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# The Meaningful Participation and Complex Capacities of Children in Family Law

*Based on Transdisciplinary Perspectives and Articles of the United Nations Convention on the Rights of the Child*

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## Abstract

This paper explores the connection between articles within the United Nations Convention on the Rights of the Child and the participation and capacities of children. Though discussed in an abundance of literature, this article aims to analyse conceptually articles relating to the participation of children and expand upon the concept of a child's capacity. The specific setting of custody and access proceedings will be considered throughout. Four critical articles, 3, 5, 9 and 12, within the Convention, will be examined thoroughly which emphasise the capacities, voices, views and best interests of children. These articles will be adequately considered in order to determine how the provisions actualise the participation of children in custody and access proceedings. A conceptual analysis of the aforementioned articles will be included to discuss concepts, definitions, language and critiques.

## Keywords

children's rights – participation – capacity – best interests – custody and access – voice – views

### 1 Introduction

The participation of children and youth is one of the main provisions that is emphasised within the United Nations Convention on the Rights of the Child (CRC, 1989). Increasingly, the voices of young people are becoming more frequently included in various settings. However, research concerning the participation of children is still ambiguous in terms of actualisation. This is especially true within the setting of custody and access proceedings. Fundamentally, this research is intended to examine children's rights through both a legal and social perspective. This article aims to explore four critical provisions within the CRC that directly relate to the participation and capacities of children. Specific CRC articles that emphasise capacity, voice, views and children's best interests will be conceptually analysed in order to explore the language, intent and tensions amongst the provisions. The purpose of this research is to gain critical insight into these articles and how they aim to support the participation of children. The research also aims to draw attention to tensions between theoretical expectations of the CRC and its practical applications. To provide legal context, a brief view of current participation models in family law proceedings, specifically custody and access cases, is critical. A close look at articles 3, 5, 9, and 12 will be included, followed by a general discussion summarising each article's key intentions and objectives. Finally, a conceptual analysis of the aforementioned articles will be included to explore key notions embedded in each provision and for their effects on the meaningful participation of children. Comments from the Committee on the Rights of the Child and other recommendations will be included throughout to provide relevant remarks and potential tensions surrounding various articles.

### 2 Current Models of the Participation: Hearing Children's Voices in Legal Settings

As mentioned, although the main focus of this research paper is to examine carefully the CRC and the articles within the Convention, it is also critical to establish a specific setting, in which to consider their application. For the

purpose of this research, that setting will be current legal practices in custody and access proceedings. In order to gain insight into the current system of children's participation in custody and access proceedings, it is important to include a basic overview of how the voices of children are currently included in various legal settings.

There are multiple methods that are employed when a custody evaluation must be completed in a separation proceeding. When a custody agreement must be reached or two parents cannot agree on an access arrangement, professional assessment may be sought out. In most cases, the judge determines how the children will be heard in the proceeding (Coenraad, 2014). Current models of assessment involving children under the age of 12, include in-depth interviews, evaluations, observation techniques and other measurements. There are a number of tools or instruments that were created with the topic of custody proceedings in mind that are extensively discussed in literature (Emery, Otto and O'Donohue, 2005).

One example is the use of Bricklin Perceptual Scales (Bricklin and Elliott, 1991), an assessment based upon extensive research which measures a child's experience with each parent in four areas: competency, supportiveness, consistency and admirable traits. It aims to assess how a child experiences life in relation to each parent in each of the four categories; this a frequently administered custody test for children (Bricklin and Elliott, 1991). Another evaluation is the Ackerman-Schoendorf Scales for Parent Evaluation of Custody (Ackerman and Schoendorf, 1992) which is designed to measure how fit a parent may be for custody by examining critical parenting elements and using questionnaire responses from both the parents and children involved. In more recent research, assessments such as, "Views of the Child Reports" (VCRs) which are completed by social workers, the voices of children are more specified (Birnbaum and Bala, 2017). This assessment is based on multiple interviews completed between a child and a lawyer, social worker, or mental health professional. The report provides a summary that includes a child's feelings, views and opinions (Birnbaum and Bala, 2017). Although this report is child-focused, it relies heavily on dialogue and an interview structure to gather a child's views. Furthermore, many child-focused professionals are accustomed to making assumptions about the needs of children and their best interests (Collins, 2016; Smith, 2007). Social workers or psychologists who are familiar with conducting custody evaluations may use their past experiences to inform the evaluation they conduct (Babb et al., 2009). As made evident by the literature, oftentimes, custody evaluators select the method to administer to parents or the children involved which can include observations, interviews, tests and quantitative assessments. These evaluation techniques are not always chosen specifically

