BC ASSOCIATION OF CLINICAL COUNSELLORS

STANDARD FOR FAMILY LAW

A PRACTICE STANDARD FOR REGISTERED CLINICAL COUNSELLORS
ON THE PREPARATION OF FAMILY LAW REPORTS

Prepared by
John-Paul E. Boyd QC, AOCA MA LLB

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BC ASSOCIATION OF CLINICAL COUNSELLORS

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PREAMBLE

As a clinical counsellor, you may be asked to prepare reports to help separated parents resolve disagreements about the parenting arrangements of their children. These reports will express your professional conclusions on matters such as the needs of the children, the views and preferences of the children, the ability and willingness of each parent to meet the needs of the children, and, ultimately, on the parenting arrangements that are in the best interests of their children.

Although these reports are invaluable and often play a critical role in breaking logjams between parents, they can have a profound impact on the lives of the children and parents they concern. You must be confident that you have the training and the experience necessary to competently conduct your assessment and prepare the report flowing from your analysis before agreeing to prepare a report in a family law dispute.

The Association has established standards of professional practice governing the different types of family law reports that counsellors may be called upon to provide. These Standards describe those reports and set out the Association's guidance and expectations for counsellors preparing them. They also discuss the potential roles counsellors may have in family law disputes, and the role of the counsellor as an expert witness.

FAMILY LAW DISPUTES AND THE ROLE OF THE COUNSELLOR

INTRODUCTION

Family law is the area of law that deals with the formation and dissolution of domestic relationships. Typical family law problems involve parenting after separation, paying child support and spousal support, and dividing property and debt. Family law deals with other legal issues as well, including: marriage, separation and divorce; family violence and personal protection orders; adoption and assisted reproduction; and, determining the parentage and guardianship of children.

Many clinical counsellors will have experience working with adults who have left or are leaving important long-term relationships; some will also have experience helping children cope with the separation of their parents. You are most likely to become involved in the legal aspects of family breakdown and restructuring in the context of addressing disagreements about the parenting of children, and helping parents, lawyers, and decision-makers determine the parenting arrangements that are best for children.

THE FRAMEWORK OF FAMILY LAW

Family law is governed by statute law and the common law. *Statute law* is made up of legislation and regulations, the written laws made by the federal and provincial governments. The *common law* is composed of judges' recent and historic decisions interpreting and applying the statute law, and the principles and rules judges have made when there is no statute law.

The most important family law statutes in this province are the *Divorce Act*, a law made by the federal government, and the *Family Law Act*, a law made by the government of British Columbia. The Divorce Act only applies to people who are, or used to be, married to each other. The Family Law Act applies to everyone in a family relationship, including married people.

DEFINITIONS

- **Parenting time:** The schedule dividing a child's time between the child's guardians. People other than guardians can also have parenting time, although this doesn't happen very often.

- **Parental responsibilities:** The responsibility of a guardian to make important decisions and give or withhold consent on behalf of a child. People other than guardians can also have parental responsibilities, although this too doesn't happen very often.

- **Parenting arrangements:** The parts of an agreement, an arbitrator's award, or a court order that talk about how parental responsibilities and parenting time are shared between, usually guardians.

- **Guardian:** Someone, usually a parent, who is legally responsible for exercising parental responsibilities on behalf of a child. A child can have more than two legal parents and more than two legal guardians.

- **Contact:** The time that someone who is not a guardian has with a child. People who have contact with a child are usually relatives of the child, including parents who are not the child's guardians.

FAMILY LAW DISPUTES AND THE ROLE OF THE COUNSELLOR

The Divorce Act and the Family Law Act both talk about parenting after separation. Thanks to changes to the Divorce Act that came into effect on 1 March 2021, both laws now discuss the subject using similar language and similar legal concepts. However, many parents will still talk about parenting after separation using older, more familiar terminology like "custody" and "access."

The Divorce Act and the Family Law Act now talk about *parenting time* and *contact* with children, and about *decision-making responsibility* and *parental responsibilities*. ("Decision-making responsibility," the term used by the Divorce Act, and "parental responsibilities," the term used by the Family Law Act, mean almost exactly the same thing. This Standard uses the term *parental responsibilities* to mean both decision-making responsibility and parental responsibilities.) Today, decisions about children's parenting arrangements after separation are decisions about parenting time, parental responsibilities and contact.

Parenting time refers to the schedule of the children's time between, usually, their parents. Under the Divorce Act, "parenting time" is the schedule of the children's time between *married spouses*, while under the Family Law Act, "parenting time" is the schedule of the children's time between their *guardians*. People other than parents, spouses and guardians can sometimes have parenting time with children too.

The term *parental responsibilities* describes how people, usually parents, make decisions on behalf of children. (Under the Divorce Act, *married spouses* have "decision-making responsibility." Under the Family Law Act, *guardians* have "parental responsibilities.") Parental responsibilities include decisions about the medical and mental health care a child will receive, the school a child will attend, the religious, linguistic and cultural instruction the child will receive, as well as giving or withholding permission for things like fieldtrips and extracurricular activities. Parental responsibilities can be shared

THE LEGISLATION ON FAMILY LAW

Family Law Act
Divorce Act

UNDERSTANDING OLDER AGREEMENTS, AWARDS AND ORDERS

- **Guardianship:** Someone who is a guardian of a child under an older agreement, arbitrator's award or court order is still a guardian of the child under the Family Law Act.

- **Custody:** Someone who has custody of a child under an older agreement, arbitrator's award or court order now has parenting time with and parental responsibilities for the child.

- **Access:** A guardian who has access but not custody of a child now has parenting time with the child but still does not have the right to make decisions on behalf of the child. A person who is not a guardian and has access to a child now has contact with the child.

by all of a child's guardian or be divided so that one guardian has the sole right to make decisions about a particular subject, like education, while another guardian has the sole right to make decisions about another subject, like health care.

There are three important things you need to know about parenting time and parental responsibilities:

- **Someone with parenting time or parental responsibilities has the right to ask for and get information about the health and wellbeing of a child.**
- **Someone with parenting time has the right to make day-to-day decisions on behalf of a child during their time with the child, including urgent decisions.**
- **Someone with parental responsibility for health care has the right to give or withhold consent to therapeutic treatments and clinical assessments.**

Contact is the schedule of time that a child might spend with people who, usually, aren't parents, spouses or guardians. Contact refers to the time a child may have with extended family members, with other adults who have important roles in their lives, or with parents who are not guardians.

There are two important things to know about contact:

- **Someone with contact does not have the right to make day-to-day decisions on behalf of a child, including emergency decisions.**
- **Someone with contact does not have the right to ask for or get information about the health and wellbeing of a child.**

The old Divorce Act and the old Family Relations Act, the predecessor to today's Family Law Act, used to talk about these concepts in terms of *custody* and *access*.

Access meant the time a parent had with a child, and usually referred only to the time of the parent who didn't have the child's primary home. Someone who had access to a child but not custody of the child did not have the right to make decisions on behalf of the child or consent to therapeutic treatments or clinical assessments on behalf of the child. They did, however, have the right to get information about the child.

Custody referred to the right to make decisions on behalf of a child. A parent could have "sole custody," meaning that only they could make decisions about the child, and probably also had the

child's primary home, or "joint custody," meaning that both parents had the right to make decisions about their child, including the right to consent to therapeutic treatments or clinical assessments.

Although these terms are no longer used, you will still see them in older agreements, arbitrators' awards and court orders.

FAMILY LAW ASSESSMENTS AND REPORTS

The reports you may be asked to prepare will usually be commissioned to help resolve disagreements about how parenting time and parental responsibilities will be shared, and sometimes about whether and how much contact a person should have with a child.

You may be asked to prepare reports about these questions under section 211(1) of the Family Law Act. This part of the Family Law Act allows counsellors and other mental health professionals to be appointed to assess:

> ***a) the needs of a child in relation to the family law dispute;***
>
> ***b) the views of a child in relation to the dispute; and,***
>
> ***c) the ability and willingness of a party to the dispute to satisfy the needs of a child.***

(Reports that address all of these subjects are often called *section 211 reports*, after the section of the Family Law Act that authorizes them, *parenting assessments*, or, using the old terminology, *custody and access reports*.)

You may also be asked to prepare a report on the views of a child under section 37(2)(b) of the Family Law Act or section 16(3)(e) of the Divorce Act. These reports are usually much

RECORDING RESOLUTIONS

■ **Agreements:** Family law agreements are contracts that record the settlement of a family law dispute or a legal issue that could become a family law dispute. Agreements made after a relationship has ended are usually called separation agreements or sometimes parenting agreements, if parenting is all an agreement talks about.

■ **Awards:** An award is the written decision of a family law arbitrator. *Consent awards* are awards that are made with the agreement of everyone involved in the arbitration.

■ **Orders:** Court orders are the oral or written decisions of a judge. *Interim orders* are short-term decisions that are made after a lawsuit has started but before it has resolved. *Final orders* are decisions that are made after trial that conclusively address all of the issues in the lawsuit. *Consent orders* are interim and final orders that are made with the agreement of everyone involved in the lawsuit.

narrower in scope than section 211 reports and may, depending on the kind of report you are asked to prepare, include no assessment at all.

