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Judicial Interviews

By Brian Ludmer

THERE ARE SEVERAL generally accepted modalities for getting the "voice of the child" before the Court in contested family law litigation or child protection litigation. Each has certain advantages and disadvantages in terms of the quality of the evidence and how the modality deals with concerns or restrictions on its use. Children's evidence in a case involving allegations or concerns of parental alienation or simple child manipulation requires a careful analysis of the modality chosen.

There is no doubt that there has been increasing emphasis in the legal community on ensuring that the "voice of the child" is "heard" in decisions about the child's future welfare [i.e., not slavishly followed, often phrased as a "voice but not a choice" – although careful scrutiny of many cases reveals an undue reliance on the voice of triangulated children].

This is driven in part by the UN Convention on the Rights of the Child (the "Convention"), although often in a mistaken way. Section 12 of the Convention provides that member states should ensure that their local legislation provides for a modality to hear the voice of the child, however, no one specific modality is recommended. The risk of triangulation and loyalty-bind is recognized through the Convention's reference to: (I) a *"child who is capable of forming his or her own views"*; and (II) *"the views of the child being given due weight in accordance with the age and maturity of the child"*.

Therefore, it is important to bear this in mind when alienating parents and their counsel assert the right of the child to have their own counsel, or to have a judicial interview. Article 12 does not say that, and the implementing local legislation almost invariably does not say that either. Only in child protection statutes is there more of an emphasis on having counsel appointed, but even then, not universally and the dynamic differs there since it is not a simple dispute between the parents but rather between the parents and the state or between one parent and the state and the other parent.

The other modalities, which I will explore in detail in a future article, include testimony from the parents themselves as well as other family members. The child's voice can also be put forward through various non-parties, including school teachers and principals, family doctors, sports' coaches and through therapists and perhaps through a custody access assessment/custody evaluation [a pure forensic process].

In prior and forthcoming articles, I have explored the misuse of children's counsel by alienating parents. Judicial interviews are also put forward by alienating parents and their counsel as a requested modality to get the voice of a conflicted child before the Court. This is a more direct attempt to influence the Court to put undue emphasis on what the child says, as opposed to how the child independently feels, but is unable or unwilling or too scared to be revealing. The request for a judicial interview in the context of a parental alienation case also serves to distract the Court from advancing the best interests of the child. Therefore, for many reasons, a judicial interview is the worst of all the possible modalities to advance the voice of the child into the litigation process.

Supporting this assertion is a fundamental principle that the trier of fact must stay outside the fray and, while a certain level of questions from the bench is permissible with a view to obtaining clarity on aspects of the case that the Judge feels uncertain about, those interventions are usually immediately followed by allowing counsel who have already finished their examination of the witness to ask further questions arising out of the Judge's questions.

That procedural protection against interventions from the trier of fact (who is supposed to stay outside the fray and not influence the course of the case) is generally not available in the case of a judicial interview. That is because judicial interviews typically take place in private in the judicial chambers, often but not always with a Court reporter present and certainly not with the parents and their counsel present.

There is therefore often little ability for counsel representing the alienated parent from challenging the specifics of what the Court was told as it unfolds and before the child's direct testimony has had a meaningful impact on the Judge's understanding of the family background. The judicial interview process does not afford counsel the opportunity to cross-examine the child witness, for example, a fundamental right and essential component of refuting the multiple false allegations frequently levied against the targeted parent.

Thankfully, however, Canadian jurisprudence has generally recognized the concerns about judicial interviews in the context of conflicted children and also the fact that Judges are rarely trained in interviewing children. Even those Judges who have prior experience as children's counsel and therefore who have received a modicum of training in this regard, will often struggle with separating their role as the trier of fact from their role as a conduit for an essential piece of evidence in the case. It would be too much to expect that the Trial Judge would be doing much forensic probing of what they are being told by the children, for example.

