2004).

Children's views and wishes in the form of hearsay can also be admitted under the state of mind exception to the rule against hearsay. This approach to the issue of admitting children's views as evidence circumvents the complicated hearsay analysis under *Khan*. See, for example, *Children's Aid Society of Algoma (Elliot Lake) v P.C.-F.* ,(OCJ, 2017) and *D.(D.) v Children's Aid Society of Toronto*. *P.C-F.,* a trial ruling on the issue of whether the views of wishes of two children, aged 14 and 11, could be admitted as evidence. The children had communicated their views to their court-appointed OCL lawyer as well as child protection workers who were called as witnesses to the case. In *Children's Aid Society of Algoma (Elliot Lake) v P.C.-F.*, Kukurin J., citing *G.(B.J.) v G.(D.L.)*, admitted the children's expressed views and preferences under the state of mind expression, noting that these views would otherwise not be admitted under the two-criteria approach outlined in *Khan* because the children are old enough to testify (ONCJ, 2017).

The admission of children's views under the state of mind exception is affirmed in *D.(D.)*, an appellate decision regarding the Children's Aid Society's application for Crown wardship with no access for a 10-year-old child. In upholding the order, Pardu JA found that the trial judge did not rely inappropriately on hearsay evidence. The child's communication of his views to his therapist is admissible under the state of mind exception (ONCA, 2015). The Court stated:

[37] Evidence about a child's expressed views is often presented through persons to whom the child has communicated. [...]

[38] Statements about the child's views and preferences set out in affidavits by Children's Aid Society workers' affidavits are admissible: *Strobridge v Strobridge* (1992), 1992 CanLII 7488 (ONSC), 10 O.R. (3d) 540 (ONSC).

[39] Statements that show the child's state of mind are also admissible as a general exception to the hearsay rule [...]

Court-Ordered Assessments

Child's views, wishes, and preferences can be presented in the form of court-ordered assessments. These reports include OCL authored investigations or Voice of the Child Reports pursuant to section 112 of the *CJA*, assessments ordered under section 30 of the *Children's Law Reform Act* (*CLRA)* or section 98 of the *CYFSA*. While evidence in the form of court-ordered reports is hearsay by definition, the statutes under which these reports are ordered nonetheless provide that the reports are admissible. Once accepted by the court, the OCL report's evidence of the child's view is often given much weight. In *A.H. v S.B.*, for example, the Ontario Court of Appeal upheld the trial judge's refusal to admit hearsay statements made by the children, on the basis that those views were already accurately reflected in the OCL report (ONCA, 2018).

A review of the case law suggests that the Voice of the Child Report has become more common in parenting proceedings. Non-evaluative Voice of the Child Reports may be particularly useful where there are discrete, time sensitive issues that require the court to quickly ascertain a child's views. Such was the case in *Yenovkian v Gulian* and *Maldonado v Feliciano*. *Yenovkian* was a case that involved, among other things, a parent's application for a section 30 assessment. In light of the time required to complete a section 30 assessment as well as the need to have the report completed quickly for the children to return on time to begin school, the court ordered a Voice of the Child Report and ordered the parents to split the cost (ONSC, 2018). A Voice of the Child Report was also ordered in *Maldonado* and deemed credible based on the OCL clinician's assessment of the consistency, independence, and accuracy of the child's views (ONCJ, 2018).

A Voice of the Child Report can play a significant role in parenting decisions, depending on the age of the child and other contextual factors. In *Henderson v Winsa*, the court ordered a report to investigate how an order to reside with either parent might impact a 13-year-old child. The child's clear desire to reside with his father was given significant weight in light of his age and history of taking extreme steps to live with his father (ONSC, 2015). Age was again a relevant factor in *McMaster-Pereira v Pereira*, where the OCL prepared a Voice of the Child Report for siblings ranging in ages 17, 15, 13, and 7. While the court acknowledged that the three older children expressed clear and consistent views, it accorded less weight to the views and preferences

of the 13-year-old (ONSC, 2018). The views of the 7-year-old was given considerably less weight. Despite his ambivalence, the court took account of his need for structure based on his ADD diagnosis.

Where there is evidence of parental alienation, a Voice of the Child Report may not be ordered even for older children. Such was the case in *Seaton v Zheng*, where the court declined to request OCL involvement in preparing a report to ascertain the views of a 15- and 13-year-old (ONSC, 2019). In coming to the decision, Shore J. observed that the parent allegedly engaging in alienating behaviour did not hide her contempt for the other parent and took no responsibility for the children's lack of relationship with him. A child's views and preferences are considered only if they can be reasonably ascertained (*CLRA* section 24(2)(b)). Given the court's concern about a Voice of the Child Report being used to enable parental alienation, a report was not ordered. Although parental manipulation is inconsistent with the right of the child to express their views *freely* in all matters affecting them, caution must be exercised in refusing to hear from the child when allegations of parental alienation are made. As stated by Martinson J. in *B.J.G. v D.L.G.*,

> There is no ambiguity in the language used. The [UNCRC] is very clear; all children have these legal rights to be heard, without discrimination. It does not make an exception for cases involving high conflict, including those dealing with domestic violence, parental alienation, or both. It does not give decision makers the discretion to disregard the legal rights contained in it because of the particular circumstances of the case or the view the decision maker may hold about children's participation, (YKSC, 2010).

Judicial Interviews

Judges may ascertain the views, wishes, and preferences of children by conducting a judicial interview pursuant to section 64 of the *CLRA*. The survey of case law in Ontario reveals that judges are generally reluctant to conduct judicial interviews. In *Stefureak v Chambers*, Quinn J. declined to exercise his discretion to interview the child, citing concerns raised in the literature about judges' lack of training and the difficulty for a child to speak in a potentially intimidating environment (ONSC, 2004). Another concern expressed in *Collins v Petric* is that interviewing might traumatize the child. In *Collins*, Perkins J. declined to interview a 13-year-old child for this very reason (ONSC, 2003). Quinn J's reasons in *Stefureak* provide a summary of the jurisprudence governing the approach to judicial interviews, should the judge decide to exercise their discretion to interview the child:

- A judge should not allow the child's comments to overwhelm other evidence of what is in the child's best interests (*Saxon v Saxon* 1974 CanLII 1701, BCSC);
- When a teenager is involved, the order should be practical and reasonably conform with their wishes (*O'Connell v McIndoe*, 1998 BCCA 5835);
- The purpose of an interview is not to obtain vital information which the other parties are unaware of or cannot challenge (*Jandrisch v Jandrisch*,1980 CanLII 3129, MBCA);
- A judge has discretion to decide whether to disclose the contents of the interview and how much of it should be disclosed (*Demeter v Demeter,* 1996 CanLII 8111, ONSC; *Jespersen v Jespersen* 1985 CanLII 838, BCCA).

On the other hand, judicial interviews have the potential to be immensely beneficial. In *G.(B.J.) v G.(D.L.)*, Martinson J. described judicial interviews as a meaningful channel for participation, underscoring the importance for judges to get to know the child before making decisions that will profoundly affect their lives (YKSC, 2010). This benefit is illustrated in *Eustace v Eustace*, where Emery J. conducted a judicial interview with a 13-year-old about his preferences regarding custody and access arrangements. The child was represented by a lawyer appointed by the OCL but refused to speak with the lawyer, speaking only to the judge in the presence of the court registrar and court reporter. In reaching his decision, Emery J. expressed confidence in the child's understanding of how his view will be factored into the decision (ONSC, 2016). The use of judicial interviewing in this case not

only revealed the child's preferences, which would otherwise have been undisclosed, but also facilitated the child's acceptance of the outcome by meaningfully involving him in the decision-making process.