(Reports on the preferences of a child are sometimes called *hear the child reports*, *voice of the child reports*, or *views of the child reports*. More on this later.)

RESOLVING FAMILY LAW DISPUTES

Family law disputes are resolved either in a cooperative manner or a combative, adversarial manner. Cooperative dispute resolution processes include *negotiation*, *mediation* and *collaborative negotiation*. The adversarial processes are *arbitration* and *litigation*. Your reports may be used in any of these processes.

In *mediation*, the parents work with a neutral person, a *mediator,* who helps them communicate with each other, identifies underlying interests, and looks for opportunities to find compromise and, eventually, agreement. Your report will be used to help the mediator and the parents reach a settlement of parenting issues.

In *collaborative negotiation*, the parents hire specially-trained lawyers and agree to work with each other toward settlement in a coordinated and highly cooperative process. Clinical counsellors and psychologists may be recruited to work with the parents to help them address the emotional sequelae of separation and the dispute resolution process in a coaching role.

Counsellors may also be asked to present the interests of the children in the collaborative process, and to make recommendations about their parenting arrangements. In this capacity, you may be retained just to prepare a written report, or you may be asked to present your opinion and be involved in the ongoing process as a child specialist.

In *arbitration*, the parents hire a neutral person, an *arbitrator*, to make a decision resolving their dispute, after hearing their evidence and arguments, like a private judge. Your report will be presented to the arbitrator as an *expert report*, and you may be asked to give oral evidence about your assessment and your conclusions as an *expert witness*.

In *litigation*, the parents are involved in a lawsuit which they expect will be resolved at a trial, if they cannot resolve their dispute on their own first. Your report will be presented to the judge as an expert report, and you may be asked to provide oral evidence as an expert witness.

FAMILY LAW DISPUTES AND THE ROLE OF THE COUNSELLOR

EXPERT WITNESSES IN LITIGATION AND ARBITRATION

An *expert witness* is a person who has special knowledge or experience about a particular subject beyond the knowledge and experience the average person is expected to have. As an expert witness, you are exempt from the usual rule that prevents witnesses from giving evidence about their opinions. In fact, your expertise in matters concerning parenting after separation is the reason you were hired to prepare your report. The arbitrator or judge is *asking* for your opinion!

There are two trial courts in British Columbia, the Provincial Court and the Supreme Court. The Provincial Court can make orders under the provincial Family Law Act, while the Supreme Court can make orders under both the Family Law Act and the federal Divorce Act. Each court's process is governed by its own set of rules. The rules describe the role of expert witnesses, the mandatory requirements of expert reports, and the uses to which expert reports may be put.

There are no similar rules that govern arbitration processes. The arbitrator will decide if and how you give evidence beyond the opinions and recommendations you express in your report.

THE COURTS OF BRITISH COLUMBIA

Provincial Court
Supreme Court
Court of Appeal

THE RULES OF COURT

Provincial Court (Family) Rules
Supreme Court Family Rules
Court of Appeal Rules

THE LEGISLATION ON PARENTING AFTER SEPARATION

Parenting time:
Family Law Act, s. 42
Divorce Act, s. 16.2

Parental responsibilities:
Family Law Act, s. 41
Divorce Act, s. 16.3

Contact:
Family Law Act, s. 59
Divorce Act, s. 16.5

THE COUNSELLOR AS ASSESSOR AND EXPERT WITNESS

HOW COUNSELLORS ARE APPOINTED TO PREPARE REPORTS

Reports about parenting after separation are common in British Columbia and will be recommended by lawyers, mediators, arbitrators and judges in many cases where there is a serious difference of opinion between parents about the parenting arrangements that are best for their children or the sort of contact their children should have with other people.

Lawyers on opposite sides of a file will often agree that a report is needed, and on the expert who should prepare it. In such cases, one of the lawyers will contact you in writing to retain your services. The letter, fax or email should be copied to the other lawyer, provide the names and contact information for the parents, and state the names and ages of the children. The letter should indicate the sort of report that is sought, identify any special instructions or questions that your report should address, and say when the lawyers would like to get your report.

Where the parents or lawyers do not agree, you will be appointed by an order of an arbitrator or a judge. (Note that the lawyers involved will usually not contact you to check on your availability in advance!) A copy of the order will be sent to you. The order should indicate the sort of report that is sought and state any special instructions or questions you are to address.

If you are not willing or able to complete the report, let the person or organization contacting you know as soon as possible. Even though an arbitrator or judge has made an order that you prepare a report, you are not obligated to accept the appointment if you don't want to or can't.

"VOICE OF THE CHILD REPORTS" OR "HEAR THE CHILD REPORTS"?

Reports that address only the views and preferences of a child are often called views of the child reports, hear the child reports, or voice of the child reports.

While some people draw a distinction between these different names, on the basis that some indicate an evaluative report while others indicate a non-evaluative report, there is no widely-shared understanding of this distinction in Canada.

It is safest to simply refer to these reports as either *evaluative views of the child reports* or *non-evaluative views of the child reports*.

TRAINING OPPORTUNITY

The **BC Hear the Child Society** offers training to legal and mental health professionals on interviewing children and preparing non-evaluative views of the child reports. Counsellors with this training may opt to be included in the society's child interviewer roster.

THE COUNSELLOR AS ASSESSOR AND EXPERT WITNESS

TYPES OF EXPERT REPORT IN FAMILY LAW DISPUTES

Experts are often asked to prepare reports in family law disputes. Expert reports can address issues ranging from the value of a company, to a person's income for the purposes of calculating child support, to the parenting arrangements that are in the best interest of the children. Under section 211(1) of the Family Law Act, counsellors may be asked to prepare reports assessing one or more of these subjects:

> ***a) the needs of a child in relation to a family law dispute;***
>
> ***b) the views of a child in relation to a dispute; and,***
>
> ***c) the ability and willingness of a party to a dispute to satisfy the needs of a child.***

If the letter or order appointing you to prepare the report does not specifically state which subject you are to address, it is usually safe to assume that you are being asked to prepare a report addressing all three subjects. However, it is good practice to confirm your instructions as soon as possible.

It is critical that you have the training and the experience necessary to competently conduct your assessment and prepare the section 211 report flowing from your analysis before accepting an appointment.

You may also be asked to prepare a report on the views of a child. There are two types of report that are limited to addressing the views and preferences of a child, *evaluative reports* and *non-evaluative reports*. Non-evaluative reports are asked for under section 37(2)(b) of the Family Law Act or section 16(3)(e) of the Divorce Act, may be prepared by anyone with training in interviewing children – including lawyers! – and are limited to summarizing what the child has told the interviewer, without offering an assessment or opinion about

PROGRESS REPORTS

Counsellors may be asked to prepare reports for mediators, arbitrators and judges about the status of individuals, including children, involved an ongoing therapeutic relationship with the counsellor. These reports are most often sought where a child is resisting or refusing contact with a parent after separation and services aimed at repairing the parent-child relationship are being provided.

Reports of this nature are addressed by neither the Family Law Act nor the Divorce Act, and should be prepared according to the instructions provided by the person or organization requesting the report.

the child's statements. Evaluative reports are requested under section 211(1)(b) of the Family Law Act and include your opinion of the child's views. If it is not clear what kind of report is sought, get clarification from the person or organization contacting you as soon as possible.

As with section 211 reports, it is critical that you have the training, and the experience necessary to competently prepare a views of the child report before accepting an appointment, whether the report you are being asked to prepare is evaluative or non-evaluative.

THE FAMILY LAW ACT, SECTION 211

211(1) A court may appoint a person to assess ... one or more of the following:

(a) the needs of a child in relation to a family law dispute;
(b) the views of a child in relation to a family law dispute;
(c) the ability and willingness of a party to a family law dispute to satisfy the needs of a child.

(2) A person appointed under subsection (1)
(a) must be a ... person approved by the court, and
(b) unless each party consents, must not have had any previous connection with the parties. ...

(4) A person who carries out an assessment under this section must
(a) prepare a report respecting the results of the assessment,
(b) unless the court orders otherwise, give a copy of the report to each party, and
(c) give a copy of the report to the court.

(5) The court may allocate among the parties, or require one party alone to pay, the fees relating to an assessment under this section.

REQUIRED CONTENTS OF EXPERT REPORTS

Under Rule 13-6(1) of the Supreme Court rules, an expert's report must state:

1) the expert's name, address and areas of expertise;

2) the expert's qualifications, employment and educational experience in their area of expertise;

3) the instructions given to the expert;

4) the nature of the opinion sought from the expert and the issues in the lawsuit to which the report relates;

5) the expert's opinion on those issues; and,

6) the reasons for the expert's opinion, including the facts on which the opinion is based, a description of any research the expert relied on, and a list of any documents the expert relied on.

THE COUNSELLOR AS ASSESSOR AND EXPERT WITNESS

COUNSELLORS' REPORTS AND THE RULES OF COURT

The primary sections of the rules of court that describe the role of expert witnesses and the requirements of expert reports are Rules 13-1, 13-2 and 13-6 of the Supreme Court Family Rules and Rule 11 of the Provincial Court Family Rules.