for the needs of the child or family, rather, the selection process may be based more heavily upon the evaluator's personal preferences (Babb et al., 2009). Furthermore, psychological measures, although often applied, may have limited relevance to the setting of a custody dispute (Emery, Otto and O'Donohue, 2005).

If the child's voice is not directly included, it is not uncommon for children to have representation (Coenraad, 2014). Further, if a case is high conflict and the court feels that the parent's views surrounding the child's situation are opposing and an agreement cannot be reached, a guardian ad litem may be sought out (Coenraad, 2014). This individual is specifically appointed in divorce cases and is intended to represent the child and their best interests within and outside of the court setting (Coenraad, 2014). Alternatively, a child may also be advised to have their own legal representation. For example, legal aid may be provided to a child when, 'the court requires independent information and representation about the interests, needs and wishes of the child who is the subject of the proceedings' (Coenraad, 2014; Ministry of the Attorney General, Ontario, Canada 2018). The lawyer can either be asked to provide legal representation or help to prepare reports.

There are numerous factors that guide which evaluation will be employed, such as the geographical area in which the proceeding is taking place or the age of the child who is involved. Though each family law jurisdiction will differ in varying ways, the CRC aims to support young people involved in any and all legal proceedings from an international scope. Thus, it is less critical to include and examine specific jurisdictions, but rather to begin an introspective look into the Convention itself.

### 3 **United Nations Convention on the Rights of the Child and Relevance to the Notion of Capacity – a Brief Introduction to the Convention**

The CRC was adopted in 1989 and is frequently understood as three main areas of protection, participation and provision rights (Freeman, 2000; Reynaert, Bouverne-De Bie and Vandeveld, 2009; Tisdall and Punch, 2012). The CRC is one of the most widely ratified conventions, with 196 states endorsing the Convention; the included governments ensure that all those working alongside children comprehend their responsibilities of upholding children's rights and participation (Welty and Lundy, 2013). As the rights of children are a considerably new development for human rights, there is still a large gap between international applications of the CRC (Alderson, 2002; Tisdall, 2015). Essentially, the

Convention maintains that individual governments shall consider children's interests when ratifying laws that involve them, and in order to do so these laws must be evaluated and produced from the point of view of the children (van Bueren, 1998). Fundamentally, the Convention emphasises that respecting and considering children's participation is not just a model of best practice, but an international legal obligation (Lundy, 2007; Welty and Lundy, 2013). In the particular setting of family law, the rights of children are often consulted in order to support their participation and involve them. Thus, it is critical to examine articles within the CRC that pertain to participation, best interests, capacity, voices and views of children and how these provisions relate to children involved in custody and access proceedings.

As previously mentioned and as seen in Figure 1, the main areas of the CRC include the areas of protection, participation and provisional rights. For the purpose of this research, the area of participation will be highlighted and explored. More specifically, the content and language embedded within Articles 3, 5, 9, and 12 of the CRC will be illustrated in order to gain a more