Lawyers Appointed to Represent Children

A court can request the OCL to become involved in a family proceeding or order such involvement in a child protection proceeding. As discussed above, the OCL may assign a lawyer to represent the child(ren), a clinician to investigate and prepare a report, or both a lawyer and a clinician in what is known as a "clinical assist" model of legal representation.

In the family context, the OCL does not have a statutory obligation to provide reasons for declining to get involved in a case. In *Novoa v Molero*, the Ontario Court of Appeal ruled that the permissive wording of sections 89(3.1) and 112 of the *CJA* makes clear that the OCL has discretion to decide whether to participate in a custody and access dispute (2007). A non-OCL lawyer can also be appointed to represent children under rule 4(7) of the *Family Law Rules*, which authorizes the court to appoint a lawyer not necessarily affiliated with the OCL to represent the child. In *W.(K.S.) v W.(S.)*, for example, an order was made pursuant to rule 4(7) to appoint private counsel to represent the children in a custody and access case because OCL had declined to become involved (ONSC, 2012). The court appointed two lawyers with recent experience working at the OCL (ONSC, 2012).

The Proper Role of the Child's Lawyer

The proper role of a lawyer appointed to represent children in parenting and child protection proceedings is that of an advocate. This approach to children's legal representation was clearly delineated in *Strobridge v Strobridge* (ONSC, 1992) and followed in *Fiorito v Wiggins* (ONCA, 2014). According to Granger J, the court-appointed lawyer is to maintain the role of a traditional advocate for their child-client even if the lawyer believes that the child's wishes are not in accordance with the child's best interests (See also *F.(M.) c. L.(J.)*, 2002 CanLII 63106 (QcCA)). This approach changes only if the child is incapable of instructing counsel or articulating their views (ONCJ, 1992). *Strobridge* also established that the child's lawyer cannot put the child's views before the court; given that the lawyer's proper role is to that of an advocate, it would be inappropriate for the lawyer to articulate the child's wishes from counsel table or what they believe is in the child's best interests (ONCJ, 1992). Counsel for the child is entitled to file or call evidence and make submissions on all of the evidence (Strobridge, ONCA, 1994). Statements regarding the child's views and preferences set out in social worker affidavits are admissible (Strobridge, ONSC, 1992, *D.(D.)*, ONCA, 2015). The OCL requires lawyers representing children to maintain a normal solicitor-client relationship with the child as far as reasonably possible, consistent with the Rules of Professional Conduct.

Representing Children Incapable of Instructing Counsel

One source of contention within the issue of the proper role of children's lawyers is the role of a lawyer representing a child who is incapable of providing instructions.

The UN Committee on the Rights of the Child states in *General Comment No. 12*, that a child's capacity must be assessed individually with no age limitation and no starting presumption of incapacity (United Nations, 2009). Capacity has been quite simply interpreted to mean cognitive capacity to form views and communicate them (*B.J.G. v D.L.G.*, 2010 YKSC 44). Lawyers should advocate for the client's *legal* interests when the child is unable to direct the representation. This involves gathering information about the child from a variety of sources "in order to arrive at or to advocate for a decision the child would make if she or he were capable."

In other words, even for a child who is deemed to lack capacity, the role of the child's representative in court proceedings is not to advance a position based on the lawyer's personal views about what is in the child's best interests, but to take a principled approach based on the evidence and to arrive at a position that, to the extent possible, maximizes respect for the child's rights and the decision the child would make if she were capable (Tempesta, 2018-2019).

As noted by Abella J. (as she then was), in *Re W,* 1979 CanLII 3654 (ONCJ); [1979] O.J. No. 2088, (Prov. Ct.),

> The child may be unable to instruct counsel. Or the child may be, as in this case, ambivalent about her wishes. Or the child may be too young. Although there should be no minimum age below which a child's wishes should be ignored – so long as the child is old enough to express them, they should be considered – I feel that where a child does not or cannot express wishes, the role of the child's lawyer should be to protect the client/child's interests. In the absence of clear instructions [...] the lawyer would attempt to guarantee that all the evidence the court needs to make a disposition which accommodates the child's best interests is before the court, is complete, and is accurate. There could in this kind of role be no inconsistency between what is perceived by the lawyer to be the child's best interests and the child's instructions. Where there is such conflict, the wishes of the child should prevail in guiding the lawyer. (at para. 12)

Challenges Associated with Parental Alienation Cases

A review of the case law suggests that the issue of parental alienation arises with notable frequency in parenting cases. In *Ciarlariello v luele-Ciarlariello*, parental alienation was defined by Ingram J. as "[a] child's campaign of denigration against a parent...it results from the combination of a programming parent's indoctrination and the child's own contribution the vilification of the target parent" (ONSC, 2015). Clark J. in *Mungal v Mungal* offers a similar definition: "parental alienation ...[is] where one parent, consciously or unconsciously, attempts to keep the children from the other" (ONCJ, 2013). The issue of parental alienation presents adds yet another layer of complexity to the task of ascertaining children's views; if a child's expressed views have been unfairly influenced by one parent, that view is arguably not independently formed and may be accorded less weight in the assessment of the child's best interests.

One of the chief challenges courts have encountered in parental alienation cases is identifying the dynamic between the parties. Sometimes a dynamic between the child and their parent(s) may look like parental alienation (or be raised as such as a strategic tool to distract from less-than-ideal parenting behaviours, including family violence), but actually reflect a child's legitimate feeling of estrangement toward one party. Such was the case in *C.R. v P.R.*, where the court relied on the qualified expert's opinion that the child's wish to not reside with his mother was the product of realistic estrangement, and not parental alienation (ONSC, 2014). This conclusion was supported by the observation that the child was able to justify and articulate his preferences independently, with no evidence of coaching (ONSC, 2014). Similarly, in *E.H. v O.K*, the court gave weight to a 12-year-old's preference against seeing her father on the basis that her views were arrived at independently (ONCJ, 2018).

The line between parental alienation and realistic estrangement is not always easy to draw. This is hardly surprising – as much as children are susceptible to parental influence (and everyone, adults and children alike, are influenced by those around them (Tisdall, Morrison & Warburton, 2021), they are also capable of autonomous decision-making. The balance between susceptibility to influence and autonomy varies with each child, of course, and the difficult task before the court is to respectfully discern and give due weight to the views, wishes, and preferences that reflect the child's reality or may reasonably be perceived as such by the child (Tempesta, 2022).

Section 2: Social Science Section

Literature Review

The central objectives of this literature review were to:

1. Identify the evidence base for the children's legal representation in child welfare and family law proceedings
2. Identify the range of factors considered key to children's legal representation in child welfare and family law proceedings

Search #	Years	Keywords	Databases	Results
1)	None specified	("legal representation of children" OR "representation" OR "children's lawyer" OR "role of counsel" OR "role of lawyer" OR "child's lawyer") AND ("child's best interests" OR "best interests of the child" OR "child's views and preferences" OR "child's best interests" OR "child's evidence" OR "child's wishes" OR "child's interests")	APA PsycInfo and APA PsycArticles in ProQuest and Sociological Abstracts	378
2)	2010-2024	*See above*	APA PsycInfo, APA PsycArticles, and Sociological Abstracts in ProQuest	208
3)	2010-2024	*See above*	APA PsycInfo, APA PsycArticles, and Sociological Abstracts in ProQuest – Scholarly Journals only	208
4) Final Search Result: Studies were screened for relevance based on the search terms, and duplicate studies were removed. References to academic commentary on the subject have been included in the review below but not included in the results.				19

A literature review was conducted to determine the breadth of information available and to identify, collect, and synthesize information relevant to the issue of **children's legal representation (CLR)**. The search engine ProQuest was utilized for the identification and collection of relevant strategies. Sources were included in the literature scan if they were peer-reviewed and contained keywords relevant to the research objective. Data sources were limited to those published in English. The final list of keywords and search terms used in the literature scan are provided below. Throughout the search process, keywords were added, deleted, or modified as different terms were discovered to enhance the search strategy.