Under these rules, mental health professionals who are appointed to prepare family law reports must provide an address at which they will receive communications from the parties or their lawyers, called an *address for service*. This is usually the address of the counsellor's workplace. Under the Supreme Court rules, counsellors also:

- **have a duty to assist the court rather than be an advocate for a party; and,**
- **must state in their report that they are aware of this duty, they have prepared their report according to this duty, and they will, if required to give oral evidence in court, give their evidence according to this duty.**

Counsellors' duty to "assist the court" and "not be an advocate for any party" means that they must be unbiased in their assessments and analysis, and that they cannot unfairly favour one parent over the other when preparing their reports. Your primary obligation is to give an honest, neutral and independent expert opinion to the court.

The same approach should be taken when preparing reports for the Provincial Court.

SUPREME COURT FAMILY RULES

13-1 (1) If, under section 211 of the Family Law Act, the court appoints a person to conduct an assessment, that person must

(a) include in the report required under section 211(4) of that Act an address for service at which a notice under subrule (2) may be served, and
(b) unless the court otherwise orders, file a copy of the report and serve a filed copy of the report on all parties at least 42 days before the scheduled trial date.

(2) A party who wishes to cross-examine at trial the person who prepared a report referred to in subrule (1) must, at least 28 days before the scheduled trial date, serve on the person and all parties, by ordinary service, a notice in Form F43.

THE COUNSELLOR AS ASSESSOR AND EXPERT WITNESS

13-2 (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.

(2) If an expert is appointed under this Part by one or more parties or by the court, the expert must, in any report he or she prepares under this Part, certify that he or she

(a) is aware of the duty referred to in subrule (1),
(b) has made the report in conformity with that duty, and
(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

PROVINCIAL COURT FAMILY RULES

11 (1.1) If, under section 211 of the Family Law Act, the court appoints a person to conduct an assessment, that person must

a) include in the report required under section 211(4) of that Act an address for service, and
b) unless the court otherwise orders, file a copy of the report and give a filed copy of the report to all parties at least 30 days before the scheduled trial date.

(1.2) A party who wishes to contest any of the facts or opinions contained in a report referred to in subrule (2) must cross examine at trial the person who prepared the report.

(2) If a party wishes to call as a witness at trial the person who prepared a report ordered by a judge under section 211 of the Family Law Act,

a) the party who wishes to call the witness must ...

ii) apply by notice of motion to a judge under rule 12 at least 14 days before the trial date for permission to do so, and

b) the judge hearing the application may make any order or give any direction that the judge considers appropriate in the circumstances.

THE COUNSELLOR AS ASSESSOR AND EXPERT WITNESS

COUNSELLORS' REPORTS IN ARBITRATIONS

The Supreme Court rules and the Provincial Court rules govern every aspect of how lawsuits are managed. There are no similar rules governing the management of family law disputes being resolved through arbitration. Instead, the parties and their arbitrator develop their own approach to the arbitration process, including the approach they will take to expert witnesses and expert reports.

Unless you receive instructions to the contrary, it is good practice to prepare your reports following the requirements of the Supreme Court Family Rules, for the same reasons that you would do so when preparing reports for use in the Provincial Court.

THE COUNSELLOR AS ASSESSOR

In a 2018 decision of the British Columbia Supreme Court called **T.E.A. v R.L.H.C.**, the judge described mental health professionals preparing reports under section 211 of the Family Law Act as "the eyes and ears of the court." This is an important role for a number of reasons.

First, very few lawyers, mediators, arbitrators or judges have any background in psychology or clinical practice, and even if they do have such a background, the rules of evidence limit how they can use the knowledge they've gained. Second, arbitrators and judges rarely meet the children who are at the centre of a family law dispute and never have the opportunity to observe the family outside the awkward and artificial setting of the hearing room. Third, disputes about parenting time, parental responsibilities and contact are often fractious and intensely emotional, diminishing the usefulness of the evidence the parents provide while enhancing the value and importance of an independent perspective. This is how the judge put it in an older Supreme Court case, Goudie v. Goudie, [1993] BCJ No. 1049, which isn't available online:

> **"In family law cases generally, and in custody and access cases in particular, the issues are often obscured by the emotional overtones of such proceedings. In such circumstances, the court's power to order an investigation by an independent person with specialized training is an invaluable tool."**

In **L.C.T. v R.K.**, a 2015 decision of the Supreme Court, the judge described mental health professionals preparing these reports as using "their education, experience and expertise to conduct the assessments with an eye to the objective of assisting the courts in determining what is in the children's best interests." This is the job you are taking when you agree to prepare a report.

THE COUNSELLOR AS ASSESSOR AND EXPERT WITNESS

THE BEST INTERESTS OF THE CHILD

The central issue in reports on children's parenting arrangements is their best interests. Section 37(1) of the Family Law Act and section 16(1) of the Divorce Act say that the best interests of the child is the *only* consideration parents and judges can take into account when making decisions about children.

The Family Law Act says that "all of the child's needs and circumstances must be considered" when determining what is in the best interests of a child, and provides a long list of some of the specific factors that may be important when considering a child's needs and circumstances at section 37(2). It's important that you read and understand these factors.

The Divorce Act takes almost exactly the same approach and provides a similarly long list of factors at section 16(3). It's important that you read and understand these factors as well. Under section 16(2), however, the factors listed in section 16(3) are to be assessed in light of three primary considerations, "the child's physical, emotional and psychological safety, security and wellbeing."

The best-interests factors identified by the Family Law Act and the Divorce Act include:

a) the child's health and emotional wellbeing;

b) the views and preferences of the child;

c) the nature and strength of the child's relationships with the important people in the child's life;

d) the history of the child's care, and the parents' plans for the child's care;

e) the child's need for stability;

CONSIDERATIONS

Factors in assessing the best interests of a child:

Family Law Act, s. 37(2)

Divorce Act, s. 16(3)

Factors in assessing the impact of family violence on the best interests of a child:

Family Law Act, s. 38

Divorce Act, s. 16(4)

f) the ability of each parent to meet the child's needs;

g) the willingness of each parent to encourage the child's relationship with the other parent; and,

h) the impact of family violence.

(Both statutes provide additional factors to consider when assessing the impact of family violence on the best interests of a child. These are listed at section 38 of the Family Law Act and section 16(4) of the Divorce Act. It's important to read and understand these factors too.)

These considerations are also relevant when family law disputes are being resolved out of court. Although arbitrators are not usually obliged to apply the Divorce Act and the Family Law Act in reaching their decisions the way judges are, section 19.10(6) of the Family Law Act says that an arbitrator making a decision about parenting time, parental responsibilities or contact must consider only the best interests of the child, as set out in section 37 of the act.

THE COUNSELLOR AS EXPERT WITNESS

Your report will often speak for itself. However, Rule 13-1 of the Supreme Court Family Rules and Rule 11 of the Provincial Court Family Rules allow lawyers and the parties to demand that you attend court to give oral evidence at trial. (A party to an arbitration can likewise ask the arbitrator for an order that you be required to attend the hearing.) The person requiring your attendance will send a notice to you at the address for service you provided. The notice will:

a) give the address of the courthouse or hearing room;

b) state the date and time you are required to be there; and,

c) tell you whether there is anything you must bring with you, such as a document you mention in your report, your notes, or your file.

If you are required to attend a hearing or trial, each party, or the lawyers for each party, will be entitled to cross-examine you. You will be asked to promise or swear that you will tell the truth, and

each party will then be able to ask you questions about your report, your methodology and your conclusions. The questions you might be asked could cover anything from your understanding of your instructions, to the steps you took to gather information and the facts you relied on in conducting your assessment, to the theoretical framework of your analysis.

Being cross-examined, especially by the party who is the least pleased with your conclusions, can be unpleasant. This is something you may want to consider before accepting an appointment to prepare a section 211 report or an evaluative views of the child report. The parties are entitled to challenge the sufficiency of your education and experience, your approach, your analysis and your opinion. While you should also expect the arbitrator or judge to ask you some pointed questions from time to time, you can also count on them to rein in a party or a lawyer who is going too far.

It is important to review your notes, organize your file and reread your report before you give your evidence. Careful preparation will be your best defense against a difficult cross-examination.

PARENTING TIME, PARENTAL RESPONSIBILITIES AND CONTACT IN MORE DETAIL

PARENTING TIME

Parenting time is the schedule of the children's time between, usually, their parents. (Under the Divorce Act, parenting time is the schedule of the children's time between *married spouses*. Under the Family Law Act, parenting time is the schedule of the children's time between their *guardians*.) Parenting time also gives parents the right to make day-to-day decisions on behalf of a child, including emergency decisions, when the child is with them.

There are no presumptions under the law that parenting time should be shared in any particular way, including equally, or that a child should spend most of their time with a particular parent because of the age of the child, the gender of the child or the gender of the parent.

Assessments considering the optimal distribution of the children's time between parents must be based on the best interests of the child and take into account the factors set out at sections 37 and 38 of the Family Law Act or at section 16 of the Divorce Act.