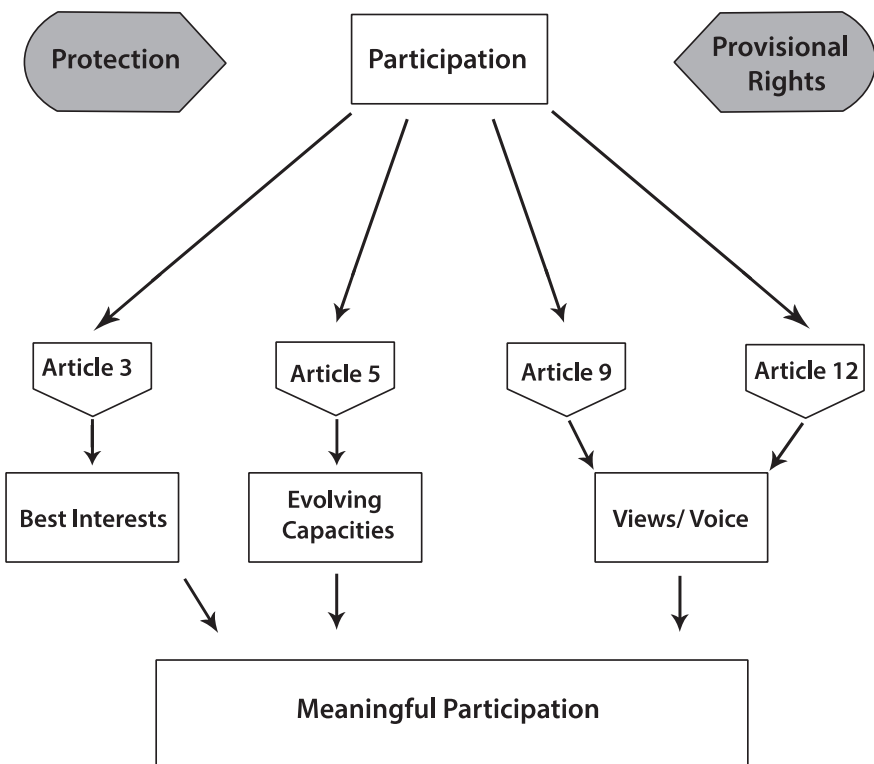


FIGURE 1 The exploration of specific CRC articles and their connection to participation

insightful view into the provisions. The examination of these specific articles will also help inform the capacity of children and how capacity is considered or determined. Although there are other articles within the CRC that would be applicable to the area of participation, the articles seen in Figure 1 are most applicable to the area of children's participation in custody and access proceedings. The main elements emphasised within the aforementioned articles include views, voice, capacity, evolving capacities and best interests. These areas within the provisions will be the main focus of this article. In order to ensure meaningful participation of young people, all fundamentals must be collectively considered and assessed. Thus, the four articles within the CRC will be included and briefly summarised, followed by a more critical, conceptual analysis of these provisions.

#### 4 Overview of Articles: Article 3, 5, 9 and 12

##### 4.1 *Text Article 3*

Article 3 of the CRC states:

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

##### Article 3: Exploring and Considering the Best Interests of Children

When actions involving children are present, this article maintains that a child's best interests should be at the forefront. This is especially applicable for adult agents, who are in positions of power to consider this article and right. This could include individuals who work in the Government or the court system where children's best interests can be considered at a policy making level (Reppucci and Crosby, 1993). The guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice are a set of recommendations

that were formed by conducting research with about 3,700 children on an international scale, with participants spanning over 25 countries (Kilkelly, 2010). These guidelines recommend legal institutions should always be comfortable, welcoming, and “friendly” in order to support the rights of children (Kilkelly, 2010; The Council of Europe Guidelines, 2011). These guidelines are not only more accommodating for children who may participate in legal proceedings, but also aligns with their best interests. The elements embedded within these guidelines which aim to help children in legal settings involve: trust, listening, understanding and support, all of which are undeniably in the best interests of children. A more detailed investigation of the term “best interests” will be included within the conceptual analysis of this paper.

#### 4.2 *Text Article 5*

Article 5 of the CRC States:

1. Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 5: Applying the Evolving Capacities of Children

The CRC emphasises that childhood must be acknowledged as a developmental period and that laws and policies must be developed ‘in a manner consistent with the evolving capacities of the child’ (Griffith, 2016). Thus, as children develop, so does their capacity and their views must be given more consideration in relation to their developing autonomy on their journey to adulthood (Griffith, 2016). According to the General Comments of the Committee, as children develop and acquire capacity, they shall become entitled to higher levels of responsibility in areas that affect them (CRC General Comment No. 12 2009, para. 85). Further, this provision in the CRC requires adults to assist children, support, guide and encourage their evolving capacities (Lundy, 2007).

