A CHILD'S EVIDENCE

A paper presented at the
Second Judicial Conference on Family Law

Halifax, Nova Scotia
August 23-25, 1985

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This paper reviews three familiar problems in the law of evidence as it affects children, and it considers changes for the future. The first situation which will be discussed is taking a child's evidence. Although we are all well acquainted with the current statutory provisions, in the last ten years, the Law Reform Commission has proposed changes which depart markedly from the accepted standard. Secondly, I wish to deal with some of the difficulties of applying traditional procedural law to custody hearings. Should the time-honoured adjective law be safeguarded, or does the nature of the proceeding necessitate a tailor-made body of procedural law? Thirdly, I wish to consider the practice of meeting with a child in private chambers. Although permitted, does the private meeting affect the judicial decision making process favorably or adversely?

A. Receiving Evidence from a Child

Receiving evidence from a child in the course of proceedings presents the problem of measuring the depth of a particular child's intelligence and perception of the need for truthfulness. As long ago as 1779, the question of the age at which a child became competent to testify, was considered by the court in the case of R. v. Brasier:[1]

> "... there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court; ..."

Two hundred years later, there remains no "fixed rule as to the time". Children of all ages may be found in courtrooms giving sworn and unsworn evidence by virtue of the provisions of the federal or provincial evidence acts. The procedure for swearing a child is relatively simple and common to courtrooms throughout the nation. The presiding judge poses several questions to the child. Generally the questions touch on age, education, and whether the child understands what the oath means. Providing nothing untoward is revealed in the responses, the child is sworn.

This is a procedure with which we have all become familiar. However, in 1975, the Law Reform Commission of

Canada proposed a very interesting change touching on the competence of children as witnesses. In a document entitled Report on Evidence[2], a distinguished group of commissioners proposed a new Evidence Code to replace the present Canada Evidence Act, R.S.C. 1970, c.E-10. Section 54 of the proposed code states:

> "54. Every person is competent and compellable to testify to any matter, except as provided in this Part or any other Act."

There is no exception proposed for the evidence of children. This explanation is provided:[3]

> "Because of the impossibility of stating and applying a standard of mental immaturity that renders a witness incompetent to testify, it seems preferable simply to let the trier of fact take into account any such incapacity in assessing the weight to be given to the testimony."

It is an intriguing proposition and perhaps it provides a direction for the future although ten years after the fact it remains a mere proposal, not yet embodied in statute. It may well be that the newly enacted Young Offenders Act provides a clue to parliament's attitude, for corroboration is required to bolster the evidence of a child under 12 years of age.

Some provisions of the Young Offenders Act S.C. 1980-81-82, c.110 are noteworthy in this context. Section 61 of the Act states:

> "61(1) The evidence of a child may not be received in any proceedings under this Act unless, in the opinion of the youth court judge or the justice, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
>
> (2) No case shall be decided on the evidence of the child alone but must be corroborated by some other material evidence.

Child is defined in section 2 as "a person who is, or in the absence of evidence to the contrary, appears to be under the age of twelve years". Pursuant to subsection 60(2) it is required that children give their evidence under solemn affirmation. However, by virtue of subsection 61(2), unless the evidence is corroborated, it is statutorily discounted.

The provision requiring corroboration may raise a charter issue. In July of this year, Judge E. G. Hachborn heard a case concerning sexual assault of a child. Defence counsel objected to the child's testimony on the basis that a child's evidence in young offender cases must be corroborated. He based his discrimination argument on Section 15(1) of the Charter of Rights, which reads:

> "Every individual is equal before and under the law and has the right to the equal protection and the equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability."

The essence of the objection was that the inconsistency between Section 16 of the Canada Evidence Act R.S.C. 1970, c.E-10 and Section 61 of the Young Offenders Act amounted to discrimination based on age. The net effect of the two sections is that the evidence of a child given in a proceeding in adult court has the potential of being much more damaging than the evidence of a child given in young offenders proceedings. Judge Hachborn indicated that the Canada Evidence Act may offend the Charter of Rights and that Section 16 could be unconstitutional. However, as the child's evidence was corroborated, the question remains to be settled another day.