PARENTAL RESPONSIBILITIES

Parental responsibilities are the responsibilities that people, usually parents, have for making decisions on behalf of children. (Under the Divorce Act, *married spouses* have "decision-making responsibility." Under the Family Law Act, *guardians* have "parental responsibilities.") A number of specific parental responsibilities are listed at section 41 of the Family Law Act. These include:

a) making decisions about where the child will live, and the people with whom the child will live and associate;

b) making decisions about the child's education and participation in activities;

c) making decisions about the child's cultural, linguistic and religious upbringing and heritage, including, if the child is Indigenous, the child's Indigenous identity;

d) giving, refusing or withdrawing consent to medical and other health-related treatment;

e) giving, refusing or withdrawing consent for the child; and,

f) exercising any other responsibilities reasonably necessary to nurture the child's development.

PARENTING TIME, PARENTAL RESPONSIBILITIES AND CONTACT IN MORE DETAIL

It's important that you read section 41 and understand these different responsibilities.

The Divorce Act does not list the specific sort of decisions that are included in decision-making responsibility in any detail. The responsibilities described in the Family Law Act can be used instead.

Although there are no presumptions under the law that parental responsibilities should be shared or allocated in any particular way, including equally, parental responsibilities can be shared or allocated so that:

> **a) each of a child's parents exercise all parental responsibilities, in which case they must all agree about how a decision will be made;**
>
> **b) the child's parents exercise one or more specific parental responsibilities together, in which case they must all agree about how those specific decisions will be made; or,**
>
> **c) one parent is solely responsible for exercising one or more parental responsibilities, in which case the parent may make those decisions without consulting the other parent.**

However, if there is no agreement, arbitrator's award or court order in place saying how parental responsibilities will be shared or allocated, section 40 of the Family Law Act says that each guardian exercises all parental responsibilities in respect of a child, and must do so in consultation with the child's other guardians.

CONTACT

Contact is the schedule of the time a child may have with people who, usually, aren't parents under an agreement or an order. (Under the Divorce Act, people who *are not married spouses* may have contact with a child. Under the Family Law Act, people who *are not guardians*, including parents who are not guardians, may have contact with a child.) Someone with contact does not have the right to make day-to-day decisions on behalf of a child or the right to ask for or receive information about the child.

There are no presumptions under the law that someone who is not a parent should have contact with a child, nor about the schedule of time that someone with contact should have with the child.

PARENTING TIME, PARENTAL RESPONSIBILITIES AND CONTACT IN MORE DETAIL

SUPERVISED AND CONDITIONAL PARENTING TIME AND CONTACT

Under section 218 of the Family Law Act and sections 16.1(5) and 16.5(6) of the Divorce Act, a person's parenting time or contact with a child may be subject to whatever terms and restrictions are in the best interests of the child. The most common terms and restrictions are requirements that a person's parenting time or contact be *supervised* or that a person's parenting time or contact be *conditional* upon the person doing or not doing certain things.

A person's time with a child may be *supervised* by another adult if the person poses a risk to the child, perhaps because there is a history of family violence or a history of substance abuse, the child is reluctant to be alone with the individual, or the person has a difficult or antagonistic relationship with the child. Potential supervisors include grandparents, other members of the child's extended family, a parent's new partner or other responsible adults.

Professional supervision services are often available in larger urban centres. The individuals who provide these services typically have a background in social work, early childhood education, or even policing, and are usually able to provide reports if such are necessary. Be aware that these services come at a cost.

Any adult may supervise a person's time with a child, although it is usually preferable that the adult have a preexisting relationship with the child or be a professional supervisor.

A person's time with a child may be *conditional* where the person poses a risk to the child because of specific behaviours, such as a propensity for reckless driving, a history of substance abuse, or a history of associating with people to whom the child should not be exposed. The person's time with the child might therefore be conditional upon the person *doing* something, like driving at the speed limit, wearing a seatbelt, or taking certain medication, or upon the person *not doing* something, like not using illicit drugs before and during the person's time with the child, not taking the child to a particular place, or not smoking around the child.

COUNSELLORS' RECOMMENDATIONS

The recommendations you make for the distribution of parenting time, parental responsibilities or contact with a child should be concrete, clear, and capable of being carried out. They should address, and exhaust, all of the issues on which you have been asked to provide an opinion.

PARENTING TIME, PARENTAL RESPONSIBILITIES AND CONTACT IN MORE DETAIL

While recommendations about parenting time and contact should be reasonably specific, remember that your job is to provide an opinion and state the recommendations for the children's parenting arrangements that logically flow from your opinion. Make recommendations as you think best for the children's day-to-day schedule and the allocation of time during religious holidays, school holidays, statutory holidays, Mothers' Day, Fathers' Day, birthdays and the like, but bear in mind that the specific details of the children's schedule will be settled by the parents, or by the arbitrator or the judge tasked with applying your opinion and recommendations.

CONDUCTING ASSESSMENTS AND PREPARING REPORTS

THE IMPORTANCE OF FAMILY LAW REPORTS

Family law reports often play a vital role in the resolution of family law disputes. A well-prepared section 211 report or evaluative views of the child report may help break an impasse in negotiation by providing the parties with the last piece of information needed to reach agreement. The recommendations made in an assessment may also be the critical factor that helps an arbitrator or judge, faced with otherwise contradictory or equivocal evidence, make a difficult decision. As the noted forensic psychologists Philip Stahl and Robert Simon observe in their book ***Forensic Psychology Consultation in Child Custody Litigation***:

> **"When [mental health professionals] are called upon to advise the court with regard to the best interests of children, these professionals carry a great deal of responsibility, influence, and, yes, power. It is not a trivial thing to weigh in on the lives of someone else's children. When the court issues orders with regard to matters of child sharing, parenting, decision making, and so forth, these orders have a lifelong impact on the lives of children."**

Clinical counsellors appointed to prepare assessments in family law disputes are appointed for their objectivity and their expertise. They are expected to provide a measured, dispassionate and well-reasoned opinion to assist parents, mediators, arbitrators and judges in better understanding the needs of the children and in making sound decisions about children's parenting and care.

COUNSELLORS' ETHICAL OBLIGATIONS

Counsellors must act in a balanced, fair and impartial fashion, in keeping with counsellors' ethical and legal duties, when preparing a family law report or any other expert report. When

DUAL RELATIONSHIPS

Judges may make orders allowing a counsellor to maintain a dual relationship – serving the same person or people simultaneously as both assessor and therapist – despite the counsellor's ethical obligations and the Association's policies against such relationships.

Orders like these are usually made for pragmatic reasons, perhaps because the counsellor has an established relationship with a party or a child, and a preexisting understanding of the family and its dynamics, perhaps because the parties have a special affinity for the counsellor, or perhaps because the parties and the counsellor are located in a smaller community without many alternate assessors or therapists.

An order allowing you to maintain a dual relationship will usually provide a reasonably good response to any complaints and a reasonably good defence to any negligence lawsuits, however your obligation to avoid such relationships exists for a reason. Your previous work as a therapist can bias your assessment and undermine both your objectivity and your credibility. Your work as an assessor can similarly interfere with the efficacy of the services you provide as therapist.

If you are not willing or able to complete a report, even with the authorization of the court,

preparing a section 211 report or an evaluative views of the child report, you must:

a) exercise your best clinical judgment; and,

b) employ your clinical assessment and critical reasoning skills in a creative but balanced fashion.

If you recognize that your professional objectivity and impartiality has become compromised at any point in your retainer, you should withdraw from the assessment process and so advise the parties, their lawyers or the appointing arbitrator or judge.

Because counsellors provide a wide range of counselling and therapeutic services to parents and their children, before, during and after the breakdown of a family relationship, it is important to avoid dual relationships. This important principle is discussed in more detail at section 4.4 of the Association's **standards of practice for clinical counselling reports**.

While acting as an assessor, a counsellor should avoid multiple roles, such as simultaneously acting as a therapist, a consultant, a mediator, an arbitrator or an advisor to the members of the same family. When acting as an assessor, you must clearly differentiate between these different professional roles to avoid role confusion. You should make every effort to ensure that your role as an assessor is fully understood by those involved.

In general, a counsellor who has been hired to prepare a family law report must not provide any counselling, therapeutic or similar services to the child or family members who are the subject of the report while conducting the assessment or preparing the report unless:

a) the appointing arbitrator or judge makes an order allowing the counsellor to provide those services; or,

let the person or organization contacting you know as soon as possible. Even though an arbitrator or judge has made an order that you prepare a report, you are not obligated to accept the appointment if you don't want to or can't.

b) the parents give their informed consent to the counsellor providing those services.

Likewise, a counsellor who is providing counselling, therapeutic or similar services to a child or family must not prepare a report, or make any recommendations about parenting, while providing those services unless:

a) the appointing arbitrator or judge makes an order requiring the counsellor to continue providing those services while preparing their report; or,

b) the parents give their informed consent to the counsellor continuing to provide those services while the counsellor prepares their report.

Finally, section 211(2)(b) of the Family Law Act says that a counsellor appointed to prepare a report "must not have had any previous connection with the parties," unless each party consents. If you have had a relationship with a parent, you must disclose that relationship as soon as possible upon being contacted about preparing a report.

COUNSELLORS' COMPETENCIES

Counsellors should have knowledge and skills in specific subject areas in order to work as an assessor and prepare family law reports. Helpful areas of *legal knowledge* include understanding the provisions of the Family Law Act and the Divorce Act addressing children's best interests, parental responsibilities, parenting time and contact, and the key sections of the rules of court addressing expert reports and expert witnesses.