In a piece of literature entitled *Evolving Capacities of Children*, Lansdown (2005) notes that the evolving capacities of children should be understood within three distinct frameworks. First, as a developmental concept which emphasises that a child’s ability to develop their own capacity and autonomy is promoted through the actualisation of the articles within the CRC. Second, as a participatory concept which attempts to transfer rights from adults to the children when appropriate. And finally, the element of protection which maintains that children’s capacities are still progressing and as such they have



rights to protection in accordance with their evolving capacities (Lansdown, 2005). Essentially, evolving capacities is a notion that can be defined in the UN (2005) General Comment No. 7, as a process where children, 'progressively acquire knowledge, competencies, and understandings about their rights and how best they can be realized' (as cited in Winter, 2011).

Furthermore, the definition continues by stating it is critical to account for variations in the capacities of children who may be the same age, and maintain the consideration of individuality (Winter, 2011). Lansdown (2005) calls for certain policies or structures to be in place in order to work alongside children's evolving capacities while simultaneously providing appropriate protection: one of which is mentioned as the, 'introduction of a model that includes age-limits but entitles a child who can demonstrate competence to acquire the right at an earlier age' (Lansdown, 2005). The involvement of adults within this context should be supportive and conducive for children to exercise their voices, capacities, and rights. The consideration of a child's evolving capacity is critical in order to actualize participation of children, especially those of a younger age.

#### 4.3 *Text Article 9*

Article 9 of the CRC states:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the

information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### Article 9: Participation of Children as Interested Parties

For the purpose of this paper, examining Article 9 of the CRC, specific paragraphs 1, 2, and 3 are most applicable. However, paragraph 2 is especially relevant as it aims to place the child as an interested party in a proceeding and places additional emphasis on the importance of that child's voice and views. Assigning the children involved in these legal proceedings as interested parties is critical to establish initially so that participation can be encouraged throughout. Article 9 also aims to focus on the rights of a child to have a caring family, surrounded by parental figures that are effective caregivers. Thus, this article touches on the potential separation of children from their parents and emphasises that a child and parent should not be separated unless staying with the parent is harmful, or their best interests are at risk (Freeman, 2009). Further, children whose parents live separately have the right to stay in contact with both parents, unless it may negatively affect the wellbeing of the child or go against the child's best interests (UNICEF, 2003). Similar to Article 3, a part of this article includes the consideration of the child's best interests, as these can guide a child's participation and potentially, the outcome of a custody proceeding (Birnbaum and Saini, 2012; Campbell, 2013; Ruhlen, 2006). As well as maintaining a child's best interests, this article emphasises children's voices and views with the intention of increasing participation. These children should be heard from directly if necessary, or through representation of an organisation, or professional. An example of this could be when the particular case involves a child protection worker, then the legal support of a children's lawyer can help the child participate (Coenraad, 2014). The Committee advises that even the best interests of babies, infants and very young children shall have consideration and be assessed, even if they cannot express them in the same manner as children who are older, as it is every child's right (CRC General Comment No. 14, 2013, para. 44). The voice and views of children, although specifically mentioned in Article 9, are also applicable to essentially every article within the CRC and will thus be discussed in more detail in subsequent sections.

#### 4.4 *Text Article 12*

Article 12 of the CRC states:

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

#### Article 12: Expression of Views in Accordance with Maturity

Despite the intention of Article 12 to support children's involvement, there is limited awareness of how to actualise it, as recognized in literature (Lundy, 2007; Welty and Lundy, 2013). Practically speaking, Article 12 can only be applied successfully in cooperation with adults who must be committed to supporting that right (Lundy, 2007). Thus, professionals and other adults involved in these legal settings with children should start with the assumption that the child has the capacity to form their own views. This article aims to support the involvement and participation of children; however, there is another step embedded within the article that requires decisions about children's capacity. It appears the provision is reliant upon the determination of a child's capacity. Article 12 states that the views of children will be 'given due weight in accordance with the age and maturity of the child'. This statement relies almost entirely on the capacity of the child to participate meaningfully, which must be assessed by an adult agent in order to give serious weight and consideration to their views (CRC General Comment No. 12, 2009, para. 28). According to the Committee, it is for this reason the views of the child must be assessed on an individual case basis to ensure each child's rights are respected.