The title and abstracts of records retrieved from the databases were screened for key words, anything not deemed relevant was not included and any duplicates were removed. Studies that did not pertain to

children's legal representation were not included. A hand search of reference lists from relevant studies was also used to supplement searches. The final search result was 30 studies included in the literature scan. The results of the literature scan revealed a limited number of published studies. The discussion here includes commentary to fill in the gaps posed by the lack of studies and to give a more rounded picture of practice.

1. Why Hear from Children?

There is extensive evidence in the literature that a significant number of children in family and child protection cases would like their voices to be integral to the decision-making process (Birnbaum et al., 2011; Fotheringham et al., 2013; Beckhouse, 2016; Cashmore, 2002; Martinson & Tempesta, 2018; Birnbaum & Bala, 2009; Miller et al., 2017). While children may appear ambivalent or not have clear views, studies show that most children want some type of consultation (Bala & Hebert, 2016). Participation, when properly facilitated, can also improve and increase children's sense of well-being and satisfaction with custody/access arrangements and foster care experience (Miller et al. 2009). This point is illustrated in the health context by Vis et al., in their 2010 study on the effects of participation in decision-making on health outcomes for children in care. The authors conducted a scoping review of studies (n = 21) relating to children's health and participation and found, when children are appropriately participate in decision-making, this involvement may have psychological benefits. Specifically, participation may enhance children's self-esteem and reduce stress associated with the uncertainty of care arrangements (Vis et al., 2011). Some studies highlighted the quality of relationship the child has with the advocate/social worker as important to helping the child feel valued in the process (Vis et al., 2011) and for their experiences while in foster care (Miller et al., 2017).

Participation can have significant benefits for children. For example, Zinn & Slowriver (2008) found a positive correlation between effective legal representation and permanency in the child welfare system. These benefits are not guaranteed but depend on *how* children are involved. In a survey of 100 young people who were in foster care or had aged out, Miller et al. found a positive correlation between and young person's perception of their legal representation and their experiences in foster care (Miller at al., 2017). This finding was duplicated in a similar survey of foster parents (Miller et al. 2019). Birnbaum and Bala's 2009 study on young adults' perspectives on legal representation provided to them when they were children is revealing on this point. The authors conducted interviews with 11 young adults who had been represented by OCL lawyers in custody and access disputes in Toronto in 2002, when they were 14-15 years old. Overall, participants found legal representation helpful as it provided them a neutral channel to communicate their views. Expanding on the relationship between the method and efficacy of participation, Cashmore theorizes that effective participation depends on the following conditions: opportunity and choice in ways to participate, access to information, availability of a trusted advocate, adequate resources, and a supportive policy scheme (2009). These conditions were derived from a review of research literature from the UK, North America, Australia, and New Zealand. Cashmore also found that effective participation tended to take place where children have a personal relationship with individuals they know and trust, who keeps them informed about the options and issues (2009). In practice, this translates to the aforementioned conditions (Cashmore, 2009).

2. Ways of Hearing Children in Family and Child Protection Proceedings

The social science literature on CLR reveals several modalities through which Canadian and non-Canadian courts have received evidence about the views of children in family and child protection proceedings. While there is broad agreement both internationally and within Canada on the importance of including children's voices in decisions that affect them, there is ongoing debate about how this is best accomplished – some methods are more controversial than others (Bala & Houston, 2016; Bala et al., 2013; Fidler et al., 2012; Fernando, 2013; Martinson & Tempesta, 2018; Tempesta, 2022; Bala & Hebert, 2016; Tempesta, Murray & Birdsell, forthcoming (2025)). A central point of disagreement

animating the debate over which method(s) meaningfully uphold CLR is whether children's wishes, views, and preferences should be mediated by a third party or conveyed directly. Bala and Hebert, in their review of approaches to receiving children's evidence across Canada (2016), provide the following list of methods of bringing the child's views before the court:

- Hearsay evidence, related by a witness, including a parent, social worker, or teacher;
- A video-recording or audiotape of an interview with the child;
- Written statements from a child in the form of a letter or affidavit
- A report or the testimony of a social worker of a mental health professional as part of an assessment of the case;
- A report from a lawyer, social worker, or psychologist who has conducted an interview (or more than one interview) and prepared a *Voice of the Child Report*;
- Lawyer for a child;
- Testimony by the child in court; and
- A meeting or interview in the judge's chambers.

The following section provides a brief overview of some of these approaches, followed by a discussion of scholarly attitudes and findings on each:

Hearsay Evidence, Recordings, and Out-Of-Court Statements

Courts may admit as evidence a child's expressed views and preferences in the form of out-of-court statements. As previously noted, children's views may be admitted as state of mind exceptions to the rule against hearsay or under the principled approach articulated by the Supreme Court of Canada in *R. v Khan*. Canadian courts have also allowed certain adult witnesses (e.g. professionals) in parenting cases to testify about a child's wishes, views, and preferences (See Strobridge, ONSC, ONCA; *D.(D.)*, ONCA) .

While these forms of hearsay evidence about a child's stated views and preferences are admissible, courts have typically refused to admit such evidence or assigned it little weight in high-conflict cases and where the adult testifying about the child's views is a parent or interested party (Bala & Birnbaum, 2018; Bala & Houston, 2015; Bala & Hebert, 2016). Of central concern is the reliability of these types of evidence; in high conflict custody/access cases, courts are concerned not just about the accuracy of the parent's testimony, but also the influence that one or both parent(s) may have on the child (Bala & Birnbaum, 2018; Bala & Hebert, 2016). There is also a broader worry that allowing for such testimony may incentivize parents to involve their children in litigation, contrary to their best interests (Bala & Houston, 2015). These concerns are largely mitigated when evidence of a child's views is introduced through the testimony of a court-appointed professional qualified to interview children (Bala & Hebert, 2016).

Audio recordings and video tapes of children adduced by court-appointed professionals raise separate issues from those prepared by parents. In the family context, recordings may be used to supplement the testimony of a clinical assessor (Bala & Hebert, 2016). Given that recordings and tapes prepared by parents are vulnerable to technical manipulation and the possibility of the child being influenced by the recording parent, courts are generally resistant to this practice (Bala & Hebert, 2016).

Voice of the Child Reports

Voice of the Child Reports, sometimes known as View of the Child Reports or Hear the Child Reports, are reports usually prepared on consent by the parties to the proceeding, by a lawyer or mental health professional for the purpose of providing the court with information about the child's views on the matters in dispute (Fidler et al., 2012). The practice, which originated in B.C., is a relatively new addition to the services offered by the OCL for family cases (Bala & Houston, 2015).

In a Voice of the Child Report, the assessor typically conducts multiple interviews with the child and parents, conducts observations of parent-child interactions and psychological testing, and contact

collateral sources (Birnbaum et al., 2013).2 Reports can be evaluative or non-evaluative depending on whether the interview's opinion and commentary on the child's views are included. Two potential advantages of this practice for some children are that it allows the child to participate in the proceeding without being directly involved, if that is the child's preference, and is much less costly and time-consuming to prepare (Birnbaum et al., 2016; Bala & Birnbaum, 2018).

