THE CHILD'S VOICE IN CUSTODY LITIGATION: AN EMPIRICAL SURVEY AND SUGGESTIONS FOR REFORM

Barbara A. Atwood*

I. INTRODUCTION

Family court judges regularly face one of the most daunting tasks known to the judiciary: determining a child's future contact with his or her parents or parent-figures. Child custody decrees, with their unique impact on the lives of children and the adults who are disputing custody, stand apart from the myriad other orders that family courts render. Unlike a divorce decree, a property settlement, or even a support award, child custody rulings fundamentally shape intimate relations among children and their care-givers and determine the course of future lives. It is a profound responsibility, one that has been the subject of robust scholarly debate and legislative reform for at least the past twenty years.[1] Although only a small fraction of custody

* Mary Anne Richey Professor of Law, University of Arizona James E. Rogers College of Law. I am grateful to Jim Rogers for enabling the College of Law to host the October 2002 Conference on Youth, Voice and Power: Multi-Disciplinary Perspectives, where a preliminary version of this Article was presented. I also presented the empirical research in this Article at a Faculty Enrichment Seminar at the College of Law and at the Annual Conference of the Arizona Association of Family and Conciliation Courts, and I benefited in each instance from the thoughtful comments of those in attendance. In particular, I appreciate the insights offered by my colleagues Kenney Hegland and Ted Schneyer. I thank Edwin Aguilar, Ph.D., for sharing his admirable expertise in statistical analysis and for his patient help in tabulating and analyzing the survey data; Annette Kundelius for her careful and comprehensive research assistance on state law across the United States; and Alisa Reed for her research on child development.

1. A rich body of scholarly literature about the legal standards for child custody adjudication exists, beginning perhaps with the now-classic article about the implications of discretionary decision-making. *See* Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975). Some recent contributions that offer constructive criticism include Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495 (2001) (suggesting structural reforms, including the use of a unified family court); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997) (criticizing the destructive impact on children of adversarial child

proceedings are contested,[2] courts and legislatures owe the conflicted families that come before them a dispute resolution structure that is based on a careful and balanced policy assessment.

This Article focuses on one discrete aspect of child custody litigation: the role of the child's voice in court-adjudicated custody dispute resolution.[3] While the law of almost all states provides that courts may consider children's preferences in deciding custody,[4] states vary widely in the discretion they provide their trial judges. States differ not only with respect to the weight given children's wishes but also to the methods used by courts in ascertaining children's views. In particular, states disagree on the procedures that trial courts must follow in order to fully protect the due process

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custody litigation and proposing a model of dispute resolution based on an ethic of care and cooperation). The Wingspread Conference, a gathering in 2000 sponsored by the American Bar Association Family Law Section and The Johnson Foundation, generated its own set of recommendations for high-conflict custody disputes. *See High Conflict Custody Cases: Reforming the System for Children—Conference Report and Action Plan*, 34 FAM. L. Q. 589 (2001) (proposing greater use of collaborative problem-solving by lawyers and courts and greater attention to therapeutic intervention among mental health professionals).

2. Estimates generally are that 5% or fewer of all custody disputes require an adversarial hearing. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 138 (1992) (reporting that in California study of 933 divorcing couples with minor children, only four percent required custody hearing).

3. A number of scholars have considered this topic from varying perspectives. *See, e.g.*, Barbara House, Comment, *Considering the Child's Preference in Determining Custody: Is It Really in the Child's Best Interest*?, 19 J. JUV. L. 176 (1998) (suggesting that judges explore reasons underlying children's preferences with particular sensitivity to presence of parental alienation syndrome); Cathy Jones, *Judicial Questioning of Children in Custody and Visitation Proceedings*, 18 FAM. L. Q. 43 (1984) (proposing model to guide judges in questioning of children based on child development theory and children's privacy rights); Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299 (1994) (recommending that courts show greater deference to children's preferences under children's rights theory); Fredrica K. Lombard, *Judicial Interviewing of Children in Custody Cases*, 17 U.C. DAVIS L. REV. 807 (1983) (reporting on survey of judges and outlining alternative proposals to address children's emotional needs and due process concerns of parties); Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873 (1996) (applying child development research to various contexts in which children's choices are germane, including custody, abortion, medical treatment, and delinquency); Elizabeth Scott et al., *Children's Preference in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035 (1988) (reporting on empirical project and recommending deference to preferences of older adolescents under social norms approach); Cynthia Starnes, *Swords in the Hands of Babes: Rethinking Custody Interviews After Troxel*, 2003 WIS. L. REV. 115, 118 (endorsing ALI approximation standard for custody disputes and urging that child's preference not be dispositive except in extraordinary cases).

4. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: State Courts React to Troxel*, 35 FAM. L. Q. 577, 618 (2002) (Chart 2). According to the research of Elrod and Spector, all but five of the fifty states authorize trial courts to consider children's wishes as one of the criteria for determining child custody.

rights of litigants.[5] States even disagree about the permissible scope of the judicial interview.[6]

The different judicial approaches to ascertaining children's wishes in custody disputes reflect competing policies. To provide an empirical foundation for the discussion, a judicial survey was conducted of state court judges in Arizona and tribal court judges presiding on reservations located within Arizona. Judges responded to a series of questions about their practices and strategies in assessing children's wishes in child custody adjudication. The Survey responses revealed, not surprisingly, a wide diversity in philosophy. For some judges, the goal of procedural fairness to the litigants seemed to assume priority, while for others the paramount goal was to facilitate the child's meaningful and confidential participation in the litigation process.

Part II of the Article will describe the Survey methodology and the results. Part III provides an overview of case law and scholarship on the question of ascertaining children's preferences in custody disputes. Lessons from the international realm are also explored in Part III, with particular emphasis on the United Nations Convention on the Rights of the Child.[7] Part IV briefly explores changing theories of child development. That section suggests that even very young children may have valuable insights about their relationships with their caregivers that could assist the decision-maker in resolving custody disputes. More generally, that section discusses research indicating that children may derive long-term emotional benefits from the very experience of being consulted during custody litigation. At the same time, I caution against endowing children with greater decisional autonomy than is warranted by current understandings of brain development.

Part V assesses the competing values at stake and offers some thoughts on how courts might accommodate those values. Put simply, the interests that are in tension include the child's interest in being heard and in being protected from emotional harm, the parents' interest in full recognition of their due process rights, the court's interest in maintaining the integrity of the judicial process, and the pervasive interest of all participants in achieving the optimal custodial arrangement for the child. This Article recommends that the views of children willing and able to communicate them be taken into consideration in custody litigation and that courts continue to enjoy considerable discretion in deciding on the weight to give the children's views. The person eliciting the children's perspectives need not be the judge. As revealed in the Arizona survey, many judges dislike the *in camera* interview and feel unqualified to evaluate children's statements. As an alternative, judges can assign the responsibility

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5. *See infra* Part III.

6. *Compare In re* Marriage of Milovich, 434 N.E.2d 811, 818 (Ill. App. Ct. 1982) (scope of *in camera* interview may include questions on various topics, including discipline received from each parent, activities engaged in with each parent, interrelationship with siblings, etc.), *with* Molloy v. Molloy, 637 N.W.2d 803, 804 (Mich. Ct. App. 2001), *vacated on other grounds*, 643 N.W.2d 574 (Mich. 2002) (scope of *in camera* interview should be limited to reasonable inquiry into preferences of child).

7. *See* U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., at Art. 12, U.N. Doc. A/Res/44/25 (1989) [hereinafter CRC], *available at* 28 I.L.M. 1448, 1461 (1989), discussed *infra* at notes 117–42 and accompanying text.

of ascertaining children's views to a qualified mental health expert, a custody evaluator, a guardian ad litem, or an independent attorney appointed for the child. At the same time, whether judges use an *in camera* interview or a different method of eliciting children's wishes, courts should provide basic procedural due process protections for the custody litigants. The parent's fundamental interest in maintaining or acquiring physical and legal responsibility for his or her child requires no less.