Across the literature, there is a strong link between the assumed maturity levels of children and age (Bala, Talwar and Harris, 2005; Campbell, 2013; Parkinson and Cashmore, 2008; Pryor and Emery, 2004). However, age should not be the sole decider of capacity and should not limit a child's right to participate fully in legal proceedings (CRC Recommendations: Day of General Discussion 2006, para. 51.). Further, assigning a fixed age to assumed incapacity is not appropriate given the modern research involving children's unique, diverse and evolving capacities. Further, the foundation of empirical data is not supportive and the importance of chronological age's effects on capacity levels remains uncertain (Campbell, 2013; Woolard, Reppucci and Redding, 1996). Within the CRC general comments (CRC General Comment No. 12, 2009, para. 21) in order to be seen as 'capable', a child does not have to have knowledge of all aspects involved in the legal setting or what may affect him or her. Rather, the child must possess 'sufficient understanding' to form their own views, feelings, insight and concerns about what is important to them and their lives (CRC General Comment No. 12 2009, para. 21). In terms of the notion of capacity in this particular provision, an explanation of when a child is 'capable' of forming their own views is ambiguous, undefined and unclear.

Essentially, if a child is by definition considered to be ‘immature’ or ‘incompetent’, then the notion of “children’s rights” appears to be entirely contradictory (Alderson and Goodwin, 1993; Cowden, 2012). This is a clear tension that must be addressed if the Convention is to be actualised in a meaningful way to support the rights of children. If articles within the CRC, which emphasise the participation of children, contain the paradox of being ‘dependent on a child’s capacity’, with no indication of how that capacity is determined, the Convention itself contains contradictions that must be addressed (Lundy, 2007; Welty and Lundy, 2013).

## 5 Conceptual Analysis: Deep Diving into Concepts, Definitions, Language and Critiques

Prior to conceptually analysing the language, definitions, theorisations and critiques surrounding Articles 3, 5, 9, and 12 of the CRC, a brief overview was provided in the aforementioned section of this paper with the intention of summarising critical elements embedded within each provision. Although many other provisions emphasise and encourage the participation of children in areas that affect their lives, for the purpose of this conceptual analysis these four articles were selected as they accentuate the terms: capacity, voices, views and best interests. These terms are critical to the ultimate success of the convention, but they lack solid definition and practical applications. Thus, the following section aims to analyse these terms and their application to the rights and participation of children.

### 5.1 *Defining and Exploring Key Terms: Voices, Views, Best Interests, and Capacity*

When considering the Convention in the realm of family law and particularly in custody proceedings, some key terms lack a strong, universal definition yet are included consistently throughout the CRC. Some of these terms must be more strongly defined in order to be appropriately actualised. The following section aims to determine more concrete and distinct definitions as a means to clarify the actualisation of the rights embeded within the convention.

#### 5.1.1 Voices and Views

When the topic of children and participation is discussed in the CRC or in practical situations, often the child’s voice and views are mentioned interchangeably. In some legal cases these are actively sought after in order to reach a decision which includes the children involved. These terms are used

frequently in any and all settings that involve the potential participation of children. As these terms are being used recurrently, some authors argue its meaning and practical application has lost some of its critical application (Lundy, 2007, Sloth-Nielsen, 1996; Roche, 1999). It can be maintained that a child's voice and views must be embedded in any decision that involves their lives, however this can look different depending on the child. Some children, for example, need the help of adult figures to form their views and voices in a meaningful way and present those in a legal setting (Lundy, 2007). Despite the manner in which children's participation is achieved, these terms cannot be simply mentioned in order to be meaningfully considered in a legal setting, but effectively determined and then presented. Thus, in this instance, a child's voice must involve their thoughts, opinions, attitudes, and views in order to form a clear narrative that can be presented to involved parties in order to ensure meaningful participation. The second layer embedded in the aforementioned definition involves the child's views which involves a more detailed look at why the child may be voicing what they are. Working backwards, essentially once the child's view is eloquently developed and formed, it can then be communicated as their voice. Children may need help from adult figures to develop and communicate their views practically: this could, for example, involve assisting children with language, or presentation skills (Lundy, 2007).