B. Third Parties Representing a Child

The evidentiary problems posed by adjective law, "the procedural-evidential branch of the law" are very pronounced in the area of representing a child or his best interest through a third party.[4] The subject is well canvassed in a paper presented by Chief Justice Bayda of Saskatchewan in 1979 for the Summer Programme in Family Law Sponsored by the Federation of Law Societies of Canada[5]. He addressed the point by

considering two familiar personages in child custody matters: the lawyer who represents the child, and the social worker.

With respect to legal representation for a child, there are three distinct characterizations or models which the lawyer may assume: "the adversary, the amicus curiae, or the social worker".[6] How can a lawyer, much less the court, know which character he is to assume? The confusion within the profession is evident and is shown in the following statements given by two practitioners. The first states:[7]

> "Too many people already assess, worry about and invariably censor the child's desires in the name of his best interests. It shouldn't be daring to suggest that there be at least one adult participant working on the premise of the child's wishes, as opposed to the child's 'best interests'.... There is a great deal that a lawyer can do for a child as a client in this and other situations, while leaving the decision of 'best interests' in the hands of the judge, where it belongs."

The second practitioner suggests:[8]

> "The advocate's function is clearly to protect and advance the interests of the younger child, but when the child is of an age to express opinions and preferences, the advocate's role becomes less clear, and may present him with conflicting duties. It must be asked whether he is to express to the court simply the views the child holds, or the view he holds as to the child's best interests. If he acts as a traditional advocate conforming to his client's instructions, he may have to advance views he disfavours and thinks immature and potentially disasterous, because his duty is to speak for his

> client and not to superimpose his own preference as to what the client should want. If he expresses his own view, based on his independent research and experience, he may be opposed by the child whose advocate he is appointed to be. Further clarification is needed on the principle by which he is to function."

Chief Justice Bayda ably demonstrated the ambiguity and confusion surrounding the role of the lawyer acting for a child. After posing a number of unanswerable questions for counsel, who might be seeking a consistent definition for their role, he addressed the problem from the judicial perspective:[9]

> "Unless the Judge knows how counsel for the child got there and what counsel's role is, how can the Judge know how much stock to place in counsel's representations? In short unless they know the rules of the games and unless those rules are, more or less, the same from case to case, a child's right to counsel may end up being somewhat hollow for many children."

As his second example of procedural difficulty in custody adjudication he reviewed the area of admissibility of the report of a social worker. "Typically, 50% of it consists of hearsay, 40% of subjective opinion and about 10% of statements of fact."[10] Although the "business records" hearsay exception permits the admission of the factual content of the report, provided that it has been duly recorded within a reasonable time, subjective opinion is excluded, although much of it may be valuable for adjudicative purposes.

The solution which Chief Justice Bayda proposed, represents a dramatic departure from the familiar adversarial setting of a custody hearing. He suggested converting the traditional trial or hearing to an enquiry much like public enquiries, with informal rules of evidence and procedure more conducive to bringing forward all of the information needed for proper adjudication. He contended that many of the difficulties would disappear if his proposals were implemented. Chief Justice Bayda stated:[11]

> "The ambience of a custody trial would change from a fight with many rules, all geared to produce a winner, albeit fairly, to a search for the right thing to do with only two rules;
>
> 1. Anything reasonable that will assist in this search (for information pertinent to custody adjudication) should be brought forward and examined; and
>
> 2. The setting should be one of informality, but a predictable informality.
>
> That kind of adjudicative process would be much better suited than the present one to enable the substantive law -- the 'best interests of the child' -- to do its job."

Most will agree that frequently, if not consistently, Judges close their eyes to some of the present rules of evidence and procedure in custody and access cases in their attempts to arrive at a solution that is in the best interests of the child. I agree with Chief Justice Bayda that the Bench should not be put in that position. It would be preferable to

effect the appropriate changes in the procedure and the rules so that all would understand and follow the accepted procedure and rules of evidence. It may well be that out of the specialized family courts such changes will emerge.

C. Meeting with a Child in Private Chambers

The practice of meeting with a child in private chambers is well accepted and soundly based on case law. In 1963, the House of Lords considered the practice in the case of In re K. (Infants):[12]

> "It is not in doubt that a judicial inquiry concerning the proper steps to be taken for the care and maintenance of a ward of court is subject - and necessarily subject because of the nature and purpose of the inquiry - to a procedure in many respects quite special. The case is normally heard in private and it is conceded that the judge may properly see - that it is his duty to see - the infant (and perhaps one or other or both parents) in private; ...."