II. THE SURVEY

Trial judges in Arizona have almost limitless discretion in determining how much weight to give children's preferences in custody litigation and in deciding how to elicit those preferences. Modeled after the Uniform Marriage and Divorce Act,[8] Arizona's child custody statute directs judges to award custody according to the child's best interests, and it enumerates a list of factors for the courts to consider, including the "wishes of the child as to the custodian."[9] Unlike the laws of a few other states,[10] Arizona's statute does not give presumptive weight to the preferences of older children but, instead, allows judges to decide in each case the appropriate significance to assign to children's wishes. As to the method of ascertaining children's wishes, Arizona law permits, but does not require, trial judges to interview children in chambers.[11] The provision permitting *in camera* interviews, moreover, is silent as to the use of procedural safeguards, such as whether other persons should be present or whether a record should be made. In this respect, Arizona diverges from the Uniform Marriage and Divorce Act provision for judicial interviews.[12]

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8. *See* UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1998) [hereinafter UMDA].

9. ARIZ. REV. STAT. § 25-403(A)(2) (2003). Arizona's legislature has steered away from endorsing presumptions to resolve child custody disputes, although in recent years it has added various "negative presumptions" arising from domestic violence, substance abuse, and other behaviors. For example, a finding of a "significant history of domestic violence" bars the court from awarding joint custody, *id.* § 25-403(E), and a determination that a parent has committed an act of domestic violence against the other parent creates a rebuttable presumption against an award of custody to the parent who committed the act of violence. *Id.* § 25-403(N). The statute also erects a rebuttable presumption against sole or joint custody by a parent who has been convicted of a drug offense within twelve months before the custody petition is filed. *Id.* § 25-403(K).

10. *See infra* note 59 and accompanying text.

11. ARIZ. REV. STAT. § 25-405 (2003) ("The court may interview the child in chambers to ascertain the child's wishes as to the child's custodian and as to parenting time."). The trial court retains discretion in deciding whether or not to interview the child. *See* Graville v. Dodge, 5 P.3d 925, 932 n. 6 (Ariz. Ct. App. 2000), *vacated on other grounds*, 533 U.S. 945 (2001).

12. Section 404(a) of the UMDA provides:

> The court may interview the child in chambers to ascertain the child's wishes as to his custodian and as to visitation. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

9A U.L.A. at 380. In light of the UMDA's language, the omission of the requirement of a recording in Arizona's law must have been intentional.

Several Indian tribes within Arizona have enacted codes that parallel state law in their approach to child custody litigation. These codes often direct judges to consider the child's wishes as to custody and visitation and permit, but do not require, judges to interview children in chambers to determine their wishes.[13] Like their state statutory counterparts, the tribal code provisions are silent regarding the recording of *in camera* interviews. Some tribal codes contain very cursory language and do not provide substantive or procedural details.[14]

The absence of legislative direction in Arizona thus leaves judges with wide latitude to independently and individually make policy choices. Judges decide whether to interview, how to frame the questioning, and whether to make a recording. In light of the broad discretion enjoyed by Arizona judges, a survey seemed particularly useful to illuminate the range of judicial practices and the rationales underlying those choices.[15] The survey instrument asked about judicial practices in ascertaining children's wishes and, in addition, judges' reasons for preferring one method over another. It also promulgated questions about the weight typically given children's wishes in the custody determination and the bearing of various factors on that determination.

Questionnaires were sent to 110 state court judges and fifty tribal court judges whose responsibilities might include child custody dispute resolution (the "Survey"). A total of sixty judges responded, twelve of whom indicated that they did not preside over child custody disputes and returned blank questionnaires. Among the completed questionnaires, forty-three were from state court judges and five came from tribal court judges. Two-thirds of the respondents were male, and one-third female. Thus, unlike other surveys that have been done in the past,[16] this Survey yielded data

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13. *See, e.g.*, LAW & ORDER CODE OF THE HAVASUPAI INDIAN TRIBE § 3.24 (1978) (court may consider "[a]ll the parties' and child/ren's wishes" and "may talk to the child/ren in chambers to determine the child/ren's wishes"); PASCUA YAQUI TRIBAL CODE §§ 10.19, 10.21 (1992) (court may consider "wishes of the child as to his custodian" and "may interview a child in chambers to ascertain the child's wishes as to their custodian and as to visitation"); LAW & ORDER CODE OF THE FORT MOHAVE INDIAN TRIBE §§ 477, 479 (1999) (same); CIVIL & CRIMINAL LAW & ORDER CODE OF THE HUALAPAI TRIBE §§ 3.22, 3.24 (1996) (same); LAW & ORDER CODE OF THE YAVAPAI-PRESCOTT TRIBE §§ 3.22, 3.24 (1979) (same).

14. *See, e.g.*, NAVAJO NATION CODE tit. 9, § 404 (1977) ("Each divorce decree shall provide for a fair and just settlement of the property rights between the parties, and also for the custody and proper care of the minor children.").

15. Various empirical studies on the use of children's preferences have been reported from other states. *See* Lombard, *supra* note 3 (survey of judges in Detroit area); Carol R. Lowery, *Child Custody Decisions in Divorce Proceedings: A Survey of Judges*, 12 PROF. PSYCHOL. 492 (1981) (survey of judges in Kentucky); Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703 (1983) (survey of judges from multiple states); Thomas J. Reidy et al., *Child Custody Decisions: A Survey of Judges*, 23 FAM L. Q. 75 (1989) (survey of judges in California); Scott et al., *supra* note 3 (survey of judges in Virginia).

16. *See* Catherine A. Crosby-Currie, *Children's Involvement in Contested Custody Cases: Practices and Experiences of Legal and Mental Health Professionals*, 20 LAW & HUM. BEHAV. 289, 298 (1996) (93% of responding judges, multi-state, were male); Lombard, *supra* note 3 (all state court judges, no indication of gender); Lowery, *supra* note 15 (subjects all

from which one could compare male and female respondents.[17] Interestingly, a cross-tabulation revealed no statistically significant differences in responses between the male and female judges.[18] The judicial experience of the respondents ranged from one year to almost twenty years since first appointed or elected to the bench, and the average length of time on the bench was seven years. As with gender, no significant differences surfaced in comparing the answers of respondents by years of experience.

In the forty-eight completed questionnaires, judges responded to a series of questions about their practices and strategies in assessing children's wishes in child custody adjudication. The results portray a judiciary intensely committed to protecting children, but individual judges disagree about how best to achieve that objective. Regarding the substantive weight that judges give to children's wishes or preferences, the Survey shows some common ground and some interesting variations. The Survey posed a series of questions asking judges to rate the significance of children's preferences by age while assuming that the contesting parties have been found equally fit to exercise custody. Consistent with the findings from other states,[19] Table 1 in Appendix A shows that about 80% of respondents reported that they consider the preferences of older teenagers to be very or extremely significant, while about 40% would ascribe that same weight to the views of children aged eleven to thirteen years. In contrast, more than 70% agreed that the preferences of very young children (infancy to the age of two) would be "of no significance whatsoever." Within the remaining age categories, however, there was wide variation as to the weight given the children's preferences. About 50% of the respondents indicated that the preferences of children aged three to five were possibly significant, but more than a third responded that the views of children in that category were of no significance

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male); Scott et al., *supra* note 3, at 1046 (eighty-six male and two female judges, all state court).

17. Of the completed questionnaires, 67% were from male judges, 31% were from female judges, and one judge did not indicate gender. Although one of my original goals was also to be able to compare tribal court and state court responses, the extremely low number of tribal court responses precludes any such comparison. Moreover, in light of the anonymity of the Survey, tribal judges' responses could not be categorized by tribe. Thus, the five responses from tribal judges were analyzed within the larger pool of state court responses.

18. In particular, the judges' practices regarding *in camera* interviews showed no statistically significant correlation with gender. The absence of differences based on gender, of course, is itself illuminating. For a review of the empirical literature assessing differences between male and female judges, see Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 897–900 (1995). The authors strongly endorse the addition of more female judges to state and federal court in order to provide a judiciary with broad perspective, but they are highly skeptical of claims that female judges will decide cases in predictably "feminine" ways.

