

# CHILDREN'S VOICES: LISTENING—AND DECIDING—IS AN ADULT RESPONSIBILITY

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## I. INTRODUCTION

Children should have a voice in all kinds of decisions that affect their lives, including decisions made in or around the legal system. On the surface, this position makes good common sense. The principle also seems just and fair. Whatever decision is made, it will greatly affect a child. It only makes sense, it only seems fair, that the child's point of view should be heard. After all, children have rights too.

In this brief essay, I question the position that we should ask children's opinions when a decision about their lives is in dispute. Let's be clear: we only really worry about including children's voices when a decision is disputed. More broadly, I question whether giving children too many rights has burdened children with too many responsibilities. For example, if unqualified, the position that children have a right to be heard can unreasonably burden children with the responsibility of making adult decisions.

What qualifications are necessary to consider? Among the most essential are:

- What precisely do we mean by giving children a voice?
- In what manner will children add their voices to the chorus of conflicting points of view about a pending decision?
- Is the child actually interested in voicing his or her opinion, and how can we ascertain this?
- What is the nature of the decision at hand?
- Where do loved ones line up in regard to a child's potential expressed preference?
- How do we evaluate the quality and the impartiality of a child's opinion?

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- To what extent should a child's age or developmental level affect whether we wish to hear a child's voice?
- To what extent should the opinion expressed by children of different ages influence the decisions at hand?

I develop and illustrate my concerns about these and other issues by considering children's roles in voicing a preference about their physical custody or residence in disputes following a parental separation or divorce. Throughout this illustration, I rely somewhat on principles from the literature on children's psychological development but more so on the common sense decision-making principles used in two-parent families. My central concern is that in attempting to give children the right to be heard, we must not inadvertently shift adult responsibility onto children's shoulders. Rights and responsibilities go hand-in-hand, and many of our well-intentioned efforts to increase children's rights have, unfortunately, burdened children with adult responsibilities.

## II. THE CONTEXT OF CHILD CUSTODY DISPUTES

Listening to children is a good idea. Yet, context is everything. Consider child custody decision making. The decision about where children should live following a separation or divorce is a huge one. A child's life will be changed dramatically by a separation or divorce. Much of the change will be determined by the decision that is made about physical custody. Children may live primarily with their mothers—the usual circumstance—and see their fathers very little or virtually not at all—also, unfortunately, the usual circumstance. Children could live primarily with their fathers, and see their mothers more often than they would see their non-residential fathers but still relatively infrequently. Or children could live in any number of arrangements in between these extremes, including a variety of straightforward joint physical custody arrangements such as dividing or alternating weeks, or a host of complex joint physical custody arrangements that require children to move back and forth between two homes according to some complicated or irregular schedule. Incidentally, in the U.S. about 10% of children live primarily with their fathers and about another 10% actually live in joint physical custody arrangements following separation and divorce.<sup>1</sup>

Not only do these alternative courses of action have a dramatic effect on children's lives, legal decisions about child custody following separation and divorce, like so many legal decisions concerning children's welfare, are made according to the principle of what will be in the child's best interests. Is it not reasonable, therefore, to give children a voice in deciding where they want to live? Is it not reasonable to give children a voice in deciding what is in their best interests? Is it not reasonable to empower children in a circumstance where they are likely to feel powerless?

Over twenty years ago, I began working with children and families that were disputing custody following separation and divorce. At the time I posed these

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1. ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 17-19 (2d ed. 1999).

questions rhetorically. The questions needed no debate, because the answers were so obvious. Of course children should have a voice in child custody decisions that are all about them, that are supposedly made according to their best interests, and that will dramatically affect their lives!

In fact, when I began doing divorce mediation over twenty years ago—mediation that focused primarily on custody decisions—I routinely included children in the process. I interviewed children because I wanted to hear their voices, and more importantly, because I wanted parents to hear their children's voices. I included children in the dispute resolution process because I thought that children deserved to be heard and because I truly wanted to promote children's best interests.

After conducting less than a dozen cases where I included children in the mediation process in order to promote their best interests, I started *excluding* children from the mediation process for precisely the same reasons. I found that, in attempting to promote children's best interests, I ended up putting children in a position that was in direct opposition to their best interests: smack in the middle between their warring parents. In fact, the preference I heard children voice most commonly did not concern a desire to live with one parent or another, but a hope, a fervent wish that their parents would stop fighting, that their parents would just get along, that their parents would stop putting them in the middle. Rather than giving children the right to be heard, I quickly came to believe that, in attempting to give children a voice, I was helping to place the responsibility for making an incredibly important, controversial, and difficult decision on to children's shoulders.