The results of a 2016 study by Birnbaum et al. suggest that non-evaluative Voice of the Child Reports can be a useful method of implementing CLR in the family law context. The authors conducted a survey of family justice professionals (n = 65) in B.C., Alberta, Saskatchewan, Manitoba, and Ontario, who have experience preparing reports based on interviews with children in family law cases. The survey revealed that reports were well received by judges, lawyers for parents, the parents, as well as the children themselves, although four children (out of 24) raised questions about the accuracy of the reporting of their information, and some judges have expressed concern that the report authors may also be providing their own opinions rather than just a summary of the child's views (Birnbaum, et al., 2016). Most survey respondents reported experience in preparing only non-evaluative reports and expressed desire for practice standards and guidelines to be developed so that reports can be even more useful (Birnbaum et al., 2016). While Voice of the Child Reports are a promising practice for upholding CLR, a key limitation is that reports may not capture the child's true views and preferences. Moreover, no assurances of confidentiality can be provided as report-writers may be compellable as witnesses, an issue raised as a concern by children (Birnbaum, 2017). Given the brevity of these reports (Fidler et al., 2012; Bala & Hebert, 2014), it is unlikely that issues such as parental alienation and domestic abuse can be properly identified and addressed (Fidler et al., 2012; Birnbaum et al., 2016). They provide less information than would be found in a full parenting assessment, and offer less opportunity for children to directly influence outcomes than if they were represented by counsel (Birnbaum, *et al.*, 2016, at 158). Although there are advantages of the practice, which include cost-effectiveness, increased accessibility for low-income or self-represented litigants, and the ability to bring children's views before the court in a timely manner, there is a risk that they may be relatively tokenistic – i.e. they allow the court and adult parties to "tick the box" of "hearing" from the child, thus fulfilling the technical requirements of Article 12, without allowing the child to have meaningful participation in, and as, a *process*, as the UN Committee on the Rights of the Child suggests is necessary (United Nations, 2019,; Tempesta 2018-2019,).

Lawyer for a Child

There is significant variation across Canadian jurisdictions in the frequency that lawyers are appointed to represent children (Bala & Hebert, 2014; Lovinsky & Gagné, 2015 at 8). In Ontario, which has the most well-established program for child representation in Canada, legal representation of children is governed by the Office of the Children's Lawyer (Bala & Houston, 2015; Bala & Birnbaum, 2018). Internationally and across Canada, there is considerable controversy concerning the role of a children's lawyer. A review of the literature reveals three main approaches to CLR: the *amicus curiae* (friend of the court), the best interests guardian, and the instructional advocate.

1. Amicus Curiae

An amicus curiae is a lawyer who meets with a child and puts forth the child's views before the court (Martinson & Tempesta, 2018; Bala et al., 2013; Bala & Houston, 2015). In Canada today, this is the least commonly adopted model for CLR (Bala et al., 2013). While an amicus curiae does not advocate for the child's interests nor provide advice to the child, it is their responsibility to ensure the completeness of the evidentiary picture (Bala et al., 2013). Unlike in a traditional solicitor-client relationship, there is no expectation between the lawyer and the child (Martinson & Tempesta, 2018; Bala et al., 2013). Given that an amicus curiae by definition does not take up an advocacy position from

2 At the Ontario Office of the Children's Lawyer, the assessor usually meets with the child twice.

the perspective of the child nor advance the child's best interests, it has been criticized as inadequate for upholding the legal rights of children in court processes (Martinson & Tempesta, 2018).

2. Best Interest Guardian

The lawyer acting as a best interest guardian will, in addition to ensuring that all relevant information about the child's interests is before the court, advocate for a position based on the lawyer's assessment of the child's best interests (Bala & Birnbaum, 2018; Bala et al., 2013). The best interest guardian is not bound by instructions given by the child and is able to lead evidence to establish that the child's views are a product of parental influence, based on immature judgment, or not aligned with their best interest (Bala et al., 2013). In practice, the best interest guardian approach is adopted in many jurisdictions, including Germany, Sweden, Great Britain, Scotland, and many American states (Bala et al., 2013).

Some commentators have expressed the concern that this model undermines the child's right to participation under Article 12 of the UNCRC, since the child's voice is replaced by that of the best interest guardian (Martinson & Tempesta, 2018; Liefaard, 2019, at 14). On the other hand, advocates for this model have suggested that best interest guardians are uniquely positioned to consider what is in the child's best interests with the widest possible perspective (Head et al., 1998). The authors argue that the advantage of this model is especially obvious in the case of a lawyer for a young child, who is said to lack understanding of their circumstances and capacity to express a proper view (Head et al., 1998). This view has been rendered much less plausible in the last two decades, however, by emerging research showing children to be capable of forming views from a young age, even when they may be unable to communicate those views verbally (United Nations, 2009; Bell, 2015).

3. Instructional Advocate

A lawyer acting as an instructional advocate, also known as traditional advocate or child advocate, takes instructions from the child and advances the child's position (Bala & Houston, 2015). The instructional advocate's relationship with the child client is governed by the same ethical and professional responsibility principles as those that apply to adult clients, as far as reasonably possible. (Law Society of Ontario, 2022). A key advantage of the model is that it facilitates the meaningful implementation of children's participation rights by allowing the lawyer to develop a plan consistent with the child's views and preferences (Martinson & Tempesta, 2018; Bala & Birnbaum, 2018).

There is growing support in many jurisdictions for the instructional advocacy model (Martinson & Tempesta, 2018; Tempesta, 2022; Drews & Halprin 2002; International Association of Youth and Family Judges and Magistrates (2017) [IAYFJM 2017]; United Nations High Commissioner for Human Rights, 2013). In 2002, the Quebec Court of Appeal has ruled that lawyers should adopt the role of instructional advocate when representing children involved in custody and access disputes. Similarly, in Ontario, the OCL requires lawyers to take a position based on the child's views or instructions.

Comparing the Best Interest Guardian Model with the Instructional Advocate Model

A study by Bala et al. (2013) on the perspectives of children's lawyers in Ontario (n = 79) and Alberta (n = 87) found that nearly half of the Ontario lawyers surveyed would adopt an instructional advocacy approach if the child expressed views. 61% of the lawyers in Ontario reported they would not adopt an instructional advocacy approach if they believed that the child was too young to have capacity to properly state views and preferences (Bala et al., 2013). Other factors precluding lawyers from adopting an instructional advocacy approach include evidence of parental alienation and undue pressure from one of the parties (Bala et al., 2013).

The "Two-Role Model"

Some commentators have responded to the debate between best interest guardianship and instructional advocacy by suggesting a more flexible model for CLR that allows the lawyer to adopt a role most suited for the circumstances of the case. One such example is Bala & Birnbaum's "two-role model" (2018), which requires lawyers

for children to act either as the child's lawyer-instructional advocate or the non-instructional rights and interests advocate. The authors argue that there should be a presumption of capacity and that the threshold for capacity is understood as the low threshold of "having a basic understanding of the main issues involved" articulated in *General Comment No. 12*. If the lawyer believes that the child's views are not truly independent, but the product of parental influence, the lawyer is obligated to introduce evidence of the influence through a mental health professional before considering withdrawing from the case (Bala & Birnbaum, 2018). Where the child lacks capacity or is unwilling to give instructions, the lawyer should adopt the role of a non-instructional rights and interests advocate. The authors liken the responsibilities of the rights and interests advocate to that of an amicus curiae and best interest guardian, in that a lawyer in this role advocates a position based on the child's rights and interests as defined by legislation and case law (Bala & Birnbaum, 2018). Unlike a best interest guardian and amicus curiae, however, the non-instructional advocate is expected to engage with the child's perspective, advance a position that objectively protects the child's rights and interests based on the facts of the case, and arrange a judicial interview where possible (Bala & Birnbaum, 2018).