19. Empirical studies of judicial practices from other states have consistently indicated that judges are more likely to defer to the wishes of a teenaged child than of a younger child. *See* Lowery, *supra* note 15, at 495; Reidy, *supra* note 15, at 79; Scott et al., *supra* note 3, at 1037. One study suggested that judicial deference to the older child's wishes stems from social norms that respect adolescent autonomy and awareness of the practical difficulties in forcing an adolescent to live with a parent against her choosing. Scott et al., *supra* note 3, at 1050–51.

whatsoever. Similarly, about 50% of the respondents marked "possibly significant" as to the views of children aged six to ten, but about one-third categorized the views of children in that age group as "significant." Thus, the child's age correlates generally to the significance ascribed to the child's views, but judges vary in the weight they give to younger children's expressed wishes.

Survey responses indicate that judges are influenced by highly individualized impressions of the child's circumstances in deciding how much weight to give the child's wishes. For example, judges reported that they are more influenced by the cognitive and psychological maturity of a child than by the child's chronological age,[20] suggesting that a fixed age limit for conducting interviews or for establishing the weight of a child's preference may be ill-advised. Moreover, judges seem more influenced by the apparent emotional health of the child than by the perceived intensity of the child's preferences.[21] Thus, the forcefulness of a child's wishes may be subordinate to the judge's perception of the child's mental health—a judicial attitude that emphasizes the paternalistic function of the court and deemphasizes the autonomy or agency of the child. Similarly, about two-thirds of the respondents ranked as "very significant" or "extremely significant" both the judge's general impression of the child's relationship with each party and the judge's understanding of the reasons for the child's preference.[22] Interestingly, although a majority of the respondents would give the same weight to children's wishes in a modification proceeding as in an original custody application, a sizeable minority of the respondents indicated that they would be likely to give more weight to a child's wishes in a modification proceeding.[23] Such an approach may be based on the view occasionally found in the case law that children's preferences are particularly significant when they are based on actual experience within a decreed custody arrangement.[24]

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20. While almost 70% of the judges indicated that age would be "very significant" or "extremely significant," 83% gave equivalent significance to the psychological and cognitive maturity of the child. App. A, Tbl. 2.

21. Almost three-fourths (73%) of the respondents reported that the apparent emotional health of the child would be very or extremely significant in deciding on the weight to be given the child's preferences, but only about 30% would give such significance to the perceived intensity of the child's preferences. *Id.*

22. Sixty-seven percent of the respondents indicated that the judge's general impression of the parties' relationship with the child was very or extremely significant, and 69% reported that the judge's understanding of the child's reasons for his or her preferences was very or extremely significant. *Id.*

23. About 57% of the respondents said that children's preferences should be given the same weight in modification proceedings as in original proceedings, but 40% indicated that the child's preferences should be given more weight in proceedings to modify custody. *Id.*

24. *See, e.g.*, Nies v. Nies, 407 N.W.2d 484 (Minn. Ct. App. 1987) (trial court properly changed custody from joint custody to sole custody in father where children expressed preference to live with father and evidence showed problems in mother's supervision of children); *In re* Marriage of Ostrem, 763 P.2d 35, 38 (Mont. 1988) (trial court properly changed custody from father to mother where children's preference for mother was based on experience living with father); McMillen v. McMillen, 602 A.2d 845 (Pa. 1992) (expressed preference of eleven-year-old boy to have custody switched to father tipped balance and justified trial judge's

Judges adjudicate child custody with some preconceived notions of the dynamics underlying children's preferences. Through a series of descriptions about children's views, the Survey attempted to illuminate some of those understandings. As reported in Table 3 in Appendix A, more than 80% of the respondents agreed with three descriptions of children's preferences: that most children prefer a custodial arrangement that poses the least disruption to their continuity with home, school, and friends; that most children prefer to be in the physical custody of the parent with whom they have the closer emotional bond; and that most children prefer a custodial arrangement that allows them to avoid direct contact with an abusive parent.[25] A more modest majority (61%) concurred with the view that children often express a preference in custody litigation that is based on sympathy for a parent. On the other hand, respondents were fairly evenly divided on whether most children prefer a custodial arrangement that offers them more freedom and less discipline,[26] and on whether children often prefer a custodial arrangement that allows them to avoid contact with a parent's new partner.[27] Clearly, judges may be reluctant to defer to children's expressed wishes if they believe that children's choices are likely to be based on sympathy or a desire for a permissive environment, and these results indicate that some judges in Arizona hold such beliefs. At the same time, the responses suggest that most judges believe children often have legitimate reasons for their custodial preferences.

The Survey also revealed important differences in judges' views about how to ascertain children's preferences. Results again show that the judges, while committed to protecting children, disagree about the best means of achieving that goal. Table 4 shows that a strong majority of respondents never allow testimony by a child in open court.[28] Significantly, the least popular method of ascertaining children's wishes, other than direct testimony in open court, was the *in camera* interview. A quarter of the respondents reported that they *never* conduct such interviews,[29] and fewer than a fifth of the respondents indicated that they conduct *in camera* interviews on a regular basis.[30] On the other hand, more than half responded that they conduct judicial interviews of children occasionally,[31] suggesting that for most judges the decision to interview a child is case-specific and highly dependent on the child's circumstances. In contrast, judges broadly endorsed other methods of ascertaining children's wishes. About two-thirds of the respondents use mental health experts

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modification where child's preference was based on his negative experience in mother's custody).

25. App. A, Tbl. 3 (94% agreed that children prefer physical custody with parent with closer emotional bond; 90% agreed that children prefer custodial arrangement that poses least disruption to continuity; 83% agreed that children prefer custodial arrangement that allows them to avoid direct contact with abusive parent).

26. *Id.* (25% agreed, 46% disagreed, 29% no opinion).

27. *Id.* (38% agreed, 38% disagreed, 25% no opinion).

28. App. A, Tbl. 4 (81% never allow child to testify in court).

29. *Id.* (25.0% never conduct *in camera* interviews).

30. *Id.* (19% of respondents conduct judicial interviews regularly, often, or almost always).

31. *Id.* (56% occasionally conduct *in camera* interviews).

regularly or more often,[32] and an almost equal number use party testimony.[33] A slight majority also regularly uses evaluations by court personnel to determine children's wishes.[34] Other less frequently used methods of ascertaining children's views, according to the Survey, include reports from appointed guardians ad litem and submissions from attorneys appointed to represent children.[35]

The Survey also posed a series of questions designed to illuminate factors that might influence a judge's decision to use one or more of the various available procedures. The answers, as summarized in Table 5, suggest that in high conflict divorces, judges are more likely to order a custody evaluation or appoint a guardian ad litem than they are to conduct a judicial interview of the children or appoint an attorney to represent the children.[36] A similar preference for the use of custody evaluations and guardians ad litem was evident in cases involving allegations of child abuse and cases involving domestic violence against a partner.[37]

As evidenced by the Survey, judges profoundly disagree about the utility and advisability of *in camera* interviews with children, and their differences reflect the competing policies at stake in custody litigation. Among those judges who do interview children, Table 6 shows that judges are evenly split on the question of whether *in camera* interviews should be recorded. About one-third of the respondents regularly conduct the interviews "off the record" with only the child present, while slightly more than one-third routinely require that a court reporter transcribe the interview.[38] Moreover, among those judges who do make a record of the *in camera* interview, respondents take different approaches to that record: about one-fourth make the record available to the parties, while a similar percentage reported that they seal the record of judicial interviews and make the record available only in the event of an appeal.[39]

In addition, judges differed in how they approach the *in camera* interview. More than one-third of the respondents reported that they never ask children directly for their custodial preferences, but one-fourth regularly ask children directly for their

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32. *Id.* (67% use mental health experts regularly or more often).

33. *Id.* (63% use parties' testimony regularly or more often).

34. *Id.* (53% use court personnel regularly or more often).

35. *Id.* (42% use guardians ad litem regularly or more often; 33% use court appointed attorneys for the child regularly or more often).