I was not alone in inadvertently playing the game of shifting responsibility. I often construe the scenario in which children's "voices are heard" in the context of disputed custody as, in reality, conveying a message that goes something like this: "Your parents are at war about where you should live. Your Mom and Dad, and their lawyers, only want you to say what they want to hear. The custody evaluator feels strongly both ways. The mediator wants to remain neutral. The guardian ad litem is not sure what to do. The judge would rather not have to decide. Why don't you, child, tell us adults what to do?"

Even twenty years ago, extensive literature documented that exposure to and involvement in parental conflict is psychologically damaging to children whether their parents are married or divorced.<sup>2</sup> Today, the literature on this topic is extensive and far more refined, but the big message remains the same: children are likely to be harmed by inclusion in their parents' conflicts.<sup>3</sup> However, I do not want to discuss research at this point in this essay. I want to discuss something more real, a case example. I could relate many "war stories" about children caught in their parents' divorce battles, and the case I will tell you about is far from the worst example. It is, however, one of the more revealing cases regarding the mistakes parents can make in the name of wanting to hear children's voices.

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2. See generally, Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *PSYCHOL. BULL.* 310 (1964).

3. EMERY, *supra* note 1, at 17–19.

### III. THE CASE OF THE WOUNDED KNEE

Recently, I treated a six-year-old boy and his father in family therapy as a part of a court-ordered process. The treatment began following a custody dispute that, in contrast to the arrangement for the past two years, sharply limited the father's access to his son. The court order required that I conduct therapy with the father and son. I was also given authority to pursue mediation with both parents if I deemed that appropriate. From the beginning of my work with this family, I involved the mother in the process, as I would do in almost any case. Although I focused on father and son, I brought the mother into the treatment process from time to time.

The mother was clearly the authority on parenting in the family. Even after the couple's divorce, the father looked to her for direction and guidance. In fact, he had followed her lead in parenting in their marriage, and he had benefited greatly as a father from her support. He had lost his former wife's guidance as a result of their separation and divorce, and the father was struggling in parenting his son. Much of my work in family therapy focused on strengthening the father's parenting skills, and also on encouraging the mother to re-assume her facilitative role for the sake of her son. Not only had the mother withdrawn her support, but in a subtle manner, she was undermining the father's relationship with their son.

The mother was very child-centered and was a strong advocate for giving her son a voice in everything. This included what custody arrangements the boy preferred, including whether he wanted to follow through with various scheduled visits with his father. If the son did not feel like going to see his Dad for whatever reason—and usually the reasons were trivial—the mother called the father and told him there would be no visit.

This circumstance angered the father, because he felt like his former wife was intruding into his limited time with his son. The circumstance also created consternation for the father, because his son apparently did not want to see him. It hurt the father terribly, but he did not want to force his son to do something that the boy did not want to do.

As the family's therapist, I was concerned about the father's need to develop parenting skills. Like the father, however, I also was troubled that the mother was using her son's "voice" as a way of controlling the father. I did not doubt the legitimacy of her concern for her son's wishes, but I did question her objectivity in questioning him and in evaluating the consequences of "hearing his voice."

I was concerned how the son's voice affected the dynamics of the parents' relationship, but I was more concerned about the pressure that Mom's approach seemed to be putting on her son. The boy did not tell me directly that he felt like he was being put in the middle, but he seemed very uncomfortable in trying to balance his relationship with his parents and especially in trying to please his mother. I suspected, in fact, that the boy often said what his mother wanted him to say. Some of my intuitions came from what I observed, but others were based on how I felt sitting in the room with the two parents. I sensed the unstated tension and pulls for loyalty myself, so I assumed that the boy felt these things even more acutely.

I was months into therapy, and the father's parenting skills were improving. Still, I could not get the boy to express his feelings directly to me or to his parents. I also was largely failing in my effort to help the parents to return to a more supportive co-parenting relationship. Finally, I was completely unable to get the mother to see that she was burdening her son by constantly asking him what he wanted to do about seeing his father. An unfortunate incident turned the case around.

One evening at his mother's home, the six-year-old boy fell and cut a gash in his knee that clearly was going to require stitches and a trip to the emergency room. Both of his parents happened to be there at the time. They each wanted to take him to the hospital, but one of them should have stayed behind since he had a playmate over to the house who needed to be taken home. The parents started arguing about who should take their son to the emergency room. In the middle of this, the mother turned to the boy, and apparently with the father's approval, asked him who he wanted to take him to the hospital. The boy said, "Both," and everyone crammed into the car and off they went to the ER.