Helpful areas of *psychological knowledge* include attachment theory, especially as it is applied to resist-refuse dynamics, childhood developmental psychology, children with special

A FEW RECOMMENDED COMPETENCIES

Counsellors preparing section 211 reports and evaluative views of the child reports should have a good understanding and working knowledge of:

1) family systems theory;

2) attachment theory, including attachment disruption and resist-refuse dynamics;

3) childhood developmental psychology, including the impact of abuse, neglect, and trauma on development;

4) the effects of separation and the grieving process on parents and children;

5) the impact of culture, spirituality and religion on separation;

6) coercive control and family violence, techniques for assessing for coercive control and family violence, and the effects of coercive control and family violence on children and adults;

7) the impact of substance use and mental health issues; and,

8) the effects of parental conflict on children.

needs, parents' emotional responses to separation, the impact of coercive control and family violence on children and adults, and the short- and long-term effects of parental conflict on children's wellbeing.

Helpful *skills* include interview techniques suitable to children, adults and collateral references, techniques for screening for the presence of coercive control and family violence, and training in the administration and interpretation of any testing instruments.

REQUIRED CONSENTS, IF NO AWARD OR ORDER

The informed consent of any adults and all mature minors, and the consent of parents or guardians on behalf of other children, must always be obtained when preparing a family law report unless the counsellor's appointment is the result of an arbitrator's award or a court order. This principle is discussed in more detail at section 5.2 of the Association's **standards of practice for clinical counselling reports**.

You must obtain the informed consent of each adult required prior to their participation in the assessment process. You should obtain these consents in writing and keep them with your file, but if consent is given orally or can be implied by a person's actions, be sure to make a note in the file documenting the person's oral or implied consent.

You must also obtain the informed consent of each *mature minor* prior to their participation in the assessment process. A mature minor is a "capable young person" who is less than 19 years old, the age of majority in British Columbia, who you believe understands the nature and consequences, and the reasonably foreseeable benefits and risks, of the assessment process. While the consent of the parents or guardians of mature minors is not required, it is usually helpful to obtain

WHO IS A "MATURE MINOR"?

Under section 17 of the provincial **Infants Act**, a person under the age of majority may consent to health care without the approval or consent of their parents, as long as the health care provider

a) has explained the benefits and risks of the care;

b) believes the young person understands the benefits and risks; and,

c) has determined that the care is in the best interests of the young person.

The Infants Act does not use the term "mature minor." The term comes from a common law principle that "where a child has sufficient intelligence and understanding of the nature of proposed health care, he or she is capable ... of consenting to such treatment." Read **Ney v Canada**, a 1993 decision of the Supreme Court, for a helpful discussion of this principle.

THE RISKS OF ORAL CONSENT

Counsellors and others providing therapeutic services obtain their clients' informed consent to those services to ensure that their clients are aware of the potential risks and costs involved in a treatment or procedure.

their consent as well. You should obtain these consents in writing.

You must also obtain informed consent for the assessment of any children you do not believe to be capable of understanding the nature, consequences, benefits and risks of your assessment:

> **a) where there is no agreement, award or order allocating parental responsibilities between the children's parents, you must obtain consent from each of the children's parents; and,**
>
> **b) where there is an agreement, award or order allocating parental responsibilities, you must obtain the consent of all parents with parental responsibility for giving, refusing or withdrawing consent to health care on behalf of the child.**

You should obtain consents given on behalf of children in writing.

CONFIDENTIALITY AND ITS EXCEPTIONS

At the beginning of each interview you conduct during your assessment, you must advise the informant that their personal information will be collected, used, disclosed and kept secure in accordance with the provisions of the **Personal Information Protection Act** or, if you are a government employee or an employee of a private agency that is primarily funded by government, the **Freedom of Information and Protection of Privacy Act**.

You must also advise the informant that you are legally required to file a report with the Ministry of Children and Family Development if, as a result of the information you gather, you have reason to believe that a child is in need of protection. See

While this duty has its origins in the individual's right to decide what is done to them and the sort of treatment they will receive, consent protects both the client and the counsellor. It protects the client from unexpected surprises in terms of outcomes, discomfort, collateral impacts and cost. It protects the counsellor from lawsuits based on allegations of negligence, incompetence or the infliction of harm.

As a result, it is always best to get a written record of an individual's consent as proof of their consent. While consent can also be given orally, and an individual's oral consent is just as effective as their written consent, it is much, much harder to prove that the individual was in fact told about the nature, risks and benefits of the procedures involved, understood the nature, risks and benefits of the procedures involved, and gave their consent to undergo the procedures involved when consent is given orally rather than in writing.

Ultimately, if you and your client disagree about whether informed consent was provided or the specific procedure that was consented to and you cannot prove the client's consent, you will lose the protection from liability consent provides.

section 14 of the **Child, Family and Community Service Act**.

If you are preparing your report for use in disputes that are being resolved through arbitration or litigation, you must also advise the informant that they may be required to give evidence before an arbitrator or a judge under their promise to tell the truth.

Finally, if you are preparing your report for use in disputes that are being resolved through litigation, you must also advise the informant that the information they provide during your interview is not privileged or confidential, and may become part of the public record.

CHILDREN'S REQUESTS FOR CONFIDENTIALITY

Children will at times ask that you keep something they have said in confidence, and not include their statement in your report.

If you consider it in the child's best interests to betray their confidence and include the information in your report, the proper course of action, described in a 1999 decision of the Court of Appeal, **Andrusiek v Andrusiek**, is to provide your report directly to the mediator, the arbitrator or the judge, without copying it to the parents or their lawyers. The mediator, arbitrator or judge will decide whether to disclose the information to the child's parents.

COMPLAINTS TO THE ASSOCIATION

The BCACC Board of Directors has adopted a policy on the investigation of public complaints against counsellors concerning reports about the parenting of children. The Inquiry Committee will not investigate a complaint filed against a counsellor concerning a parenting report, any other expert report that the counsellor prepared pursuant to a court order, or a private report that was submitted to and accepted by the court as an expert report, unless the Committee is also provided with evidence that a court was critical of either the counsellor's assessment process or the resulting report. The purpose of this screening policy is to ensure that the Association's complaint investigation and disciplinary proceedings do not undermine the role of the courts in adjudicating matters that fall within its jurisdiction, such as making decisions based on court-ordered or other expert reports.

It is important to understand that despite the gatekeeping effect of the Inquiry Committee's

screening policy, these standards may be used by the Association, the courts and others to assess the quality of family law reports prepared by clinical counsellors.

SECTION 211 REPORTS

Section 211 of the Family Law Act allows the court to appoint a counsellor to prepare reports concerning one or more of:

> **a) "the needs of a child in relation to a family law dispute," under section 211(1)(a);**
>
> **b) "the views of a child in relation to a family law dispute," under section 211(1)(b); and,**
>
> **c) "the ability and willingness of a party to a family law dispute the satisfy the needs of a child," under section 211(1)(c).**

(Family law lawyers, mediators and arbitrators will be quite comfortable with section 211, and will frequently reference the section when requesting reports on optimal parenting arrangements for children, even when their clients are not embroiled in litigation but using another process to resolve their dispute.)

Reports on children's parenting arrangements in general require you to conduct an assessment of each of the three subjects identified in section 211(1) of the Family Law Act. However, this section is broad enough that a specific, targeted enquiry into almost any aspect of the parent-child relationship may be pursued under this provision.

In preparing a section 211 report, it will be helpful to arrange an opportunity to observe the interaction of family members in each in home, including the interactions of each parent with each child, the interactions of each parent with their new

ADDITIONAL SOURCES OF DOCUMENTARY INFORMATION

Other sources of potentially useful information for section 211 reports include:

a) previous agreements, awards and orders addressing family violence and the children's parenting arrangements;

b) affidavits and other forms of statement provided by the parents and other individuals;

c) previous reports on the children's parenting arrangements, previous views of the child reports;

d) report cards and other school records, including educational assessments;

e) medical and psychiatric records, including medico-legal reports such as employment assessments; and,

f) criminal and child protection record checks.

Be cautious in allowing a parent or lawyer to send you whatever documents they think are important! You may find yourself buried under a pile of conflicting documents, all of which the sender expects you to review and take into account in preparing your assessment.

partners, and the interactions of each parent's new partner with each child. If you cannot observe a parent and the children in a home setting, your observations should occur in a neutral setting that encourages natural interactions, such as a park or a restaurant, or even your workplace if no other acceptable alternative presents itself. Videoconferencing, through services such as FaceTime and Zoom, is another option.

You may also wish to seek out other sources of information about the parents and their children. While you may always do this when preparing the other reports authorized by section 211 of the Family Law Act, the assessment you conduct when preparing general reports on children's parenting arrangements may be much improved by additional information. The other information you obtain will either come from documents or from conducting interviews with individuals with personal knowledge of the parties and their children.

Parents will usually provide you with a list of other people they would like you to interview as collateral references. However, the informants identified by a parent are inevitably those persons the parent believes to be most likely to provide positive comments about themselves and their excellent parenting skills. These comments of these informants, while partisan, may nevertheless provide additional insight into the dynamics of the family, the strengths and weaknesses of each parent and the needs of each of the children, and should not be automatically discounted.