36. *See* App. A, Tbl. 5 (in high conflict cases, 47% of judges regularly or more often use judicial interview, 44% appoint attorney for child, 58% appoint guardian ad litem, and 85% order custody evaluation).

37. *Id.* (in cases involving allegations of child abuse, 43% of judges regularly or more often use judicial interview, 40% appoint attorney for child, 63% appoint guardian ad litem, and 72% order custody evaluation; in cases involving allegations of domestic violence, 38% of judges regularly or more often use judicial interview; 31% appoint attorney for child, 50% appoint guardian ad litem, and 68% order custody evaluation).

38. App. A, Tbl. 6 (33% regularly or more often conduct interview off the record with no other person present; 38% regularly or more often require court reporter during interview).

39. *Id.* (25% make record available to parties very often or almost always; 26% regularly, very often, or almost always seal record and make available only for appeal).

preferences.[40] A strong majority indicated a preference for indirect questioning to ascertain preferences.[41] More than two-thirds of the respondents reported that they regularly tell the child that the interview will remain confidential.[42] In contrast, one-fourth indicated that they routinely explain to children that what they say during the interview will be shared with others.[43]

The Survey also explored the competing values at stake in ascertaining children's views through the *in camera* interview. Table 7 reveals a wide divergence of opinion among the respondents about the advantages and disadvantages of the judicial interview. Although very few judges regularly conduct interviews with children, about two-thirds agreed that a child's expressed preference is important evidence in a judge's determination of best interests, and a majority of the respondents agreed that judges can acquire a better understanding of the child and the parties through an *in camera* interview.[44] Judges were split on whether children benefit emotionally by expressing their preferences in custody litigation, and on whether children have a right to be heard in litigation affecting their interests.[45] Fairly even divisions also appeared on questions relating to the reliability of children's expressed preferences,[46] and on the competence of judges to evaluate children's statements.[47] On the other hand, almost 90% of the respondents concurred that children may suffer emotionally if they feel they must choose one parent over another.[48] Finally, the judges were split on the central question of procedural fairness to the litigants. A slight majority of the respondents agreed with the statement that parties' procedural due process rights are at risk if judges rely on unrecorded *in camera* interviews in resolving custody disputes, while about one-third disagreed.[49]

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40. *Id.* (40% never ask directly for children's preferences; 25% regularly or almost always ask directly for children's preferences).

41. *Id.* (83% of respondents prefer indirect questioning to ascertain children's preferences).

42. *Id.* (73% regularly or more often explain to children that what they say will be held in confidence).

43. *Id.* (25% regularly or more often explain to children that what they say will be shared with others).

44. *See* App. A, Tbl. 7 (65% agreed that child's expressed preference is important evidence in best interests determination; 61% agreed that judge can acquire a better understanding of the child and the parties through the *in camera* interview).

45. *Id.* (51% agreed and 38% disagreed that children may benefit emotionally by expressing their preferences to judge; 53% agreed and 36% disagreed that children have a right to be heard during litigation affecting their interests).

46. *Id.* (42% agreed and 33% disagreed that children's expressed preferences are unreliable because children are subject to influence and manipulation by parents).

47. *Id.* (45% agreed and 38% disagreed that judges lack the necessary training to interview children and evaluate children's statements).

48. *Id.* (87% agreed that children may suffer emotionally if they feel that they must choose one parent over another).

49. *Id.* (51% agreed and 36% disagreed that parties' procedural due process rights are at risk if judges rely on unrecorded *in camera* interviews in resolving custody disputes).

In summary, the Survey responses revealed a striking diversity in judicial philosophy.[50] A key tension that is suggested by the Survey and the literature arises from the concurrent goals of facilitating the child's meaningful participation in the litigation process, minimizing trauma to the child, and protecting litigants' due process rights. Judges seemed united in their desire to give the child a voice, but they took very different views on how best to achieve that goal. Similarly, they disagreed on the therapeutic impact for a child of expressing his or her preferences in custody litigation. Finally, the judges divided in their approach to litigants' due process rights. In the view of a slight majority, unrecorded *in camera* interviews raise serious due process concerns. Many respondents, however, disagreed that litigants' due process rights are at risk. Those respondents may ascribe to the view, sometimes expressed in the case law, that the need for confidentiality in the interview outweighs the procedural rights of the litigants.[51]

III. AN OVERVIEW OF COMPETING APPROACHES

A. Case Law

The opposing interests inherent in the sensitive task of determining a child's preferences in custody litigation surfaced in the responses to the Survey and appear frequently in the case law. These concerns loosely fall into three categories: (1) judicial interests in rendering competent decisions, (2) children's privacy and welfare interests, and (3) parties' due process rights.[52] As will be seen, the competing interests have yielded an array of inconsistent precedents across the United States as well as strikingly divergent recommendations from commentators and law reform bodies. The disagreements seem most pronounced on questions of procedure rather than substance.

American courts largely agree that children's wishes are a relevant, though not dispositive, consideration in resolving a custody dispute.[53] In some states, judges

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50. For the judges' diverse responses to an open-ended question at the end of the Survey asking them to identify two ways in which the law of child custody could be improved, see App. B.

51. *See, e.g.*, Willis v. Willis, 775 N.E.2d 878, 885 (Ohio. Ct. App. 2002) (stating that transcript of *in camera* interview must remain sealed from parents, since "it is only this promise of confidentiality that convinces these embattled children to speak freely" (quoting *In re* Longwell, No. 90NU040969, 1995 WL 520058, at *4 (Ohio Ct. App. 1995))).

52. Noticeably absent from the focus of courts within the United States, in contrast to the concerns of judges in many other nations, is the vindication of children's rights. According to Professor Woodhouse, "In the United States, society is living in a time warp [preceding the U.N. Convention on the Rights of the Child]. Children's interests are continually spoken of instead of their rights; rights are perceived as something that is useful only to an autonomous individual who is fully capable of making mature choices." Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L. Q. 105, 110 (2002) (hereinafter *Talking About Children's Rights*). Interestingly, however, a majority of respondents to the Survey agreed with the statement that "[c]hildren have a right to be heard during litigation affecting their interests." *See* App. A, Tbl. 7 (54% marked "agree" or "agree strongly").

53. *See generally* cases cited in D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R. 3d 1396, 1402–09 (1965 & 2002 Supp.).

must consider the child's wishes, while in other states, the consideration of children's wishes is discretionary.[54] States also assign different weight to children's preferences. In most states, judges have broad discretion to determine the significance of children's preferences, and a trial judge's decision to award custody in opposition to the child's wishes is rarely disturbed on appeal.[55] Indeed, trial courts are encouraged to examine the reasons or motives underlying the child's wishes in making an overall assessment of the child's best interest, and if the circumstances appear problematic (coercion by a parent, sympathy for a parent, desire for permissive environment), appellate courts view the trial judge as fully justified in ruling otherwise.[56] Under this common approach, the trial court takes the child's wishes as one factor in determining the child's best interests rather than as the choice of an autonomous agent.[57] Courts in a few states have suggested that if the parents are equally fit, a child's preference to live with one parent should function as a tie-breaker.[58] Finally, in a minority of states, the wishes of older children are presumptively controlling as a matter of statutory mandate.[59] In those states, trial judges risk reversal much more easily if they fail to defer to an age-qualified child.[60]

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54. Under the Uniform Marriage and Divorce Act, judges "shall consider all relevant factors, including . . . the wishes of the child as to his custodian." UNIF. MARRIAGE & DIVORCE ACT § 402, 9A U.L.A. 282 (1998). In most adopting states, that language has been construed to require consideration of children's wishes. *See, e.g.*, Reeves-Weible v. Reeves, 995 S.W.2d 50, 63 (Mo. Ct. App. 1999); McMillen v. McMillen, 602 A.2d 845, 847 (Pa. 1992). In other states, courts have ruled that they may consider children's wishes within their discretion but are not required to do so. *See, e.g.*, Tasker v. Tasker, 395 N.W.2d 100, 103 (Minn. Ct. App. 1986).

55. *See generally* O'Neill, *supra* note 53, § 4.