We had a family therapy session scheduled for shortly after this event, and by a stroke of good luck, I had previously asked both parents and the son to attend. In the family therapy session, the father related the story of the wounded knee and proudly asked his son if he was glad that Dad was there to take him to the hospital too. The father clearly was trying to show me, and the mother, what a good father he was. But when the father asked the question, the mother tensed, rolled her eyes, and gave other nonverbal cues to her son, all of which read, "Be careful not to fall into this trap."

For once, the boy did not fall into either parent's trap. He finally let his emotions fly. He burst into tears and shouted angrily at both of his parents. "No. I was *not* glad you both took me. Why did you have to ask *me* what to do? I was there *bleeding*. Why couldn't you decide?"

Fortunately, the parents were able to see that this incident, and their son's reaction to it, was a metaphor for all they had been doing wrong. In the name of giving him a voice, they repeatedly put him in the middle. He did not feel empowered. He felt burdened and trapped. He did not want a voice in these decisions. He wanted his parents to decide—and to decide fairly without involving him in their arguments. Like so many children from separated and divorced families, he wanted his parents to act like parents, so that he could just be a kid.

I do not have unequivocal social science evidence to support my point of view that children feel burdened by the responsibility of making adult decisions in child custody disputes, but I do have twenty years of experience. I believe that this case is not a rarity but a prototype. I worry that when we ask to hear the child's voice in this context—however carefully, cleverly, or subtly—we are not empowering children. We are, in fact, putting children in the middle of their parents' conflict. We are, in fact, burdening children with the responsibility of making decisions that the adults involved are failing to make.

To be sure, there are exceptions. And I also am aware that my case example puts a hole in my argument even as I use it to make my point. I did, after all, work with the child in this case. It was, in fact, the child's voice that turned the case around. True enough. I do want to give children a voice in child custody disputes, especially if

they are older and have a strong preference about where they want to live. Yet, I worry about staying well clear of the line that divides hearing children's voices from shifting the burden onto kids. In my case example, the boy was in therapy, *he* chose to express himself, and his point, like mine, was, "Stop putting me in the middle. You decide!"

#### IV. THE REFERENCE POINT: TWO-PARENT FAMILIES

Another brief example can illustrate the tricky balance that worries me about children's voices. In trying to decide on a reasonable approach for how separated or divorced families should make decisions, I often consider how two-parent families make them. Moving across the country is the decision that two-parent families face that perhaps comes closest to approximating the magnitude of deciding upon physical custody in divorce. What role should a child play in a two-parent family's decision to move from one coast to the other? How should a child's voice be heard in this process?

Good parents would want a child to know about a cross-country move well in advance. Good parents would want to ask a child how he or she felt about the move and to ask on more than one occasion. Good parents also would "read" their child's emotional reaction, not just hear their child's words, and if possible, act accordingly. Good parents would consider several alternatives if it was clear that the child did not want to move, perhaps because the child was silent but clearly upset upon learning of the move, or perhaps because the child immediately shouted, "I'm not going!" In cases like this, good parents help a child to cope with his or her difficult emotions, come up with strategies to ease the transition such as helping a child to keep in touch with old friends, or even make the drastic decision not to move after all. If they had no choice about moving themselves, good parents might allow an older adolescent not to move if he or she was adamant about staying put. For example, good parents might allow a seventeen-year-old adolescent to live with a friend or relative to complete the last year of high school rather than force the teenager to move across the country.

What would good parents do if the father wanted to move but the mother did not? Would the parents ask the children about their preferences before coming to an agreement themselves? Would they decide to move or stay depending upon the wishes that their children expressed? Would they bring the child to a therapist and ask the therapist to find out what the child really wanted to do? If the parents went to a mediator to try to resolve their differences about moving, would they expect to have their children involved in the process?

I do not think that good parents would take these steps. Good parents who were in dispute with each other would almost certainly talk to the children about the possibility of moving, they probably would ask their children in a careful and non-threatening way how they might feel about moving, and they perhaps would inform the children about their disagreement. Still, I think that most good parents would believe that it was *their* responsibility to take their children's wishes, needs, and preferences into account. Ultimately, I also think most good parents would know that the decision about whether or not to move was *their* responsibility too, even if they were finding it hard to agree.

I think the same is—or should be—true for divorcing parents. Absolutely, children's wishes, needs, and preferences—their voices—need to be taken into account in deciding upon physical custody arrangements. However, in my view, it is the *parents'* job to do so. I also strongly believe that it is the parents' responsibility to make the ultimate custody decision. If parents cannot fulfill their parental responsibilities in the emotional turmoil of separation and divorce, other professionals sometimes need to play the role of substitute parent. I can envision professionals wanting to hear children's voices as a part of their job in stepping into the parents' shoes, but I urge extreme caution in so doing. I fear that, in trying to hear children's voices in regard to emotionally-charged issues like child custody, we run the risk of turning the *children* into the substitute parents.