Tempesta (2018) has expressed concerns that this model undermines the rights of children as noted by Hensley (2006):

> It is suggested that the representational models proposed by Bala and Birnbaum are misnomers and that neither model is fully rights-compliant, nor consistent with legal representation, having regard to the lawyer's overarching duty of loyalty to her client. In fact, both are a version of the [guardian *ad litem*] with the lawyer acting as the eyes and ears of the court rather than a vehicle for the child's legal empowerment and meaningful participation. With the court as the true client, these models risk undermining both the child's voice and her confidence in the legal system.

The "Jean Koh Peters Model"

A 2002 American case study by Drews & Halprin compared four standards on the role of children's lawyer. Based on their analysis of how well each standard provides guidance to the lawyer in the case study scenario, the authors expressed support for the model championed in 1997 by legal scholar Jean Koh Peters (the Peters Model). The Peters Model minimizes the child lawyer's discretion by requiring them to develop a "thickly detailed" understanding of "the child-in-context" (Drews & Halprin, 2002). Three steps are required of the lawyer: (1) meeting with and building rapport with the child; (2) determining the child's competency to determine the extent to which the child may contribute to advancing a position; (3) giving deference to the child's expressed views, unless the child is incapable of such (Drews & Halprin, 2002). Where the child is incapable of expressing views and preferences, the child's voice should continue to be a major focus in the position advanced by their lawyer (Drews & Halprin, 2002). The Peters Model maximizes child participation by presuming capacity. Both it and the "two-role model" are premised on the notion that a child's lawyer should, by default, act as a traditional advocate to give effect to a child's stated views and preferences to the greatest extent possible. Both models further emphasize that, where the lawyer advances a position on the child's behalf out of necessity, the lawyer must ensure that their representation is based on an objective assessment of the child's circumstances and not on their subjective opinion of what's best for the child. Drews & Halprin go a step further than the "two-role model" to suggest the creation of an interdisciplinary supervisory board to resolve lingering questions and receive complaints with respect to CLR in each state – or province, in the Canadian context (2002).

A Relational Approach to Best Interest Guardianship

An Australian qualitative study by Ross on the role of Independent Children's Lawyer (ICL) (2012) provide some guidance for lawyers acting as best interest guardians. ICLs are best interest representative not bound by children's instructions (Ross, 2012). The author conducted interviews that included two vignettes involving children to explore ICLs' (n = 18) approaches and practice in relation to their role and

to children's participation (Ross, 2012). Respondents were divided classified as either a "responsible lawyer" or a "relational lawyer". As a whole, responsible lawyers were more focused on children's best interests, whereas relational lawyers focused on both assisting the court to determine the child's best interests *and* supporting children's participation in legal proceedings. "Relations lawyers" were therefore more likely to be supportive of and facilitate children's right to participate (Ross, 2012). The author attributes this difference to relational lawyers' propensity to approach children as individual, social persons and sense of responsibility to include the child's voice, even though the child is not their client (Ross, 2012). Responsible lawyers, on the other hand, placed little emphasis on the importance of including children's voice; many emphasize the need to protect children from potential harm of being exposed to litigation over children's right to participate (Ross, 2012). To truly honour children's rights, it is crucial for lawyers to adopt a relational approach. This means not only safeguarding the child's best interests but also actively facilitating their participation. Findings from this study demonstrate that it is possible to reconcile these dual responsibilities – ensuring that the child's voice is heard without compromising their well-being.

The theoretical models discussed above are promising for several reasons: the presumption of instructional advocacy is consistent with Bala et al.'s finding (2013) that children's lawyers in Ontario and Alberta are more familiar with the traditional advocacy role. Furthermore, the maximization of child participation and expansive understanding of capacity is consistent with the UNCRC's interpretation of Article 12 (United Nations, 2009). Perhaps most importantly, both models give lawyers flexibility in exercising discretion to adopt the role that best meets the needs of each case. This individualized approach is consistent with the interpretation of Article 12 as a right that applies to both groups of children and the child as an individual (United Nations, 2009).

Despite the advantages of appointing lawyers to children, and particularly the benefits of adopting a flexible, advocacy-based model such as the two theoretical models discussed above (and more particularly the Peters Model), there remain significant challenges. These include funding constraints and concerns about whether lawyers are adequately qualified for such nuanced advocacy work without substantial training. These challenges will be discussed in greater detail under the Challenges Associated with Children's Legal Representation section below.

Judicial Interviews

Another method of implementing CLR, particularly in the family law context, is for judges to interview the child in the judge's chambers. In Ontario, the legal basis for judicial interviews is found in section 64 of the *Children's Law Reform Act*. In Birnbaum and Bala's study on the views and experiences of Canadian judges (n = 62) with judicial interviews of children in family proceedings, the authors found an increased willingness to meet with children. Among those judges willing to meet with children, however, the authors found diverse views about issues such as the extent of confidentiality (Birnbaum & Bala, 2014). Those who remained strongly opposed to the practice expressed concerns about whether judges' competency to interview children and (Birnbaum & Bala, 2014). According to Bala and Hebert's overview of common methods by which Canadian courts receive children's evidence (2016), judges generally expect to understand the child's views from meetings, are more likely to meet with older children. Some judges also provide parents transcripts of the interview to ensure that parents can respond to the comments made by the child during the interview (Bala & Hebert, 2016).

Some commentators have advocated for increased adoption of judicial interviews as a way to include children's voices (Bala & Birnbaum, 2018; Fernando, 2013). Bala and Birnbaum suggest that judicial interviews should be made part of a comprehensive range of services, made available through government programs, to facilitate children's participation in family proceedings (2018). Fernando's review of Australian judges and children's attitudes about judicial interviews (2013) suggests that, compared to other methods of CLR, judicial interviews offer the unique advantage of allowing children to participate directly. This benefit is particularly salient where children feel inadequately represented by lawyers acting as their best interest

guardian (Fernando, 2013). Similar to Canadian judges, however, Australian judges raised concerns about judges' lack of expertise in interpreting children's views and incentivizing parents to pressure their children (Fernando, 2013).

Other considerations articulated by Tempesta (2018), include that it may not be the most child-friendly or reliable way to elicit the child's views as the child may see the experience as intimidating; that it is a one-off, time-limited event, with little opportunity to establish the rapport for children to feel comfortable; there is no guarantee of confidentiality in common law systems given the due process rights of parties; and finally, if the child's views shift over time, there may be no prospect of the court taking into account the child's evolving perspective. There is research to suggest that the child's presence in civil law matters may have an impact on decision-making – judges report that meeting with the child can lead to greater weight being accorded to her views (Morag et al., 2013). It is important to note that having a lawyer or other representative does not preclude the possibility of the child meeting the judge.

Challenges Associated with Children's Legal Representation

Meaningful implementation of CLR faces many challenges. The following section summarizes the literature on issues applicable to current and proposed channels of implementing CLR.

Prioritization of Other Discourses Over Children's Right to Participation

A chief challenge to upholding children's right to have their voices heard in family and child protection cases is a hegemonic protectionist discourse which prioritizes children's protection over their right to participation (Berrick et al., 2015; Vis et al., 2010; Pinkney, 2011; Beckhouse, 2016). According to Vis et al. (2010), a protectionist discourse often links essentialist notions of a child to ideas about children's (in)competence. This discourse is grounded in the assumption that speaking with children about subjects deemed appropriate by adults, such as violence, abuse, and parental separation, could "disrupt the innocence of the imagined normative child" (Vis et al., 2010).