It is a practice which I approach with some hesitation for I fear becoming an active participant and possibly a witness in the action which I am to hear and decide. The Law Reform Commission of Canada has this to say about the role a judge is to play:[13]

> "Our system ... is an 'adversarial system', one in which each party presents his evidence to support the facts, and the judge in general acts as an impartial arbiter to hear and determine the

> issues. Not that the judge is a mere umpire. He must, when need be, intervene in the interests of justice, for justice is what the process is about. But he must as much as possible avoid joining in the fray lest his impartiality be affected."

In some case the usefulness of meeting with a child in private chambers cannot be denied. However, it is a practice which must be used sparingly. The judge who used it indiscriminately may find that he has compromised his judicial role by becoming an active participant or even an advocate in the proceedings which he is to hear. In some jurisdictions there are attempts to formalize the procedure. Australia has attempted a statutory means of learning the child's desires in custody disputes. Section 64(1) of the Family Law Act 1975 (Cth.) provides:

> "(b) Where the child has attained the age of 14 years the Court shall not make an order under this part contrary to the wishes of the child unless the Court is satisfied that by reason of special circumstances it is necessary to do so."

This makes it mandatory to ascertain the wishes of a child 14 years of age or older. Under that age the court may ascertain the child's wishes if it considers it relevant to do so. Where the court has to, or wishes to, ascertain the child's wishes, Regulation 116 of the Family Law Regulations permits the court to interview a child in chambers. If the judge interviews the child in chambers, Regulation 116(3) provides that:

> "Evidence of anything said at their interview shall not be admissible in any court."

When considering this somewhat remarkable provision, it should be remembered that in Australia the Family Court is a specialized court with family law expertise and support services. Nevertheless, the Australian court, noting the difficulties inherent in the judicial interview procedure, has suggested that interviews be used sparingly. In many cases, a report from a welfare officer or separate representation may be preferable.[14]

It is to be noted that this guidance came from the judiciary and not from the legislature. Despite the fact that meeting with a child in chambers is statutorily sanctioned in Australia, it remains a practice which is to be used rarely and only when dictated by necessity.

The Australian experience strengthens my own conviction that in virtually all cases the judge should hear of the child's wishes, or what would be beneficial to the child's best interests, from an "expert". The testimony of the expert whether that of a psychologist, a psychiatrist, a social worker or a family doctor, should be introduced by the counsel representing the child.[15] Such testimony can then be tested by cross examination by both parent's counsel. In such

circumstances, the judge's role is not blurred nor compromised. This procedure is compatible with both the enquiry approach suggested by Chief Justice Bayda, and the traditional trial. And the parents are assured that they have full opportunity to challenge all of the evidence placed before the Court. That can never be the case where the Judge interviews the child.

FOOTNOTES

1. R. v. Brasier (1979), 1 Leach 199 at 200, 168 E.R. 202 at 203.

2. Law Reform Commission of Canada Report 1: Report on Evidence (1975).
This report was submitted to the former Minister of Justice. The Honourable S. R. Basford by the following commissioners: E. Patrick Hartt, Chairman; Antonio Lamer, Vice-Chairman; J. W. Mohr, Commissioner; and G. V. LaForest, Commissioner.

3. Id., at p.84

4. E.D. Bayda, "Procedure in Child Custody Adjudication: A Study in the Importance of Adjective Law" (1980), 3 Can. J. of Fam.-Law 57 at 58.

5. Ibid.

6. B. M. Dickens "Representing the Child in the Courts" The Child in the Courts, (I. Baxter and M. Eberts ed. 1978) p.280.

7. J. Wilson, Up Against It: Children and the Law in Canada (1980) pp.120-1.

8. Supra, note 6 at p.294.

9. Supra, note 4 at p.59.

10. Id., at p.67.

11. Id., at p.70.

12. In re K. (Infants), [1965] A.C. 201 at 218, at 218 (H.L.)

13. Supra, note 2 at p.2.

14. In the Marriage of Ryan (1976), 14 A.L.R. 466 at 477 (Fam. Crt. of Aust. - Full Ct.).

15. Barbara A. Chisholm, Obtaining and Weighing the Childrens Wishes; Private Interviews with a Judge or Assessment by an Expert & Report (1976) 23 R.F.L.1