### 5.1.2 Best Interests

The best interests of children are discussed across literature and within the CRC. It is a subjective term that lacks a universal agreement: some parties involved in delegating the CRC thought it needed more development and clarity, while others accepted the concept without any need to discuss further (Freeman, 2007). The notion of a "child's best interests" was established well before it appeared in the CRC when it was expressed in the Declaration of the Rights of the Child (1959). Again, the term "best interests" is often referred to in custody and access proceedings and can guide most decisions reached (Fotheringham, Dunbar and Hensley, 2013). Though this term is mentioned within family law proceedings constantly, there is no specific view on what that entails or how to assess the best interests of children (Chambers, 1984; Fotheringham, Dunbar and Hensley, 2013). Checklists have been developed and determined in order to help gain insight into the best interests of children; however, an international consensus of a child's best interests seems extremely difficult to determine (Freeman, 2007).

As cited in Freeman (2007), Eekelaar (1992), is one author who attempts to define best interests, as:

Basic interests, for example to physical, emotional and intellectual care developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own.

Although authors have attempted to define this term, it still lacks a working and universal definition. Depending on the age of the child, the notion of “best interests” can be dependent on what adult agents view as best, but these adult-based determinations should not be the only basis of legal decisions. Much of the literature encourages an adult-led conversation about determining a child’s best interests, but this conversation must prioritise the child. Children must be included in this conversation; it is inevitable best interests will remain subjective. For one individual their priority may be another individual’s last consideration and therefore a universal consensus is indeed a near impossible task. It is important that the adult is not the only voice, but rather helps to ensure the views of the child are also considered. Specifically, in Article 3, paragraph 2 for example, a duty is placed upon States Parties and adult agents involved in the child’s life to ensure that competent supervision and caregiving for children is provided (van Bueren, 1998). In this context of safety and wellbeing, it is appropriate to allow adults to lead this basic standard of care for children. However, when seeking information regarding the best interests of children for other matters within their lives, this framework of adult-led discussion needs to be reframed and reconsidered carefully (Smith, Taylor and Tapp, 2003; van Bueren, 1998). The Committee on the Rights of the Child advises that the best interests of the child and their views should be interconnected, essentially that the child’s best interests must be established in consultation with the child (CRC General Comment No. 12, 2009, para. 71). In this Comment, it is implicit that in order sufficiently to consider a child’s best interests, their voice must be heard and the child must in fact contribute to deciding what these interests are. Although hearing and determining a child’s best interests may not determine a verdict, it is critical they are able to participate and voice their opinions of what is indeed in their best interests, as maintained by the CRC. A definition of a best interest is difficult to determine as it is a concept that is subjective and individual. The importance here should be placed on forming individual definitions of best interests with the child whose interests are being sought.

### 5.1.3 A Working Definition of Capacity

The term capacity, for example, is a term that is embedded within the convention; this term is often interchanged with other terms such as competency or

maturity. Case law maintains that a child's views will be heard, however there are factors that influence the weight a young person has in court proceedings such as: capacity and level of "maturity" (Ruhlen, 2006). As a considerably universal guideline, the wishes of children under 12 years of age are not given as significant weight in custody or access proceedings, although the voices of the children may be heard (Bala, Talwar and Harris, 2005; Shaw, 2001; Reidy, Silver and Carlson, 1989). The Committee on the Rights of the Child emphasises that children's voices are not heard only as a way to satisfy "tokenistic approaches", but rather are deeply considered, taken seriously and given due weight (CRC General Comment No. 12, 2009, para. 132). It appears that many of the articles within the CRC maintain the notion that a child's participation shall be based upon or considered in accordance with their level of capacity. However, the implementation of a specific capacity assessment is not advised or recommended, nor is there a consistent definition which specifies when a child is to be considered "capable". This seems to be rather tokenistic when considered in the larger scale of application. To state that the capacity of a child will be considered when hearing their voices, with no universal way to gauge that child's capacity level, presents tensions in actualising their voice. When exploring the General Comments of the Committee on the assessment of the capacity of a child, the only comments reads, 'good practice for assessing the capacity of the child has to be developed' (Council of Europe Guidelines, 2011). The notion of capacity is constant throughout many articles within the CRC, as either stated in the text or insinuated in the intended actualisation. This fundamental principle also emphasises that children's rights are fully respected and they should be allowed to exercise all rights when considering their capacity to share their own views (Council of Europe Guidelines, 2011).