In a 2016 article surveying the landscape of CLR schemes from several jurisdictions, including Canada, Beckhouse points out that a challenging aspect of good CLR is determining the appropriate level of participation for the child. While directly involving children is an obvious means of including their voice, there is also the justified concern that unequivocally involving children in high conflict proceedings further traumatizes the child or encourages them to "take sides" (Beckhouse, 2016). These concerns about adequately protecting children do not defeat the need to include their voices, however, given research evidence that lack of meaningful contact from children's lawyers further silences and disempowers children (Bell, 2015). Children should be consulted about the desired level of participation. Participation is a right, not an obligation.

When children's welfare is at stake, children's right to participation is often overshadowed by a child protectionist discourse that focuses on children's best interests (Vis et al., 2010). This may be explained by the high degree of discretion required of professionals working with children in family and child welfare contexts. In a cross-country analysis on how child protection workers involve children in decisions regarding involuntary child removal (2015), Berrick et al. administered a survey and case vignette to child protection workers (n = 772) to examine workers' conversations with children along three dimensions: (1) conversations with children to include them in the decision-making; (2) conversation to provide information to the children; (3) conversations to collect information from the children (Berrick et al., 2015). Almost all respondents reported that they would speak to a child in a high-risk situation but operated with different understandings of participation. Interestingly, the authors did not observe higher indicators of children's involvement in countries that provide policy guidance regarding children's role in child protection decision making (Berrick et al., 2015). The findings from this study suggest that the degree of children's involvement may be influenced by local interpretations of polices and individual workers' discretion.

Challenges of Facilitating CLR in Alienation Cases

Having first emerged in the United States during the 1970s, the concept of parental alienation generally understood as when a child's resistance to one parent is largely the product of psychological manipulation by the other parent against the rejected parent (Rosen, 2013; Birchall et al., 2022). While Canadian courts and many courts from other jurisdictions have recognized parental alienation, its definition as a concept in family cases, surrounding terminology, and exact scale remain under debate (Birchall et al., 2022). In their 2022 article, which presents empirical findings from a research study on domestic abuse in family courts in the UK, Birchall et al. highlight research evidence showing that accusations of parental alienation are frequently levied against mothers and survivors of domestic abuse. In particular, Neilson's 2018 study of Canadian child contact cases involving allegations of parental allegations (n = 357) found that 42% of such cases also involved allegations of domestic or child abuse. The parental alienation allegation was made by the alleged perpetrator of domestic or child abuse in 77% of such cases (Neilson, 2018). The extensive body of research on the ways parental alienation intersects with domestic violence, abuse, and harmful stereotypes about gender underscore the care that must be taken when engaging with the concept.

Given these challenges associated with defining parental alienation, it is not surprising that lawyers and judges have found it difficult to respond to alienation in practice. In Marques et al.'s qualitative study of how family court judges (n = 21) conceptualize parental alienation (2022), the authors uncovered several properties common across the judges' understanding of the concept. This finding supports the idea that judges have a nuanced understanding of parental alienation as a kind of "dynamics" between the implicated parties, rather than as merely a description of behaviours (Marques et al., 2022). The authors also highlighted the gendered nature of parental alienation discourse, evidenced by judges' tendency to offer examples of mothers as the alienating parent (2022).

In practice, lawyers face similar difficulties with involving children where there are concerns about parental alienation. There are suggestions in the literature that it may be more appropriate to adopt a best interest guardian approach when representing alienated children (Rosen, 2013). Writing in the US context, Rosen argues that children's lawyers are ethically bound to treat the alienated child as a client with diminished capacity (2013). This suggestion relies heavily on the lawyer's assessment of capacity, which turns on a non-exhaustive list of factors including the child's age, maturity, ability to communicate, demeanour, as well as consistency in the child's instructions, and risk of harm in the child's desired plan. On the other hand, some commentators have suggested that parental alienation should not overshadow the importance of including children's voices (Martinson & Tempesta, 2018; Fidler et al., 2012). Proponents of this view point to the difficulty of discerning cases of true parental alienation from cases where children exhibit legitimate affinities for one parent over the other (McSweeney & Leach, 2011; Martinson & Tempesta, 2018). Moreover, children in alienation cases, particularly older children, may nonetheless benefit from direct participation; they are more likely to be satisfied with the outcome if they feel they have at least been heard (Fidler et al., 2012).

Challenges of Canvassing Children's Perspectives

Another challenge to effective implementation of CLR is the difficulty of reliably and accurately canvassing children's perspectives without exposing them to more harm. The literature on CLR in Australian articulates this as a concern for "systems abuse" – the infliction of harm to children by over-involving them in the court process (Beckhouse, 2016; Ross, 2012; Bell, 2015). Mental health professionals in the US have similarly expressed concern that improper involvement of children in custody proceedings can be emotionally destructive, particularly when children feel pressured to choose sides (Bala & Hebert, 2014). These findings underscore the importance of devising channels of participation that do not strip children of their genuine voice.

Commentators caution that there is a need to guard against paternalism and to consider that children are already aware of/exposed to their parents' conflict. As stated by Martinson and Tempesta, 2018:

> If done in a manner sensitive to the child's particular circumstances, including their age, maturity and social context, affording children the opportunity to participate in family court proceedings will not harm them or expose them to further conflict. Rather, it can benefit them by ensuring that they understand why their input is sought; how, what and with whom it will be shared; and how it will be factored into the decision-making process; and by providing children with some control over their participation in the process, including the right not to participate, if that is their wish.
>
> In most cases, it is the fact of the conflict that is harmful, not the expression of the child's views.

Related to the suggested harm that children may experience from over-exposure to court processes is the question of how to elicit information from children. There is a rich and complex body of research on children's suggestibility and how interviewing techniques can influence children's reports (Bruck et al., 1998; Bala & Hebert, 2014; Bell, 2015). Bruck et al.'s extensive review of this topic shows that children are highly susceptible to the influence of adult interviewers, whether those interviewers are conscious of it or not. Adult interviewers can easily – and often unconsciously – exert influence over children's responses through their choice of interviewing technique and demeanour (Bruck et al., 1988). These conclusions are consistent with and corroborated by findings about children's preference for specific questions and difficulty with answering open-ended questions and questions about frequency of events and time (Bala & Hebert, 2014). While a full summary of the social science evidence on children's susceptibility to interviewing techniques is beyond the scope of this report, what is clear is that interviewing children in legal contexts requires great care and skill. It is essential that those interacting with children are well-versed in child development and psychology.

The social science literature offers some guidance on best practices with respect to interviewing children and canvassing their perspectives. Drawing on the literature on forensic interviews with children, McSweeney and Leach highlight the importance of building rapport with the child, limiting the use of suggestive, leading, forced choice, and open-ended questions, and using age-appropriate language (2011). Writing in the Australian context, Bell emphasizes lawyers' obligation to prepare children for participation, which should be accomplished by explaining their role to the child and setting expectations about how the child will be involved (2015). See also the IAYFJM Guidelines (IAYFJM, 2017).

Challenges Respecting the Quality of Representation

Despite significant consensus that children are entitled to effective representation, there is little research on the quality of that representation and the perspectives of young people who are impacted. Miller et al. (2017) in an exploratory study with 100 foster youth/alumni in the United States found that participants perceived a lack of quality communication and interaction with their legal representatives. Youth who had more contact with their lawyers had better perceptions of their legal representation and overall foster youth and alumni indicated that they wanted a stronger relationship with their lawyers.