56. *See, e.g.*, Rogers v. Rogers, 345 So. 2d 1368, 1370–71 (Ala. Civ. App. 1977) (upholding the trial court's refusal to defer to wishes of children where evidence showed their desire to live with father was based on preference for late-hour play and television over more disciplined life with mother); Beck v. Beck, 432 A.2d 63, 73 (N.J. 1981) (upholding trial court's refusal to defer to children's preferences where evidence showed children had been persuaded by mother to make their statements of preference); Muller v. Muller, 634 N.Y.S.2d 190, 191 (N.Y. App. Div. 1995) (upholding trial court's refusal to defer to children's expressed preference to live with father where evidence showed children's feelings toward mother were fostered by father's hostility); Renaud v. Renaud, 721 A.2d 463, 465–66 (Vt. 1998) (stating that trial court should not place undue reliance on child's expressed preference for parent who has engaged in active alienation of child's affection for other parent).

57. In *Huffman v. Huffman*, 11 S.W.3d 882 (Mo. Ct. App. 2000), for example, the court explained that "[a] child's preference of custodial parent can have a bearing on custodial rights at divorce only if, in light of all the evidence, their welfare and interests are consistent with that preference." *Id.* at 886.

58. *See, e.g.*, McMillen v. McMillen, 602 A.2d 845, 848 (Pa. 1992) (where households of both parents are equally suitable, child's preference to live with one parent "could not but tip the evidentiary scale in favor" of that parent); Goldstein v. Goldstein, 341 A.2d 51, 53 (R.I. 1975) (substantial weight was properly given to nine-year-old girl's preference, where factors favoring either parent were nearly in state of equipoise).

59. In Georgia, for example, a child who has reached the age of fourteen has the right to select the parent with whom he or she wants to live, and the child's selection is controlling unless the chosen parent is unfit. GA. CODE ANN. § 19-9-3 (2003). *See also* N.M.

Major disagreements exist across the United States on fundamental procedural questions concerning the ascertainment of children's wishes, primarily because of the strength of the competing goals of protecting the child from emotional trauma, on the one hand, and protecting the litigants' due process rights, on the other. Courts recognize that they benefit from access to all relevant evidence in deciding a custody dispute, and a majority of the Arizona judges surveyed viewed the child's wishes as important evidence in the ultimate determination of best interests.[61] Consistent with that view, appellate courts have insisted that trial judges consider children's wishes and have found error for the failure to permit a competent child to testify in open court[62] and for the failure to elicit the child's preference through judicial interviews or otherwise.[63] At the same time, courts are sensitive to the

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STAT. ANN. § 40-4-9(B) (2003) (directing court to consider only "desires of the minor" if minor is fourteen years old or older in awarding custody). Mississippi ostensibly gives a right of choice to children age twelve or over, but requires that the court find that the child's preferred custodial arrangement be in the child's best interest. *See* MISS. CODE ANN. § 93-11-65(1)(a) (2003) (providing that child who has reached age twelve "shall have the privilege of choosing the parent with whom he shall live" if court finds both parties fit and that it would be in best interests of child). In a somewhat different approach, Maryland authorizes a child who is sixteen years old or older and the subject of a custody order to petition to change custody, without proceeding by guardian or next friend. MD. CODE ANN., FAM. LAW § 9-103 (2002). Other states' statutes identify the age at which courts must give children's wishes more serious consideration while still retaining discretion to depart from those wishes. *See, e.g.*, IND. CODE § 31-17-2-8(3) (2003) (directing court to consider wishes of child "with more consideration given to the child's wishes if the child is at least fourteen (14) years of age"); TENN. CODE ANN. § 36-6-106(a)(7) (2000) (directing court to consider "reasonable preference of the child if twelve (12) years of age or older" and providing that court may hear preferences of younger children upon request, with preferences of older children to be given greater weight). Texas is unique in allowing children age twelve and older to choose the custodian ("managing conservator" in Texas parlance) by submitting a signed written preference to the court. TEX. FAM. CODE ANN. § 153.008 (2003). In most states, in contrast, the codified law leaves to trial judges the task of discerning which children's preferences to consider and the weight to be given those wishes. *See, e.g.*, COLO. REV. STAT. § 14-10-124 (1.5)(a)(II) (2002) (directing trial judges to consider the wishes of the child "if he or she is sufficiently mature to express reasoned and independent preferences").

60. *See, e.g.*, Saxon v. Saxon, 428 S.E.2d 376, 377 (Ga. Ct. App. 1993) (reversing trial court's change of custody from mother to father where 15-year-old son selected mother as preferred custodian and evidence did not indicate she was unfit); Burney v. Burney, 152 S.E.2d 871, 873 (Ga. 1966) (reversing trial court's original custody decree where it differed from preference of age-qualified child).

61. *See* App. A, Tbl. 7 (65% agreed or strongly agreed that the child's expressed preference is important evidence).

62. White v. White, 655 N.E.2d 523, 527–28 (Ind. Ct. App. 1995) (trial court erred in excluding testimony of competent ten-year-old called to rebut allegations against mother). In contrast, other courts have upheld trial court decisions that denied requests to have children testify. *See, e.g.*, Reed v. Reed, 734 N.Y.S.2d 806, 810 (N.Y. Sup. Ct. 2001) (trial court in its role as *parens patriae* properly recognized that having six-year-old testify in open court was "fraught with the possibility of dangerous long term effects on that child").

63. *See, e.g.*, Koppenhoefer v. Koppenhoefer, 558 N.Y.S.2d 596, 599 (N.Y. App. Div. 1990) (finding that failure of trial court to ascertain wishes of teenaged children in

emotional impact of their dispute resolution processes on children. Respondents to the Survey preferred to ascertain children's wishes through methods such as court-ordered custody evaluations or party testimony rather than in court testimony or the *in camera* interview.[64] Moreover, to the extent *in camera* interviews are used, most respondents in the Survey reported that they do not ask direct questions of children, preferring indirect questioning as an interview technique.[65]

Similar concerns for the emotional impact on the child have surfaced in the case law. One trial judge explains why he did not interview a child in a custody dispute:

> [T]his Court is going to have to make a decision and award permanent custody to one of these parties. And I do not believe that [the son] could add anything to my decision. He may state a preference and I would not be bound by that preference and I think I've had enough hard cold facts before me to make the appropriate decision. I do not want any decision I made [sic] to be on the conscience of a 9 year old boy and feeling that maybe something he said that he later regrets saying would affect his life and his parents' life and [his sister's] life. For those reasons and also the fact that I do not believe it is beyond the realm of possibility that either one of these parties could be inquisitive as to what [their son] said to me or asking about it of him. I do not think this child needs to be put under that pressure.[66]

As this passage reveals, the trial judge speculated that the child might suffer regret later in life if he were made to feel responsible for the custody decision, and the judge also suspected that the parents would inevitably discover any preference voiced by the child in the *in camera* interview. Thus, for many judges, the perceived harm of questioning children may be so significant that they forego the judicial interview altogether.

The judges who do conduct *in camera* interviews construe the procedural rights of the litigants in quite divergent ways. A growing majority of states now require, either by statute or by judicial holding, that *in camera* conversations with children be recorded.[67] In a few states, a record must be made only if a party requests

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visitation dispute was error); Bovard v. Baker, 775 A.2d 835, 841 (Pa. Super. Ct. 2001) (finding that failure of trial court to interview parties' four children regarding their custodial preference was abuse of discretion).

64. *See* App. A, Tbl. 4.

65. *See* App. A, Tbl. 6, discussed *supra* at notes 38–43 and accompanying text.

66. *In re* Marriage of Doty, 629 N.E.2d 679, 683 (Ill. App. Ct. 1994) (quoting the trial court's decision).