You may also interview informants *not* identified by a parent. Useful sources of information often include: the children's therapists, counsellors, teachers, coaches, doctors, social workers and dentists; the parents' therapists and counsellors; neighbours and extended family members; community leaders and elders; the parents' coworkers and colleagues; and, the parents' present and past partners.

Ensure you that have obtained a release and authorization from each parent before interviewing any other people, including the collateral references provided by the parents. A release and authorization may be general and need not identify the specific people with whom you wish to speak.

The best-interests factors listed at section 37(2) of the Family Law Act and section 16(3) of the Divorce Act will help guide your assessment. Where family violence is a factor, you should also consider, and discuss in your report, the additional factors listed at section 38 of the Family Law Act

and section 16(4) of the Divorce Act.

EVALUATIVE AND NON-EVALUATIVE VIEWS OF THE CHILD REPORTS

Views of the child reports, whether evaluative or non-evaluative, may be commissioned under section 37(2)(b) of the Family Law Act or section 16(3)(e) of the Divorce Act. Evaluative reports may also be sought under section 211(1)(b) of the Family Law Act.

These reports are usually commissioned to let everyone involved in family law dispute hear what a child has to say about their situation and their satisfaction with their living arrangements, and acknowledge the obligation imposed by article 12 of the United Nations Convention on the Rights of the Child to allow children to express their views freely in all matters affecting them. In fact, research conducted by Rachel Birnbaum and Michael Saini, "**A qualitative synthesis of children's participation in custody disputes**" and "**A scoping review of qualitative studies about children experiencing parental separation**," suggests that children want, and benefit from, the opportunity to participate in decisions affecting them after separation. It is also often preferable, especially in high-conflict situations, to hear what children have to say from an objective third party rather than have them give evidence about their views as witnesses.

Sections 37(2)(b) and 211(1)(b) of the Family Law Act, and section 16(3)(e) of the Divorce Act, are all broad enough to authorize a specific enquiry into almost any aspect of the child's views and preferences, including the child's satisfaction with their parenting schedule, the child's preferred choice of school and choice of extracurricular activity, and the child's experience of the conflict between their parents.

You will be required to interview the child to collect the information necessary for your report. You may wish to conduct more than one interview, perhaps once in each parents' home, and you should conduct these interviews with the child alone, with the child's parents, siblings and other family members out of the room and out of earshot.

A non-evaluative views of the child report merely restates what the child has told you. As a mental health professional, you may comment on the child's affect and any circumstances you have observed that may have influenced the child's statements.

An evaluative report includes the child's statements to you as well as your observations about matters such as the strength and consistency of the child's views, the likelihood that the child's stated views accord with the child's actual views, and the extent to which the child's preferences are

in the child's best interests. You may also provide your opinion on matters incidental to the child's views, such as whether the child's statements suggest the possibility of coaching, estrangement or alienation, alignment with a parent, or enmeshment in the parents' dispute.

When interviewing a child, you should assess and, if appropriate, discuss with the child, the following issues at a minimum:

a) the child's level of maturity, personality and character;

b) the child's health and emotional wellbeing, including any special needs the child may have;

c) the child's education and involvement in extracurricular activities;

d) the emotional bonds that exist between the child and their parents and siblings;

e) the role of extended family members and other significant persons in the child's life;

f) the child's experience of their parents' separation and their parents' involvement in dispute resolution processes;

g) the extent of the child's knowledge of the status of the dispute resolution process their parents are engaged in and the positions their parents have taken;

h) the child's experience of any conflict between their parents, including family violence;

i) the child's experience of and satisfaction with their parenting arrangements after their parents' separation; and,

j) the child's wishes for the future, including with respect to the child's parenting arrangements, relationships with each parent, relationships with each sibling, contact with extended family members, contact with friends, schooling, and involvement in extracurricular activities.

You should usually avoid bluntly asking a child to choose the parent with whom they prefer to live. In some circumstances it will be appropriate for you to ask an older child how they would feel if the arbitrator or the judge makes an order that requires the child to spend more time with one parent

than another, requires the child to move to another town or city with a parent, or separates the child from a sibling.

NEEDS OF THE CHILD REPORTS

Reports addressing the needs of a child under section 211(1)(a) of the Family Law Act are rarely requested independently of a full section 211 report although the Family Law Act clearly provides for such reports.

If you are requested to prepare a report under section 211(1)(a), you should assess the needs of each sibling independently, including ascertaining each child's level of maturity, interests, aptitudes, special needs, educational needs, and general routines. It will be helpful for you to interview the child to collect the information necessary for your report. You may wish to conduct more than one interview, and you should conduct these interviews with the child alone, with the child's parents, siblings and other family members out of the room and out of earshot. In the event that you cannot interview a child alone, you should clearly describe the circumstances of the interview in your report.

You should assess and, if appropriate, discuss with the child, the following issues at a minimum:

a) the child's level of maturity, personality and character;

b) the child's health and emotional wellbeing, including any special needs the child may have and any deficits the child is experiencing in the satisfaction of those needs;

c) the child's physical, psychological, social and economic needs, and any deficits the child is experiencing in the satisfaction of those needs;

d) the child's education and involvement extracurricular activities;

e) the emotional bonds that exist between the child and their parents and siblings;

f) the role played by each parent in the child's life regarding care, nurturance and discipline, and the competence of each parent in fulfilling these functions;

g) the roles of extended family members and other significant persons in the child's life, including as caregivers;

h) the child's cultural and religious heritage, and current traditions or practices if they are substantially different from the past;

i) the length of time the child has lived in a stable home environment; and,

j) the child's experience of any conflict between their parents, including family violence.

The best-interests factors listed at section 37(2) of the Family Law Act and section 16(3) of the Divorce Act will help guide your assessment of the child's needs.

You should usually avoid bluntly asking a child to choose the parent with whom they prefer to live. In some circumstances it will be appropriate for you to ask an older child how they would feel if the arbitrator or the court makes an order that requires the child to spend more time with one parent than another, requires the child to move to another town or city with a parent, or separates the child from a sibling.

REPORTS ON A PARTY'S ABILITY TO MEET THE CHILD'S NEEDS

Reports addressing the ability and willingness of a party to satisfy the needs of a child under section 211(1)(c) of the Family Law Act are rarely requested independently of a full section 211 report although the Family Law Act clearly provides for such reports.

In conducting your assessment, you will be required to separately interview and assess each parent and the new partners of each parent. (If it is not possible to interview or assess a parent or a parent's new partner, you should explain why you could not conduct the interview in your report.) You may also wish to arrange an opportunity to observe the interaction of the family members in each in home, including the interactions of each parent with each child, the interactions of each parent with their new partners, and the interactions of each parent's new partner with each child.

When interviewing a parent, you should assess their capacity to exercise the entitlements and responsibilities associated with parental responsibilities, parenting time and contact. You should discuss with each parent the following issues at a minimum:

a) the relationships between the parent and each child;

b) the personal and family histories of the parent, including the parent's relationships with the other parent and with their new partner;

c) the parent's relationships with their own parents, with extended family members and within the community;

d) the presence and any history of coercive control and family violence;

e) any history of criminal complaints or convictions regarding past or present family relationships;

f) any history of child protection complaints or involvement regarding past or present parenting relationships;

g) the presence and any history of cognitive, mental health or addiction concerns;

h) the past and present parenting arrangements for the children, and the parent's plans and hopes for the children's future parenting arrangements;

i) the parent's ability and willingness to cooperate with the other parent, and to support the relationships between each child and the other parent;

j) the parent's knowledge, skills and attitudes about and toward parenting;

k) the parent's strengths and weaknesses as a parent, and their capacity to make difficult decisions and resolve difficult problems in the children's best interest;

l) the support systems available to the parent and to the children, and the resources available to the parent for the support of any children with special needs;

m) the safety of the parent's home environment;

n) the parent's views of the parenting capacity of the other parent; and,

o) the level of conflict between the parents and how that conflict is expressed.

You may also wish to ask each parent to comment on the other parent's plans for the children's future parenting arrangements, and any concerns expressed by the other parent about their parenting capacity.

The best-interests factors listed at section 37(2) of the Family Law Act and section 16(3) of the

UNDERTAKING AN ASSESSMENT

Divorce Act will help guide your assessment. Where family violence is a factor, you should also consider, and discuss in your report, the additional factors listed at section 38 of the Family Law Act and section 16(4) of the Divorce Act.

ADDRESSING PERCEPTIONS OF BIAS

Parents are more likely to accept the conclusions of your assessment, and to refrain from lodging complaints with the Association, if they perceive your assessment and the report which results from your analysis, as balanced, fair and impartial. This will require that you manage the parties, and the procedures you follow in conducting your assessment, as even-handedly as possible.

Among other things, you should make your best efforts to spend an equal amount of time with each parent, interview approximately the same number of collateral references for each parent, and request information of the same kind and with the same degree of detail from each parent. Your report should include a description of the dates, times and places you met with each parent and each informant, and the length of time you spend meeting with those individuals.

You should also make sure that, if you specifically ask a parent about concerns raised by the other parent, you describe the concerns and the parent's response in your report and offer the parent the opportunity to raise concerns of their own about which you will ask the other parent. Concerns about bias most commonly concern perceptions of bias than actual bias affecting the assessment and recommendations made in a family law report.