As noted by Birnbaum & Bala in their 2009 study, former youth in care participants unanimously indicated a desire for lawyers to provide more information and do so in a manner that children and youth can understand (Birnbaum & Bala, 2009). As the authors of the study point out, meeting this demand would require lawyers to understand the children's developmental and emotional needs, be able to communicate effectively with children, and have enough time and resources to spend on each case (2009). A survey of U.S. lawyers, Miller et al. (2020) revealed concern about the quality of legal representation of young people in the child welfare system and suggested the need for broad initiatives related to a consistent practice framework. The authors recommended, among other things, robust training and education for representatives. This is more consistent with the current approach in Ontario with the Office of the Children's Lawyer (McSweeney & Leach, 2011).

Section 3: Case Law and Social Science Synthesis

The review of case law and social science literature shows that Ontario's judiciary agrees with the importance of implementing children's legal representation in line with the benefits some of the research suggests. This alignment between the legal and social science literature can be attributed to their shared focus on Canada's obligations under the *United Nations Conventions of the Child*. While there is a dearth of research demonstrating the beneficial outcomes of legal representation, there is some basis for associating better outcomes for children with effective legal representation, and it is consistent with the rights of children including their rights of participation and best interests under the UNCRC.

In Ontario, the OCL's model of representation strives to empower the child's voice as much as possible. However, this practice is animated by the same challenges identified in the social science literature regarding the lawyer's appropriate role, what it means for a child to have capacity to instruct counsel, and best practices in complicated circumstances such as parental alienation, and the viability of other methods of including the child's voice.

With respect to the appropriate role of the child's lawyer, there has been much debate in the social science literature over the merits of best interests guardian representation and the instructional advocacy model. A review of the more recent literature on this topic reveals scholars' preference for the latter approach, given that instructional advocacy more explicitly supports to children's right to participate under Article 12 of the UNCRC. Cognizant also of how instructional advocacy may sometimes be incompatible with situations where a child is unwilling or deemed incapable of instructing counsel, the literature also suggests that lawyers should have discretion to act as best interest guardians in such cases.

Both sides of the literature have recognized the difficulty of determining what it means for children to have capacity to instruct counsel in theory and in practice. Both the case law and social science evidence have adhered to an expansive understanding of capacity to instruct counsel, premised on the notion that age alone is not determinative of capacity. This conclusion is buttressed by extensive social science evidence of young children's ability to articulate their views and provide helpful information, if properly prepared to do so. In cases where children are genuinely incapable of putting forth views or unable to do so, there is consensus across both sides of the literature that best interests representation based on an objective assessment of the child's circumstances is most appropriate.

Judicial commentary and the experiences of practitioners who have represented children underscore the importance of involving qualified professionals with expertise in child development, psychology, and social work when formulating a position on a child's behalf. From both child development and psychology perspectives, and the legal standpoint, there are important distinctions between representing children and representing adults. The evidence on both sides therefore strongly supports the need to involve a qualified clinician, or at the very least child development training, whenever a lawyer is appointed to represent a child in family and child protection cases. This involvement is particularly important because it helps alleviate the apprehension judges and lawyers may feel about interpreting and presenting the child's voice. Social science evidence indicates that, without this support, legal professionals may inadvertently default to a protectionist stance when navigating cases involving children. Appointing qualified clinicians alongside lawyers representing children can therefore be important for ensuring that the right balance is struck between upholding the child's right to participation and legitimate child protection concerns.

Finally, the social science literature advocates increased adoption of Voices of the Child Reports and judicial interviews. Recent jurisprudence has recognized Voices of the Child Reports as viable options, though some hesitation remains with respect to the use of judicial interviews. Social science evidence indicates that children feel more empowered when they are given the opportunity to speak directly to judges. Furthermore, judicial interviews are particularly

crucial where a child is uncomfortable communicating their views to parties involved in the case, including their OCL lawyer or clinician. Broader adoption of judicial interviews would greatly benefit from the development of guidelines, best practices, and training for judges. Voices of the Child Reports, though limited in comprehensiveness, can provide timely insights into child's wishes, but only where the child wishes to participate in this manner. Given that the OCL is unable to involve itself in every family case, more frequently consideration of use of these reports would enhance access to justice, as reports provide an additional tool to ensure the child's voice is heard.

Reference	Location of Study	Research Design/ Description of Objectives	Sample	Socio-Demographics of Sample	Instrument?
Bala, N., Birnbaum, R., & Bertrand, L. (2013). Controversy about the role of children's lawyers: Advocate or best interests guardian? Comparing practices in two Canadian jurisdictions with different policies for lawyers. *Family Court Review*, *51*(4), 681–697.	Canada	This article reports on a study of the experiences and perspectives of lawyers in two Canadian provinces with different policies for the role of children's counsel; web-based surveys were completed by attendees at legal education programs in Alberta and Ontario concerning their experiences and attitudes towards the legal representation of children in child protection and domestic cases. All three surveys addressed the same issues, with similar forced choice and open-ended questions	N = 166 lawyers	N/A	N/A
Berrick, J. D., Dickens, J., Pösö, T., & Skivenes, M. (2015). Children's involvement in care order decision-making: A cross-country analysis. *Child Abuse & Neglect, 49*, 128-141.	UK, Finland, Norway, United States (CA)	This international comparative paper examines how child protection involves children in decision-making regarding involuntary child removal. The analysis is based on 772 workers' responses to a vignette describing preparations for care order proceedings	N = 772 workers	In all four countries, the vast majority of workers sampled were female	The statistical programme Stata was used to undertake simple correlation analyses, chi square tests, and mean-comparison *t*-tests
Birchall, J., & Choudhry, S. (2022). 'I was punished for telling the truth': How allegations of parental alienation are used to silence, sideline and disempower survivors of domestic abuse in family law proceedings. *Journal of Gender-Based Violence, 6*(1), 115–131.	United Kingdom	This article presents empirical findings from a research study conducted by Women's Aid Federation England and Queen Mary University of London looking at domestic abuse and the family courts	N = 72 women involved in the research; N = 63 completed the survey, N = 9 took part in focus groups, N = 9 interviewed	N/A	N/A

Reference	Location of Study	Research Design/ Description of Objectives	Sample	Socio-Demographics of Sample	Instrument?
Birnbaum, R., & Bala, N. (2009). The child's perspective on legal representation: Young adults report on their experiences with child lawyers. *Canadian Journal of Family Law*, *25*(1), 11-71. Canada The study was qualitative in design with three major objectives: (1) to summarize the literature that discusses the different ways children's voices are being heard in court in the context of separation; (2) to find what young adults report about the experience of having a lawyer from the Ontario Office of the Children's Lawyer (OCL) represent them during their parents' custody or access dispute; and (3) to explore broader practice, research, and policy implications of this empirical study about child legal representation. N = 11 participants (aged 14 or 15 when represented by OCL lawyers)				N/A	N/A
Birnbaum, R., Bala, N., & Cyr, F. (2011). Children's experiences with family justice professionals in Ontario and Ohio. *International Journal of Law, Policy, and the Family*, *25*(3), 398–422.	Canada and the United States	In 2010, children were recruited from closed family court files in three Ontario court jurisdictions (different court levels) and four Ohio court jurisdictions. The study was guided by an inductive qualitative design using grounded theory strategies	N = 32 children	16 females and 16 males; age of the child ranged from 4 to 12 years	N/A
Birnbaum, R., & Bala, N. (2014). A survey of Canadian judges about their meetings with children: becoming more common but still contentious. *Canadian Bar Review*, *91*(3), 637-655.	Canada	The authors surveyed judges from across Canada who attended a family law judicial education program in February 2013 about their views and experiences with judicial meetings in family disputes (child custody and child welfare) over the past year.	N = 62 respondents	56% males and 44% females	N/A
Birnbaum, R., Bala, N., & Boyd, J. P. (2016). The Canadian experience with Views of the Child Reports: A valuable addition to the toolbox? *International Journal of Law, Policy, and the Family*, *30*(2), 158–178. https://doi.org/10.1093/lawfam/ebw004	Canada	This article examines the methods by which children's views are obtained for use in court and non-court dispute resolution processes, reviews Canadian case law on Views of the Child Reports and presents the results of a survey of legal and mental health professionals about their practice and experience preparing Views of the Child Reports	N = 65 respondents	11 men and 54 women; 16 lawyers, 24 social workers, 6 psychologists, 3 clinical counsellors, 5 court counsellors	N/A