In order to further this statement within these principles, each child should be given the opportunity to display their capacity in order to have their participation be meaningful. In order for participation to be meaningful, as per Merriam-Webster's definition, it is important that the act of such is considered as serious, important and worthwhile and may include 'communicating something that is not directly expressed'. This definition aligns with considering the capacity of children. A child's developmental stage may not allow them to communicate directly, therefore alternative communication methods must be considered in order for a child to include their voice. Capacity is a complicated and multifaceted notion when referring to assessing or measuring such a concept in a custody or separation proceeding. Again, if participation relies on the ability or capacity of a child, then it must be equally as important to determine the level of capacity.

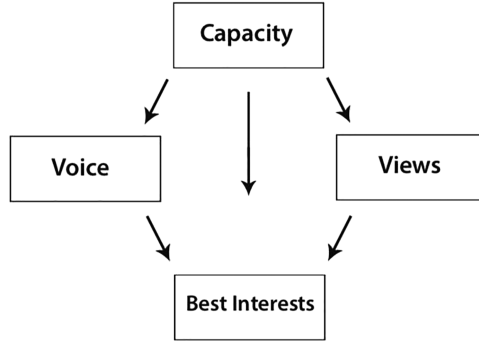


FIGURE 2 Connection between key terms within participation articles in the CRC

5.1.4 Moving Beyond Definitions: Ratifying the Convention

As mentioned, although the CRC is a widely ratified and universally accepted convention, the provisions within remain somewhat ambiguous in terms of universal actualisation and application. Essentially though the concepts embedded within the CRC appear to be connected and fluid, any disruption or uncertainty in one area can cause a lack of actualisation in another. As shown in Figure 2, for example, when considering all concepts in conjunction to ensure a child’s participation, any obscurity could affect the proceeding or verdict. If the child’s capacity is not initially determined through a universal measurement (which, as determined by the literature, does not exist) and is rather just assumed, their voices and views will be subsequently affected. If a child’s voices and views are not adequately included or considered, then a determination of their best interests is inherently more difficult. Without that solid foundation that determines a child’s capacity and capability, it can be argued that all other factors will be consistently ambiguous throughout a custody or access case.

There are many connections between various articles within the CRC and in order to comprehend fully the Convention and understand how the rights of children can be actualised in practice, these provisions must be explored. Of the aforementioned Articles 3, 9, 5 and 12, there are many overlaps, similarities and connections. As seen within Figure 1, the main elements extracted from analysing the four Articles include: views, voice, capacity, evolving capacities and best interests. Many of these principles and the ideas within, are closely connected (Detrick, 1999). The notion of “best interests” should be applied in conjunction with other articles such as Article 12. For example, Article 3 containing language of “best interests” could not be applied if the elements of Article 12 which emphasise participation are absent and vice versa (CRC General Comment No. 12, 2009, para. 74). It is difficult to



implement many of the aforementioned articles as there are layers embedded within each article. Article 12 itself is critical for participation, but lacks detail on actualisation. If the child, for example, is given the opportunity to speak and have their voice heard in a custody proceeding, that is only one part of actualising that article. In fact, the Committee on the Rights of the Child rejects the notion that the voices of children without or with limited capacity will not be taken seriously (CRC General Comment No. 7, 2006, para. 14). Proper application of Article 12 involves separate elements of primarily hearing what the child has to say, and accordingly consider what has been heard in line with the child's age and capacity (Kilkelly, 2010). If the perspectives of this child are heard by an adult who is not willing to consider their voice, then the child's participation will be considerably vague. Factors must be considered such as: who is listening, in which space are the voices being heard or considered, whose voice is being heard and what influence might it have? In order meaningfully to include a child's voice there are three factors that must be considered and led by adult agents: space, audience and influence. The space in which the child is heard is critical, an example of this could be a child participating in a large court room in front of a judge as opposed to a child-friendly interview space. Additionally, it is critical to consider the audience, more specifically who is listening to this child speak and why? In order for a child's voice to have weight in a decision or allow them to participate meaningfully, involvement of the audience and consideration of the influence is crucial (Council of Europe Guidelines, 2011; Lundy, 2007). Thus, the voice of a child can be audibly heard; however, it is critical that the appropriate individuals are listening effectively in order for the views and participation to be meaningful. An adult agent must attend to the three outlined factors which are: space, audience and influence. Therefore, another embedded element within the CRC should focus on adult allies who work in partnership with the children to exercise their rights.