67. *See Ex parte* Berryhill, 410 So. 2d 416, 418 (Ala. 1982); Mattocks v. Mattocks, 986 S.W.2d 890, 892 (Ark. Ct. App. 1999); *In re* Katrina L., 247 Cal. Rptr. 754, 759 (Cal. Ct. App. 1988); COLO. REV. STAT. § 14-10-126(1) (2002); Gennarini v. Gennarini, 477 A.2d 674, 678 (Conn. App. Ct. 1984) (transcription or summary by court must be made available to parties); Nowak v. Nowak, 546 So. 2d 123, 124 (Fla. Dist. Ct. App. 1989); King v. Scarborough, 204 S.E.2d 174 (Ga. 1974); Strain v. Strain, 523 P.2d 36 (Idaho 1974); 750 ILL. COMP. STAT. 5/604(a) (2003); Conkling v. Conkling, 185 N.W.2d 777 (Iowa 1971); Dickison v. Dickison, 874 P.2d 695 (Kan. Ct. App. 1994) (failure to make record of *ex parte* conversations

it,[68] but in other states the presence of a court reporter is mandatory and cannot be waived by the parties.[69] Some states, moreover, require that parties' lawyers be allowed to attend the *in camera* interview.[70] Within the group of states requiring a record, most require that the record be made available to the parties before a custody determination is rendered, recognizing that information obtained in the *in camera* interview may play a determinative role in a judge's custody ruling without any guarantee of its accuracy.[71] In a few states, courts seal the record of the interview for appellate review in an effort to protect children's confidentiality while still providing a basis for appellate scrutiny.[72] In that latter group, the emphasis seems to be on the integrity of the judicial process as a concern that is separate from the traditional procedural right of parties to have access to the evidence considered by the judge.[73]

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with minor children may be reversible error in future cases, but records may be sealed for *in camera* use only); KY. REV. STAT. ANN. § 403.290(1) (2002); Hicks v. Hicks, 733 So. 2d 1261 (La. Ct. App. 1999); Marshall v. Stefanides, 302 A.2d 682 (Md. Ct. App. 1973); Molloy v. Molloy, 637 N.W.2d 803, 810 (Mich. Ct. App. 2001), *aff'd in part, vacated in part*, 643 N.W.2d 574 (Mich. 2002); MINN. STAT. § 518.166 (2002); Robison v. Lanford, 1999-CT-01836-SCT, 841 So. 2d 1119 (Miss. 2003); MO. REV. STAT. § 452.385 (2003); MONT. CODE. ANN. § 40-4-214(1) (2002); Kumke v. Kumke, 648 N.W.2d 797 (Neb. Ct. App. 2002); M.P. v. S.P., 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979); N.M. STAT. ANN. § 40-4-9(C) (2003); Horton v. Horton, 183 S.E.2d 794 (N.C. Ct. App. 1971); Willis v. Willis, 775 N.E.2d 878, 885 (Ohio Ct. App. 2002) (transcript of *in camera* interview must be sealed for appellate review and may not be disclosed to parents); Cyran v. Cyran, 566 A.2d 878 (Pa. 1989); Haase v. Haase, 460 S.E.2d 585 (Va. Ct. App. 1995); WASH. REV. CODE § 26.09.210 (2003); Rose v. Rose, 340 S.E.2d 176 (W.Va. 1985); Seelandt v. Seelandt, 128 N.W.2d 66 (Wis. 1964).

68. *See, e.g.*, DEL. CODE ANN. tit. 13, § 724 (2003) ("The court shall, at the request of a party, cause a record of the interview to be made and it shall be made part of the record in the case.").

69. *See, e.g.*, DeYoung v. DeYoung, 379 N.E.2d 396 (Ill. App. Ct. 1978).

70. *See, e.g.*, 750 ILL. COMP. STAT. 5/604(a) ("Counsel *shall* be present at the interview unless otherwise agreed upon by the parties.") (emphasis added); MINN. STAT. § 518.166 ("The court shall permit counsel to be present at the interview and shall permit counsel to propound reasonable questions to the child . . . .").

71. *See, e.g.*, Robison v. Lanford, 1999-CT-01836-SCT, 841 So. 2d 1119 (Miss. 2003). The precise method and timing of the disclosure of the transcript may vary. *Compare* Haase v. Haase, 460 S.E.2d 585 (Va. Ct. App. 1995) (parents in custody dispute are entitled to record of *in camera* interview on request), *with* Shapiro v. Shapiro, 458 A.2d 1257 (Md. Ct. Spec. App. 1983) (parties' due process rights are protected so long as *in camera* interview is recorded by court reporter and record is read to parties and their counsel immediately following interview), *and In re* Marriage of Hindenburg, 591 N.E.2d 67 (Ill. App. Ct. 1992) (Illinois law allows for temporary sealing of *in camera* interview transcript so long as it is eventually made available to parties).

72. *See Willis*, 775 N.E.2d at 885 (transcript of *in camera* interview must be sealed for appellate review and may not be disclosed to parties); *Molloy*, 637 N.W.2d at 810, 811 (transcript of interview must be sealed for appellate review unless interview exceeds scope of child's preference, in which event parties must have access to record at trial level).

73. In *Foskett v. Foskett*, 634 N.W.2d 363 (Mich. Ct. App. 2001), for example, the appeals court reversed a trial court for failing to make a record of *in camera* interviews with two children. The trial court, in changing custody from the mother to the father, had substantially relied on unrecorded information gleaned from the *in camera* interview. The

Those courts see appellate review of the record—not party access—as the core safeguard.[74] On the other side of the ledger, a substantial minority of states still affords judges discretion to interview children privately in chambers, without making any record whatsoever of the interview.[75]

Trial judges' different methods of questioning have also been the topic of appellate court scrutiny. While many judges are reluctant to ask children directly for their preferences as to custody,[76] there is recent authority for the proposition that trial judges should not question children on topics *other* than their preferences out of concern for the due process rights of the parents. In *Molloy v. Molloy*,[77] the Michigan Court of Appeals considered the due process implications of wide-ranging and unrecorded questioning during an *in camera* interview. The court reasoned that trial courts interview children *in camera* rather than in open court in order to "lessen the emotional trauma for the child and protect the child from openly having to choose sides."[78] In the court's view, however, "this enlightened and sensitive focus on the child's well-being should not permit courts to ignore issues of fundamental fairness in proceedings affecting a parent's custodial rights."[79] In particular, the court reasoned that using the *in camera* interview for generalized fact-finding "invites numerous due

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judge formed an "impression" of the alleged problems in the mother's home, but the actual record established only the allegations of such problems. In reversing, the appeals court explained that its primary concern was with its inability to engage in meaningful appellate review:

> If a trial court relies significantly on information obtained through the in camera interview to resolve factual conflicts relative to any of the other best interest factors and fails to place that information on the record, then the trial court effectively deprives this Court of a complete factual record on which to impose the requisite evidentiary standard necessary to ensure that the trial court made a sound determination regarding custody. Indeed, decisions that will profoundly affect the lives and well-being of children cannot be left to little more than pure chance. These critical decisions must be subject to meaningful appellate review.

Id. at 369.

74. *Id. See also Willis*, 775 N.E.2d at 885 (stating that appellate review of *in camera* interviews protects rights of parents while ensuring that children's statements remain confidential).

75. Arizona statutory law, for example, imposes no requirement of recordation. *See* ARIZ. REV. STAT. § 25-405 (2003). At least one state court has rejected arguments that parents' due process rights require a record of any *in camera* interview, reasoning that confidentiality is necessary to encourage frankness from the child and to protect the child from emotional harm. *See* Lincoln v. Lincoln, 247 N.E.2d 659 (N.Y. 1969).

76. Among the Survey respondents, 40% indicated that they never ask directly for a child's custodial preference. *See* App. A., Tbl. 6. A respected authority flatly recommends that judges *never* ask a child "outright to state a preference for one parent" because of the potential emotional stress on the child. *See* LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES 298 (Robert J. Levy ed., 1998).

77. 637 N.W.2d 803 (Mich. Ct. App. 2001), *aff'd in part, vacated in part*, 643 N.W.2d 574 (Mich. 2002).

78. *Id.* at 805.