Reference	Location of Study	Research Design/ Description of Objectives	Sample	Socio-Demographics of Sample	Instrument?
Fernando, M. (2013). Children's direct participation and the views of Australian judges. *Family Matters: Newsletter of the Australian Institute of Family Studies, 92*, 41-47.	Australia	This article discusses the issue of children's direct participation in family law matters by examining why some judges, in Australia and more commonly in other jurisdictions, choose to hear directly from children; in-depth interviews with judges were conducted and analyzed and a survey was distributed to family law judicial officers	N = 4 family court judges; N = 44 judicial officers	N/A	N/A
Fotheringham, S., Dunbar, J., & Hensley, D. (2013). Speaking for themselves: Hope for children caught in high conflict custody and access disputes involving domestic violence. *Journal of Family Violence, 28*(4), 311-324.	Canada	The Speaking for Themselves (SFT) project sought to enhance the physical, emotional, and psychological safety of children exposed to domestic violence and high conflict custody and access disputes. Children were provided with both a trauma therapist and a lawyer, in an attempt to ensure their well-being while providing decision-makers with reliable and authentic information about these children's circumstances. This project was an attempt to balance the "best interests" approach applied in family law decision-making with the value placed on a child's right to be heard	N = 25 families (including 41 children and 52 adults)	On average children were 6 years old; 31 parents identified as Caucasians, and other identified ethnicities included African, Aboriginal, East Indian, East and Southeast Asian, Latin, and Central and South American	Andy & Angie Cartoon Trauma Scales and the Trauma Symptom Checklist for Children
Marques, T. M., Narciso, I., & Ferreira, L. C. (2022). How do family court judges theorize about parental alienation? A qualitative exploration of the territory. *International Journal of Environmental Research and Public Health*, *19*(13), 7555-.	Portugal	This study provides an account of how legal professionals conceptualize "parental alienation" and how they describe the characteristics of the phenomenon	N = 21 family court judges	N = 11 and N = 10 women; all participants identified as Caucasian/White	QSR NVivo 12 software was used to support the analysis which followed the basic procedures and requirements established by the grounded theory methodology
Miller, J. J., Donahue-Dioh, J., Duron, J., & Geiger, J. M. (2019), Examining legal representation for foster youth: Perspectives of foster parents, *Children and Youth Services Review*, 104 (2019) 104380.	United States	This study investigated foster parent perspectives about the legal representation of foster youth involved in dependency court proceedings.	N = 792	All participants were from one southeastern state in the U.S. Typical participant was Female, White and aged 43.25.	Data collected by online software and analyzed via SPSS.

Reference	Location of Study	Research Design/ Description of Objectives	Sample	Socio-Demographics of Sample	Instrument?
Miller, J. J., Donahue-Dioh, J. & Owens, L. (2020), Examining the legal representation of youth in foster care: Perspectives of attorneys and attorney guardians *ad litem*, *Children and Youth Services Review* 115 (2020) 105059.	United States	This study surveyed attorneys and guardian *ad litem* attorneys nationally. Described as an exploratory study it examined the perceptions of attorneys who represented foster youth about the quality and impact of legal representation.	N = 934 attorneys	278 men and 653 women. 89.8% Caucasian.	Data collected via online survey software and analyzed via SPSS.
Miller, J. J., Duron, J., Washington, E., Donohue-Dioh, J. (2017), Exploring the legal representation of individuals in foster care: What say youth and alumni? *Child and Youth Services Review* 78 (2017) 142-149.	United States	This exploratory study surveyed foster youth/alumni about their perceptions of the legal representation they received while in out of home care.	N = 100	All participants were either currently or previously in foster care in one southeastern state in the U.S.	IBM SSPSS (Version 24) and NVivo 11.
Neilson, L. C. (2018). Parental alienation empirical analysis: Child best interests or parental rights? Fredericton: Muriel McQueen Fergusson Centre for Family Violence Research and Vancouver: FREDA Centre for Research on Violence Against Women and Children.	Canada	This article explores how Canadian courts are responding to parental alienation claims. A document search of Canadian case law was conducted on CanLII	N = 357 cases	N/A	N/A
Pinkney, S. (2011). Discourses of children's participation: Professionals, policies and practices. *Social Policy and Society, 10*(3), 271-283.	United Kingdom	This article analyses a wide range of policy and interview texts using narrative and discourse analysis and aims to provide fresh insights into the ways policies of children and young people's participation are constructed and negotiated within social care. The study is based on original work involving analysis of 166 policy documents from Social Services Departments (SSDs) and Children's Services in England and Wales. Qualitative and semi-structured interviews were then conducted in five Departments as a follow-up	N = 166 policy documents	N/A	N/A

Reference	Location of Study	Research Design/ Description of Objectives	Sample	Socio-Demographics of Sample	Instrument?
Ross, N. (2012). Independent children's lawyers: relational approaches to children's representation. *Australian Journal of Family Law*, *26*(3), 214–239.	Australia	This report examines the results of an online survey conducted by Family Law Express into the experiences of parents with Independent Children's Lawyers (ICLs) within the Australian Family Law system through a qualitative and quantitative questionnaire approach	N = 87 respondents	31% males and 69% females	N/A
Vis, S. A., Strandbu, A., Holtan, A., & Thomas, N. (2011). Participation and health -- a research review of child participation in planning and decision-making. *Child and Family Social Work, 16*(3), 325-335.	Countries included in review: United Kingdom, Ireland, Canada, Sweden, United States, Australia, Israel	A scoping review of major health and social work research databases was undertaken. Searches in five databases yielded 1830 studies of which 21 were finally included in this review. Studies were included if a relationship between health and participation was evident from the data presented, even if this was not the main objective in the study at hand	N = 21 studies	N/A	N/A
Vis, S. A., Holtan, A., & Thomas, N. (2012). Obstacles for child participation in care and protection cases-why Norwegian social workers find it difficult. *Child Abuse Review (Chichester, England: 1992)*, *21*(1), 7–23. https://doi.org/10.1002/car.1155	Norway	This paper reports on a study of factors that are likely to predict if social workers will attempt to give children an effective voice in decision-making processes. Child protection case managers and social work students participated in a questionnaire survey in which they were asked to agree or disagree with 20 statements about child participation	N = 52 case managers, N = 33 social work students	N/A	Statistical factor analysis
Zinn, A. E. & Slowriver, J. (2008). Expediting permanency: Legal Representation for foster children in Palm Beach County. Chicago: Chapin Hall Center for Children at the University of Chicago. Online: https://legalaidresearch.org/wp-content/uploads/2020/01/palm-county-legal-representation.pdf	United States	The purpose of this study was to examine the impact of Legal Aid's Foster Children's Project (FCP) which provided legal representation to children 12 years of age and younger, on the nature and timing of children's permanency outcomes.	N = 1333	FCP N = 1201; Comparison N = 132	Data came from DCF administrative data base; Juvenile Court files and participant interviews.

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