## 6 Moving Towards a Transdisciplinary Approach

When considering complex notions such as capacity of children and their best interests, there is a call for a cooperative approach in determining these elements. The development of children is critical to consider within these realms, and their legal relevance is equally as crucial when allowing children to participate meaningfully. Essentially, a child's age as presented in a legal setting cannot be the only determinant for capacity. A deeper understanding is required to include the child. As mentioned earlier when defining

and exploring the notion of capacity, if maturity is linked to age or expected development stage alone, this can be problematic and limiting for children. Considering age and developmental stage is imperative, but when assessing a child's capacity to participate, there are other critical factors that must be accounted for. If an assumption of irrational thought is connected to children and their age, then the vocal participation of young people will not be seriously considered in any adult-dominant setting (Alderson and Goodwin, 1993). Thus, when considering children's participation in family law settings, the focus of maturity or competency should be shifted to view and place children as the "experts" in their own lives (Campbell, 2013). Instead of appointing adults as the decision-makers of children's lives, if children were deemed as "experts" of their own lives, then the need for capacity consideration would be shifted and would allow children to be the most valuable decision makers. If young people indeed become considered as such, then their wishes and views must be included, discussed, and prioritised. When asking and seeking deeper views into their life experiences, it moves beyond only considering maturity or capacity, but requires a richer account of the child's voice and narrative to be at the forefront (Roberts, 2000). A child's view of their own life and their own experiences does not require only an assessment of maturity but rather it places that child as an agent with a voice based upon their own life. This is something an appointed adult cannot fully comprehend, nor can this voice be generated or created by anyone other than the child. When considering how each child's expertise, personal experiences and circumstances develop them into a unique being, automatic assumptions based on age simply will not suffice in areas such as legal settings (Havenga and Temane, 2016).

The provisions stated within the Convention would benefit from the accompaniment of practical direction in terms of applying the rights in partnership with any children involved. An example could be when attempting to determine capacity; this may entail bringing another professional in the legal setting to determine capacity. These practical examples may be a critical step in actualising the Convention. Otherwise, the Convention itself is essentially adult-led perceptions of what they believe the Convention means and how that should then be applied to the children's lives. Moving beyond theorising about the Convention through ideal concepts to practical examples is critical for meaningfully including children. Overall, the extent of a child's involvement in a custody or access case is dependent on their voices, views, best interests and capacities (see Figure 1) and how these are applied and considered in order to participate meaningfully. The previous literature supports the conception that children should not have to rely on adult figures to actualise their

rights but, rather, are capable of comprehending and acting upon their rights themselves. It is indeed in their best interests to partake fully, regardless of their age. However, research will note, in practice, that an adult dominated process still remains. Although the voices of children are vocally presented and heard, most of these decisions rely on “best interest” considerations which are assessed and ultimately determined by adults (Reynaert, Bouverne-De Bie and Vandevelde, 2009). This process should shift to become more child-led and actively include their voices and views with adults acting as supporters in children’s participation.

## 7 Best Interests, Participation, Capacity and Children’s Rights: What’s next?

After reviewing Articles 3, 5, 9 and 12 within the United Nations Convention on the Rights of the Child (1989), it can be determined that there are indeed limitations in terms of actualising the best interests and participation of children in legal settings and determining their capacities. It is clear throughout the literature, when considering all elements of participation, best interests and the rights of children, that the capacity of the child must be assessed. In order to examine the connection between meaningful participation and children’s rights, a deeper, and more transdisciplinary understanding into the concept of capacity must be attained. Further, the potential to assess the capacity level of children in a comprehensive way is apparent as it is required in order to realise many Articles within the CRC. Therefore, there is a strong need for the development of a capacity assessment tool, which would aim to assess the capacity of children meaningfully to participate in all matters that affect their lives. It is critical to move towards a practical and applicable way to support the rights, voices and best interests of children and moving beyond theorising the CRC and implementing practical ways to ensure that the Convention is being exercised by the children it was designed to support is critical.

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