79. *Id.*

process problems."[80] The court therefore held that "the purpose and questioning of an *in camera* interview is limited to determining the child's preference."[81]

The *Molloy* court also wanted to ensure that appellate courts have a full record in order to review custody decrees, and the court thus required that all *in camera* interviews in the future be recorded and sealed for appellate review.[82] At the same time, the court recognized that inquiries about a child's preferences may frequently elicit information about other facts (beyond the child's preferences) that may influence a judge's decision.[83] In the court's view, the litigants are entitled to disclosure of those facts at the trial level to protect the rights of parents and preserve the state's interest in accurate decision-making.[84] Thus, the court announced a novel rule: "if the information provided in the *in camera* setting does exceed the scope of preference to the extent that it affects the custody decision, then the trial court must permit parties access to the record and the opportunity to be heard."[85] Under *Molloy*, a trial judge must *sua sponte* disclose to the parties any information that is revealed during the interview beyond the child's preference if the information may affect the court's decision. The court thus gave qualified protection to the due process rights of the litigants and the integrity of the judicial process and held that the child's interest in confidentiality must give way to that limited extent.[86]

In contrast, other courts have given greater protection to the child's need for confidentiality and lesser attention to parents' due process arguments. The Arizona Court of Appeals endorsed the confidentiality of the *in camera* interview in an early decision. In *Bailey v. Bailey*,[87] the court observed:

> Frequently these conferences are conducted with a promise by the trial judge that the information is confidential, that the child need not repeat that which has been said and that the judge will not repeat that which has been said. It is vital that this confidence be observed.
>
> In this, one of the most difficult responsibilities of a trial judge, the judge is privileged to consider the information so secured in

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80. *Id.*
81. *Id.* at 804.
82. *Id.* at 805.
83. *Id.* at 808–09.
84. *Id.* at 810–11.
85. *Id.* at 811.
86. Interestingly, the Michigan Supreme Court summarily affirmed the appeals court's holding as to the scope of the *in camera* interview but vacated the holding as to recordation. Molloy v. Molloy, 643 N.W.2d 574 (Mich. 2002). The high court explained that it could not determine on the record whether recordings of *in camera* interviews were constitutionally required. *Id.* at 574. Apparently envisioning a process akin to rule-making, the court announced that it was opening "an administrative file to examine the extent to which, and the procedures by which *in camera* testimony may be taken in custody cases," and it invited public comment. *Id.* The Michigan Supreme Court's reluctance to affirm the appeals court's mandate for recording highlights the difficulty and importance of this central procedural question.
87. 412 P.2d 480 (Ariz. Ct. App. 1966).

> his final decision. The information . . . may well be the crucial and determining factor in the court's decision.[88]

The court in *Bailey* wanted to protect the child's expectation of privacy so as to promote an open and frank discussion with the judge. According to that view, the child—shielded from the parental gaze and the possibility of parental reprisal—is less likely to suffer emotional trauma. The respondents in the Survey showed a similar belief that children will suffer emotionally if pressured to choose one parent over another.[89] At the same time, the *Bailey* court acknowledged that the confidential *in camera* interview might not be sufficient to sustain a custody decision favoring one parent if the record evidence overwhelmingly supported a different result.[90] In other words, the court recognized that the off-the-record nature of the interview in chambers could pose problems for appellate review in some situations.

In sum, trial courts across the United States possess very broad discretion in deciding the weight to give children's preferences and in selecting the method of ascertaining those preferences. While a minority of states currently gives older children a presumptive right to choose their custodian, most states leave the question of weight to the individualized judgment of the decision-maker. A clear trend is discernible toward greater protection of the due process rights of custody litigants, but again the implementation of those procedural rights varies considerably from state to state.

B. Commentators' Recommendations

Commentators have taken widely divergent positions in identifying the paramount values and recommending policy in this area. In their study of Virginia judges, Elizabeth Scott and her colleagues documented a correlation between the age of the child and judges' willingness to defer to the child's expressed preference.[91] Noting the broad diversity of approaches among judges as to the conduct of interviews with children, the authors came down on the side of limitation rather than expansion. They concluded that "a short, private judicial interview directed solely at eliciting the preference of the adolescent child who wants to have a voice in the decision represents the optimal accommodation of the conflicting interests of parents and children in custody determinations."[92] Their recommendation reflected concerns about the potential trauma to the younger child, the unreliability of younger children's expressed wishes, and the need to protect the procedural rights of the litigants. Similarly, one commentator has recommended adoption of a flat rule that judges should give "no weight" to preferences stated by children under ten since those children "have not developed to a point where they can likely engage in rational decision making."[93]

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88. *Id.* at 484.
89. *See* App. A., Tbl. 7, discussed *supra* at notes 44–49 and accompanying text.
90. *Id.*
91. Scott et al., *supra* note 3, at 1060–78.
92. *Id.* at 1038.
93. Mlyniec, *supra* note 3, at 1907.

Others have taken the position that the child's preference ought to be followed in cases where two equally fit parents are vying for custody. Professor Kandel, for example, has argued that "as between fit parental custodians who cannot agree on the child's custody, the choice of children six years old and older should be legally dispositive as to their custody."[94] In her view, evolving constitutional law principles recognize the autonomy of children and the rights-bearing status of children.[95] Developmental psychology, according to Kandel, similarly demonstrates that by middle childhood, children are able to make reasoned choices, apply norms of fairness, and understand long range consequences of their decisions.[96] She also points out that a rule of children's choice would be practically beneficial by decreasing costly and destructive litigation.[97]

An influential text for judges on mental health dimensions of child custody litigation is *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges*.[98] The *Deskbook* is moderately critical towards "children's rights advocates" who have pushed recently for a greater role for children's preferences in custody dispute resolution. The text states that the children's rights perspective is "not widely shared in the United States currently by legislators, judges, or mental health experts."[99] It goes on to note that "[i]t is unlikely that an alternative social consensus concerning children's preferences in custody cases, one favoring 'children's autonomy' or any other, will soon prevail."[100] In the view of Barbara Bennett Woodhouse, the *Deskbook* "fails to give adequate weight to the rights of children,"[101] and she speculates that the authors did not want to "undercut constitutional protection of family autonomy."[102]

The American Law Institute, in its recently completed set of proposed Principles of the Law of Family Dissolution, addresses both the question of the substantive weight to be given children's preferences and the issue of procedural requirements. In its general recommendations for custody standards, the ALI places great weight on parental autonomy by giving joint parenting plans presumptive enforcement.[103] If the parties cannot agree, however, the ALI proposes a custodial presumption that approximates the proportion of time each parent spent on caretaking functions before separation.[104] Taking a cautious approach in determining what weight

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94. Kandel, *supra* note 3, at 375.
95. *Id.* at 357–61.
96. *Id.* at 369.
97. *Id.* at 370–75.
98. DESKBOOK, *supra* note 76.
99. *Id.* at 61–62.
100. *Id.* at 62.
101. Woodhouse, *Talking about Children's Rights*, *supra* note 52, at 1132.
102. *Id.*
103. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, § 2.06 (2002) [hereinafter ALI]. Under § 2.06, a custody agreement between the parents should be enforced unless the court finds that the agreement "(a) is not knowing or voluntary, or (b) would be harmful to the child." *Id.*
104. *Id.* § 2.08(1) ("[T]he court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of

to give children's preferences, the ALI recommends that courts heed children's wishes only when the child has attained a mature age specified under state law and only when the preferences are "firm and reasonable."[105] If these criteria are met, the child's wishes can be a basis for departing from the ALI's general presumption governing custodial responsibility.[106] Thus, the ALI's general presumption can be modified if necessary to accommodate the wishes of an age-qualified child. In its commentary, the ALI explains that giving weight to the preferences of children can raise "significant difficulties," primarily because of the burden on the child who may feel responsible for the consequences of expressing a preference or frustrated when the custody award is unsuccessful.[107] It also notes that the child's preference can be "unreliable, short-sighted or irrational."[108] For children who do not meet the age criterion, the ALI categorizes their wishes as irrelevant in applying the general presumption. On the other hand, in cases where the ALI general presumption does not apply and the court is therefore engaged in a general best interests analysis, the ALI recommends that even younger children's wishes be considered as mere evidence.[109] Out of an apparent desire to diminish a child's sense of responsibility for the resolution of the dispute, the ALI takes the position that the preferences of children should not be directly solicited but should be ascertained only indirectly.[110]

On the question of methodology, the ALI's recommendations reveal a dual concern for protecting the child's sensitivities and for promoting procedural fairness. The ALI recommends that judges have discretion to interview children, or to direct others to interview them, "in order to obtain information relevant to the issues of the case."[111] Clearly, the ALI envisions a wide-ranging conversation with children that

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time each parent spent performing caretaking functions for the child prior to the parents' separation . . . .").