The Ontario Canada Courts have provided some significant guidance in this regard and now frequently reference a protocol for judicial interviews of children that serves the purpose of: (I) first providing a list of rationales for why a request for judicial interview should be denied; and (II) secondarily, if the judicial interview is to proceed, how it is to proceed in a manner that protects the integrity of the adjudicative process to the greatest extent possible.

Factors listed in the protocol which resulted from a consultation and committee process co-sponsored by The Advocates' Society (Ontario) and the Association of Family and Conciliation Courts, Ontario Chapter. [Guidelines for Judicial Interviews and Meetings with Children in Custody & Access Cases in Ontario", (2014) 36 RFL-ART 489 (WL), at p. 8 ["Guidelines"] that would suggest that a judicial interview is **inappropriate** include:

a. *There has been an assessment report or CLR which has been completed within the past year, unless that report requests a judicial interview and there is no conflicting professional recommendation against such an interaction;*

b. *The child has independent legal representation obtained through the OCL [Office of the Children's Lawyer] or otherwise privately retained by the parties;*

c. *There is independent and reliable evidence available through an independent third party regarding a child's views and preferences;*

d. *The child's age or level of development suggests that he or she does not possess a sufficient level of maturity;*

e. *The court has balanced the expected benefits of the interview against the risk that the child may be adversely affected and is satisfied, on balance, that conducting the interview would be inappropriate;*

f. *One or both parties do not consent to a judicial interview of the child taking place;*

g. *There is evidence before the court that the child does not wish to be interviewed by a judge.*

Statutory authorization generally provides that the court *may* interview the child, but allows for significant judicial discretion as to whether a judge will interview a child. In addition, other than generally specifying that the interview shall be recorded and attended by the child's counsel, if any, the legislation allows for discretion in terms of the process used to conduct an interview.

Jurisprudence generally supports the reluctance of Judges to undertake judicial interviews (even though statutorily authorized), for the following reasons:

(I) judicial interviews *"should be limited and not seen as an opportunity to obtain vital information shielded from the knowledge of and challenge by the litigants."*

(II) *"The practice of interviewing children in chambers by a judge is not an ideal way to ascertain a child's wishes. The interview is conducted in an intimidating environment by a person unskilled in asking questions and interpreting the answers of children... Where other methods appear to be unavailable, the judge's interview is an appropriate last resort."*

(III) *"In my view it is not proper to use the judicial interview process in order to contest evidence that may be disputed. The prejudice to the litigants far outweighs any potential probative value. These children have already been excessively involved in this litigation. The care givers have talked to them and, in some cases, involved them in this litigation. They have already talked to a judge, their lawyer and a social worker on numerous occasions. I will not place Sarah in a position where, through questioning by the judge, where she will be at the centre of a storm that may go further to destroy future family relationships rather than preserve the potential of necessary familial re- integration".*

(IV) In another case the Judge noted that he was not trained as a psychologist or psychiatrist and was concerned that he might not appropriately interpret the answers given by the children, or even ask the appropriate questions. The court was also concerned that the children had been influenced by the father and questioned whether what they said would be their true views.

If a judicial interview is to proceed, the Guidelines suggest the following structural elements: the Judge should explain to the child that their conversation will be recorded and advise who may have access to the recording or transcript (parents and parents' counsel are often provided with same), and whether parents will at least be provided with a summary of the information. Except for special circumstances, the parties should be provided with a summary of what transpired and, if appropriate, given an opportunity to make submissions or present evidence related to what transpired.

For the foregoing reasons, judicial interviews should be used infrequently and only if there is the unavailability and/or significant evidentiary concerns about all other possible modalities of ensuring that the voice of the child is put before the Court with the requisite context to allow the Court to weigh the authenticity and reliability of the asserted voice of the child. Clearly, the preferred modality to have the voice of the child heard in context is a more forensic (custody evaluation) or experiential (reconciliation therapist) approach which avoids having the trier of fact too directly involved in how that is all presented. The weight of the jurisprudence is that judicial interviews: *"should be used very rarely and only where all other means of ascertaining the child's views are absent."*