COMMUNICATIONS CONSIDERATIONS

Except for your interviews with a parent, you should avoid communicating with one parent or lawyer alone. If you must communicate with a parent or their lawyer about your assessment or report, even if only by replying to a communication received from a parent or their lawyer, be sure to copy your outgoing email or letter to the other parent or other lawyer. You do not want a parent believing that your assessment or recommendations have been influenced by unilateral communication with the other parent.

It is important, as a general rule, to cultivate transparency and the appearance of transparency in all of your dealings with parents and their lawyers.

WRITING A REPORT

GENERAL PRINCIPLES FOR REPORT WRITING

Your primary consideration in preparing section 211 reports and evaluative views of the child reports is the best interests of the children, assessed in light of the factors set out at sections 37 and 38 of the Family Law Act and section 16 of the Divorce Act. Of course, the interests of a child are directly impacted by the interests of the child's parents, extended family members and friends, and you may wish to take those interests into account when drafting your report as well.

■ **Take a child-focused perspective.** Both the Family Law Act and the new Divorce Act are oriented toward a child-centred view of the entitlements and responsibilities, parenting time, parental responsibilities and contact entail. This is a purposeful change from the old Family Relations Act and the old Divorce Act, which emphasized the rights of parents. Under the current legislation, however, it is the child who has the right to parenting time and the child who benefits from exercise of parental responsibilities. Taking this approach in your report may help parents keep the interests of their children front of mind and may reduce the dissatisfaction they may feel with your recommendations.

■ **Take a strengths-based perspective.** Family law reports by necessity require concerns to be documented. However, a strengths-based perspective suggests that you should include only as many negative statements about a party as is necessary to make the point and avoid using unnecessarily inflammatory language when doing so.

■ **Preserve the dignity and privacy of the parties.** Family law reports may require the disclosure of information that may be damaging to important relationships. You should attempt to avoid impairing significant relationships, especially those involving children, when possible.

■ **Include constructive comments.** Family law reports comment on family dynamics and are intended to present the best parenting options for children. Comments and recommendations that counsellors provide should contribute positively to the children's parenting arrangements and reinforce good parenting behaviours.

■ **Adopt a broad theoretical and practical base.** Family law reports should carefully guard against subscribing to particular points of theory that may become obsolete due to the evolving nature of the scientific knowledge and professional practice to which they refer.

■ **Avoid making predictions.** Family law reports should present the current knowledge of the profession and criteria for informing decisions that are superior to other alternatives. They cannot, however, predict the future with certainty. This limitation applies to both the content of your report and your recommendations.

WRITING A REPORT

■ **Avoid irrelevancies.** Family law reports should present only the facts that help to explain the issues the counsellor has been asked to address and have a bearing on the counsellor's opinion. Avoid reporting facts that are irrelevant.

WRITING STYLE

Your report should be as clear and concise as the subject matter allows. While you are writing for a professional audience and needn't adopt the plain-language approach you would use if you were writing for laypeople, you should still try to avoid overly-technical language and the use of legal or psychological jargon whenever possible. If you must use a technical term, be sure to provide a definition. It is important that the parents are also able to follow your report and understand your recommendations.

Use headings, subheadings and numbered or bulleted lists whenever they will help the reader understand and make their way through your report.

You should make your best efforts to write in the active voice, use gender-neutral language, and convey an attitude of respect to all of the adults and children who are the subject of your report and the informants you have interviewed.

REQUIRED CONTENT

Under Rule 13-1 of the Supreme Court Family Rules and Rule 11 of the Provincial Court Family Rules, your report must include an address for service. An "*address for service*" is the address of a place at which the parents or lawyers can reliably contact you. Most counsellors simply provide the address of their workplace.

Under Rule 13-2(2) of the Supreme Court rules, you must certify that:

> **a) you are aware of your duty "to assist the court and ... not to be an advocate for any party" under Rule 13-2(1);**
>
> **b) you have made your report "in conformity" with this duty; and,**
>
> **c) you will, if asked to give oral evidence about your report, give your evidence "in conformity" with this duty.**

WRITING A REPORT

Your "certification" can consist of a simple statement confirming your awareness of the rule and may appear at any appropriate point in your report:

> **"I certify that I am aware of my duty under Rule 13-2(1) of the Supreme Court Family Rules. I have my report in conformity with this duty. If I am asked to give evidence about my report, I will give my evidence in conformity with this duty."**

Under Rule 13-6 of the Supreme Court rules, you are also required state in your report:

> **a) your name and your area of expertise;**
>
> **b) your qualifications and the employment and educational experience you have in your area of expertise;**
>
> **c) the instructions provided to you for your report;**
>
> **d) the nature of the opinion sought from you and the issues in the family law dispute to which your opinion relates;**
>
> **e) your opinion on those issues; and,**
>
> **f) the reasons for your opinion, including a description of the factual assumptions on which your opinion is based, a description of any research you conducted that led you to form your opinion, and a list of every document you relied on in forming your opinion.**

The statement of your qualifications and experience can be easily accomplished by appending your curriculum vitae or résumé to your report.

The instructions provided to you and the nature of the opinion sought from you should be taken directly from the order or correspondence appointing to prepare your report, and should reflect any clarifications you may have received subsequent to your appointment.

Your opinion on the issues in the family law dispute will be the conclusions and recommendations you express in your report.

The list of the documents you relied on in forming your opinion should include all of the documents you reviewed in the course of your assessment, such as affidavits, report cards, letters, educational assessments and psychosocial reports. After this list, you should include a list of the interviews you conducted in the course of your assessment, stating the names of each informant, the dates, times and places you met with each parent and each informant, and the length of time you spend

meeting with each parent and each informant.

While the rules of the Provincial Court have no similar set requirements of counsellors' reports, and there are no rules at all governing experts' reports used in mediation and arbitration, the content requirements of the Supreme Court rules are sensible, improve the usefulness of these reports, and help to support the credibility and reliability of these reports. It is good practice to include the content required by the Supreme Court rules in all of the reports you prepare for use in family law disputes.

Finally, if you disclosed a previous connection with a party as required by section 211(2)(b) of the Family Law Act, your report should describe your disclosure, the date disclosure was made, the nature of the relationship, and the parents' consent that you continue with your appointment.

EVALUATIVE AND NON-EVALUATIVE VIEWS OF THE CHILD REPORTS

If you are preparing a views of the child report, you should make it clear at the outset whether your report is an evaluative report, prepared under section 211(1)(a) of the Family Law Act, or a non-evaluative report, prepared under section 37(2)(b) of the Family Law Act or section 16(3)(e) of the Divorce Act. An evaluative report must contain your assessment of the child and the child's views and preferences; a non-evaluative report requires you to summarize the child's views and preferences without commentary or analysis.

In addition to the mandatory content of your report, your account of the child's views and your assessment, if any, it will usually be helpful to include a description of:

a) the child's age, school and grade level;

b) your impressions of the child's level of maturity, personality and character;

c) the child's health and emotional wellbeing, including any special needs the child may have;

d) the child's involvement in extracurricular activities;

e) the child's current parenting arrangements, contact with siblings and the roles of extended family members and other significant persons in the child's life; and,

f) the extent of the child's knowledge of the status of the dispute resolution process in which their parents are engaged.

WRITING A REPORT

It is good practice to quote the child as much as possible in these reports, including the child's linguistic idiosyncrasies and characteristic turns of phrase. Ideally, the parents should be able to hear the child speaking when they read statements attributed to the child in your report.

Views of the child reports should not provide an opinion or make recommendations about the child's parenting arrangements.

NEEDS OF THE CHILD REPORTS

In addition to the mandatory content of your report and your assessment, reports prepared under section 211(1)(a) of the Family Law Act will benefit by including a description of:

a) the child's age, school and grade level;

b) your impressions of the child's level of maturity, personality and character;

c) the child's health and emotional wellbeing, including any special needs the child may have;

d) the child's involvement in extracurricular activities;

e) the child's current parenting arrangements, contact with siblings and the roles of extended family members and other significant persons in the child's life;

f) the emotional bonds that exist between the child and their parents and siblings;

g) the role played by each parent in the child's life regarding care, nurturance and discipline;

h) the roles of extended family members and other significant persons in the child's life, including as caregivers; and,

i) the extent of the child's knowledge of the status of the dispute resolution process in which their parents are engaged.

If you have interviewed the child, it is good practice to quote the child as much as possible in your report, including the child's linguistic idiosyncrasies and characteristic turns of phrase.

WRITING A REPORT

REPORTS ON A PARTY'S ABILITY TO MEET THE CHILD'S NEEDS

In addition to the mandatory content of your report and your assessment, reports prepared under section 211(1)(c) of the Family Law Act will benefit by including a description of:

a) the ages of the children, their schools and grade levels;

b) the ages of the parents and their occupations;

c) the relationships between each parent and each child;

d) the children's involvement in extracurricular activities;

e) the children's past and present parenting arrangements, and the roles of extended family members and other significant persons in the children's lives;

f) the personal and family histories of each parent, including each parent's relationships with the other parent and with their new partner;

g) the presence and any history of coercive control and family violence;

h) any history of criminal complaints or convictions regarding past or present family relationships;

i) any history of child protection complaints or involvement regarding past or present parenting relationships;

j) the presence and any history of mental health or addiction concerns;

k) your impressions of the parents' ability and willingness to cooperate with each other parent, and to support a relationship between each child and the other parent;

l) each parent's knowledge, skills and attitudes about and toward parenting;

m) your impressions of each parent's strengths and weaknesses as a parent, and their capacity to make difficult decisions and resolve difficult problems in the children's best interest;

n) each parent's views of the parenting capacity of the other parent; and,

o) the level of conflict between the parents and how that conflict is expressed.

WRITING A REPORT

If you have interviewed the child, it is good practice to quote the child as much as possible in your report, including the child's linguistic idiosyncrasies and characteristic turns of phrase.

SECTION 211 REPORTS

Full reports on children's parenting arrangements under section 211(1) will benefit from including the information that should be provided in reports on the needs of the child, the views of child, and the parties' ability to meet the child's needs. You should also include a description of:

a) your observations of the interactions between family members;

b) any relevant information gathered from your review of any documents;

c) any relevant information gathered from your interviews with the collateral references provided by the parents, and from any additional informants; and,

d) the parenting arrangements preferred by each parent.

Be sure that you identify and disclose in your report any assumptions you have made affecting your opinion and recommendations, any personal biases you have identified that may affect your opinion and recommendations, and the data on which you relied in formulating your opinion and recommendations.

THE LIMITS OF COUNSELLORS' REPORTS

When the terms of your appointment include making recommendations in addition to an assessment, you may make those recommendations but you should avoid providing a detailed proposal about the parenting arrangements that are in the best interest of the children unless you are expressly asked to provide such a proposal.

Section 15 of the Family Relations Act, the predecessor to section 211 of the Family Law Act, was described in a 2010 decision of the Court of Appeal, **K.M.W. v L.J.W.**, as permitting the court to "seek the assistance of an independent and impartial investigator and to call on that investigator to make recommendations based on the results of that investigation." However, the recommendations you provide should not go so far as to tell the arbitrator or the judge what their decision should be.

WRITING A REPORT

In **Fawcett v Fawcett**, a 1999 decision of the Supreme Court, the judge discussed a report that included "a recommendation that amounts to a predisposition of the issue the court is asked to decide." The judge wrote that:

> **"[The assessor] not only brings his expertise to bear on the situation in assessing the pros and cons of [the child] living in each household but goes further and actually formulates a detailed resolution of the dispute. He offers a nine point proposal that addresses custody, guardianship, and the time [the child] should spend with each parent. It is, however, my respectful view that, in making such a recommendation, [the assessor] has gone beyond what was asked of him under the terms of the order to which the parties consented. Neither the Act nor the order invites, much less directs, that he make a recommendation as to what the court's decision should be. [The assessor] was asked only to investigate the matter of [the child's] custody and access and to report his findings. That must certainly mean that he should offer his opinion, as he so helpfully does, in assessing the apparent advantages and disadvantages of [the child] living with one parent or the other, but does not mean he should then go on to recommend the disposition to be made. That is what the court must decide albeit based in large part on the report of the investigation made."**

In other words, while the arbitrator or judge will welcome an assessment and such recommendations as the facts may support, you should avoid making recommendations that are so detailed and so specific that they amount to deciding the case for them.

THE IMPORTANCE OF FACTS AND ACCURACY

When you quote from or refer to documents you have reviewed or informants you have interviewed, you must identify the document and the informant. This is to allow the parents and their lawyers to probe the truthfulness and accuracy of the document or the informant's statements, and will reinforce your credibility in the eyes of the arbitrator or judge.

Similar care must be taken whenever you describe an observation as a fact. Counsellors preparing parenting reports by the order of an arbitrator or a judge take on an investigative role on behalf of the court, as a result of which their conclusions about the facts of a family law dispute are taken to be correct. In a 2004 case of the Supreme Court, **P.A.B. v T.K.B.**, the court said that:

> **"Once the [assessor's] report has been received either party is at liberty to compel the author's attendance for cross-examination and may lead evidence as to factual matters contained within the report.**

> **"Given these various safeguards, the proper approach is, in my view, to consider the factual aspects of the report to be prima facie evidence as to the truth of those facts. Where, as in the present case, neither party has challenged the report itself and neither has required the attendance of its author, the report should be considered a part of the evidence as a whole placed before the court."**

As a result, a counsellor's conclusions about the facts can have an important impact on the parents involved in a family law dispute and their children. Any statements that are consequential but inaccurate will almost certainly result in a demand that you attend court to be cross-examined and a lessening of the weight the arbitrator or judge will be inclined to give to your report.

ADDRESSING PERCEPTIONS OF BIAS

As the "eyes and ears of the court," your job in conducting an assessment and writing a report in a family law dispute is to function as an independent and impartial investigator. You are to be "impartial, and unbiased, and make objective recommendations rather than act as an advocate for any party," as the judge put it in **Kwan v Lai**, a 2016 decision of the Supreme Court.

These admonitions extend beyond your analysis of the data collected to the writing of your report, as parents' concerns about the counsellor's potential bias may arise just as much from perception as from fact. You should strive to be as even-handed as possible in your description of the parents and their parenting. Avoid gratuitous descriptions of the parents' appearances, clothing, personalities, mental state, apparent intellect or the cleanliness of their homes when such are not relevant to your assessment. Avoid disparaging remarks as well as inflammatory descriptions, adjectives and adverbs. Subject to the demands of your assessment and recommendations, strive to give equal space to your descriptions of your interviews with each parent and their collateral references, the home environments and parenting strategies of each parent, and the qualities, skills and experience they each offer their children.

Remember that the most important issue in a report on children's parenting arrangements is their best interests, and let their best interests be your lodestone.

RESOURCES

American Psychological Association, ***"Guidelines for Child Custody Evaluations in Family Law Proceedings"*** (December 2010).

Association of Family and Conciliation Courts, ***"Model Standards of Practice for Child Custody Evaluation"*** (September 2006).

British Columbia College of Social Workers, **"Child Custody and Assessments Standards of Practice"** (September 2002).

Boyd, John-Paul and Courthouse Libraries BC, ***JP Boyd on Family Law: Resolving Family Law Disputes in British Columbia*** (Courthouse Libraries BC, 2019).

Galatzer-Levy, Robert and Louis Kraus eds, ***The Scientific Basis of Child Custody Decisions*** (Wiley, 2009).

Gould, Jonathan and David Martindale, ***The Art and Science of Child Custody Evaluations*** (Guilford Press, 2007).

Kuehnle, Kathryn and Leslie Drozd eds, ***Parenting Plan Evaluations: Applied Research for the Family Court*** (Oxford University Press, 2012).

Ontario College of Social Workers and Social Service Workers, ***"Practice Guidelines for Custody and Access Assessments"*** (September 2009).

Stahl, Philip, ***Conducting Child Custody Evaluations: From Basic to Complex Issues*** (Sage Publications, 2010).

Stahl, Philip and Robert Simon, ***Forensic Psychology Consultation in Child Custody Litigation*** (American Bar Association, 2013).

Suche, Zoe and John-Paul Boyd, ***"Parenting Assessments and their Use in Family Law Disputes in Alberta, British Columbia and Ontario"*** (Canadian Research Institute for Law and the Family, 2017).

RESOURCE: TYPES OF FAMILY LAW REPORTS

NON-EVALUATIVE VIEWS OF THE CHILD REPORT

A Views of the Child Report (also called a Hear the Child report or Voice of the Child report) is a direct, often verbatim, record of the child's stated desire. It is non-evaluative. It is not an assessment, an expert report nor an expert opinion and typically includes only information received from the child.

Statutory Authority: s. 37(2)(b) of the Family Law Act, and s. 202 of the Family Law Act

Status: Non-Evaluative, can be verbatim

Prepared by: Anyone who is trained to conduct neutral child interviews (including lawyers and mental health professionals).

Training Required:

Training in conducting neutral child interviews.

PARENTING ASSESSMENTS AND EVALUATIVE VIEWS OF THE CHILD REPORTS

Under section 211(1) of the Family Law Act, counsellors may be asked to prepare reports assessing one or more of these subjects:

a) the needs of a child in relation to a family law dispute;
b) the views of a child in relation to a dispute; and,
c) the ability and willingness of a party to a dispute to satisfy the needs of a child.

Reports assessing the views of the child under section 211(1)(b) are evaluative views of the child reports.

Statutory Authority: s. 211 of the Family Law Act

Status: Evaluative / Assessment

Prepared by: Family Justice Counsellors, Mental Health Practitioners, Psychologists

Training Required:

JIBC - Writing needs of the child assessment course

JIBC - Family Justice Counsellor training

PROGRESS REPORTS

Counsellors may be asked to prepare reports for mediators, arbitrators and judges about the status of individuals, including children, involved in an ongoing therapeutic relationship with the counsellor. These reports are most often sought where a child is resisting or refusing contact with a parent after separation and services aimed at repairing the parent-child relationship are being provided.

Statutory Authority:

Reports of this nature are addressed by neither the Family Law Act nor the Divorce Act, and should be prepared according to the instructions provided by the person or organization requesting the report.

Training Required:

Basic report writing training as part of your graduate program