105. *Id.* § 2.08(1)(b). The ALI recommendation has been criticized for short-changing children's interests. *See* Christine M. Szaj, *The Fine Art of Listening: Children's Voices in Custody Proceedings*, 4 J.L. & FAM. STUD. 131 (2002) (contending that ALI model emphasizes past parental behaviors and fails to consider needs of children; recommending that children actively participate in development of parenting plans).

106. ALI, *supra* note 103, § 2.08(1)(b).

107. *Id.* § 2.08 cmt. f.

108. *Id.*

109. *Id.*

110. *Id.* The ALI's philosophy of avoiding harm to the child is apparent in the Comment:

> [T]he preferences of a child, even when relevant, should not be directly solicited. The risks of involving children in disputes for which they may feel personally responsible may be diminished by ascertaining their preferences indirectly. . . . [I]n most cases, children with firm preferences will find a way to make those preferences known without significant effort by those involved in the case.

Id.

111. *Id.* § 2.14. The full text of the provision is the following:

> The court should have discretion to interview the child, or direct another person to interview the child, in order to obtain information relevant to the

goes well beyond the ascertainment of the child's wishes or preferences, in contrast to the *Molloy* court's reasoning about the optimal scope of questioning. To the ALI, the child is a source of evidentiary information with a "useful perspective"[112] on the issues in the dispute. The proposal also permits the use of a third party to conduct such an interview, and the ALI's commentary suggests the alternative of appointing an investigator, evaluator, or guardian ad litem.[113]

The ALI's proposal does not directly address the due process rights of the litigants. It recommends that counsel for parent or child be permitted to submit questions,[114] but it is silent as to whether counsel should be present during the interview. On the other hand, the ALI notes, without approval or disapproval, that "[t]he practice in most jurisdictions is to require a transcript, videotape, or other reliable means of recording the complete interview, which may be reviewed by the parties and becomes part of the record on appeal."[115] Although that passage may indicate tacit endorsement of such a practice, the ALI stopped short of a clear recommendation on the question of recordation. The driving concerns throughout its proposals regarding custody interviews seem to be to minimize the potential emotional trauma for the child and to protect against the court's use of unreliable evidence.[116]

C. International Trends

In the international realm, there is a growing consensus that protection of children's rights ought to play a more prominent role in family law reform generally and in custody dispute resolution in particular. Driven in large part by the United Nations Convention on the Rights of the Child,[117] children's advocates around the globe are pressing governments to view the child as a human being, endowed with the

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> issues of the case. Counsel for a parent or for the child should be permitted to propose questions to the court that may be asked of the child.

Id.

112. *Id.* § 2.14 cmt. b.

113. *Id.*

114. *Id.* § 2.14, quoted *supra* at note 111.

115. *Id.* cmt. a.

116. *Id.* cmt. b ("Declining to give a greater role to the child's perspective reflects some caution about soliciting their preferences—caution based on their immaturity, their unreliability, and the burdens placed on them when they are asked to choose between parents.").

117. CRC, *supra* note 7, *available at* 28 I.L.M. 1448 (1989). Of the nations of the world, 191 have now ratified the CRC, making it the most widely adopted human rights treaty in history. Among the UN member states, only two hold-outs remain—Somalia and the United States. Somalia signed the CRC in May 2002 but has not yet ratified it. Former President Clinton signed the CRC on behalf of the United States in 1995, but the Senate has not yet ratified it. A current listing of signatories and States Parties to the CRC, along with a comprehensive explanation of the CRC and its background, can be found at UNICEF, *Convention on the Rights of the Child*, *at* www.unicef.org/crc/crc.htm (last visited Sept. 2, 2003).

full panoply of human rights.[118] Children's rights theorists see children as persons, not property; subjects, not objects of social concern or control; participants in social processes, not social problems; and unique individuals.[119] Some commentators have noted that the Convention, which was adopted in 1989 by the U.N. General Assembly, gives international legal recognition to four guiding principles: the child's right to be free from discrimination,[120] the State's obligation to protect the best interests of the child,[121] the child's right to maximum survival and development,[122] and the child's right to participation.[123] The drafters' incorporation of the best interests standard acknowledges the special limitations of children and their dependence on the adult world for protection and guidance. Nevertheless, the Convention sees the minor as a possessor of rights and not solely as an object of paternalistic protection. The Convention leaves room for signatory States to fashion dispute resolution systems that respect a child's agency and dignity while recognizing that children are in an interdependent relationship with others.[124]

Article 12 of the Convention is the central provision protecting the child's right of participation, and it has been construed to protect the child's voice in custody proceedings. That Article provides:

> 1. States 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.

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118. *See* FOCUS ON EARLY CHILDHOOD: PRINCIPLES & REALITIES 175 (Margaret Boushel et. al. eds., 2001); Cynthia Price Cohen, *Introductory Note*, U.N. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/Res/44/25 (1989), *available at* 28 I.L.M. 1448, 1448–53 (1989). Cohen played a principal role in drafting the Convention.

119. *See* Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6 INT'L J. CHILD. RTS. 433 (1998).

120. CRC, *supra* note 7, at Art. 2, *available at* 28 I.L.M. at 1459.

121. CRC, *supra* note 7, at Art. 3, *available at* 28 I.L.M. at 1459 ("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.").

122. CRC, *supra* note 7, at Art. 6, *available at* 28 I.L.M. at 1460.

123. CRC, *supra* note 7, at Art. 12, *available at* 28 I.L.M. at 1461. For an explanation of the background of the CRC and the efforts leading to its adoption, see Cohen, *Introductory Note*, *supra* note 118, *available at* 28 I.L.M. at 1448–52.

124. The CRC obligates signatory states to incorporate a children's rights perspective into their laws, including their family and juvenile law systems, and signatory nations must regularly review their laws and practices to maintain compliance with the CRC. *See* CRC, *supra* note 7, at Art. 44, *available at* 28 I.L.M. at 1473 (requiring States to submit reports within two years of ratifying Convention, and every five years thereafter). As part of the oversight responsibility under the CRC, the United Nations Committee on the Rights of the Child has reviewed government structures for children in over fifty countries. For a description of the monitoring function under the CRC, see UNICEF, *Convention on the Rights of the Child*, *at* www.unicef.org/crc/crc.htm (last visited Sept. 2, 2003).

> 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.[125]

True to its overall philosophy, Article 12 of the Convention recognizes the right of children to meaningfully participate in proceedings affecting their interests.[126] At the same time, the Convention acknowledges that a child's maturity should influence the weight to be given to the child's wishes and that the manner of a child's participation need not be direct. Sometimes referred to as the doctrine of "evolving capacities,"[127] the theory underlying Article 12 is that as children grow towards maturity, they should be given rights in accordance with their varying stages of development. Under Article 12, the child must be capable of forming his or her own views in order to have the right to express those views, and the child's age and maturity must be considered in determining the weight to be given those views.[128]

Law reform advocates have relied on the theme of Article 12 when suggesting changes in child custody dispute resolution procedures. In Europe and elsewhere, revisions in existing law have been proposed to enhance the role of the child's voice in custody dispute resolution.[129] According to New Zealand scholars Tapp and Henaghan, for example, New Zealand family courts have too often ignored

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125. CRC, *supra* note 7, at Art. 12, *available at* 28 I.L.M. at 1461.

126. Professor Woodhouse's contribution to this Symposium Issue suggests that the right of participation can be construed to require the involvement of children even at policy-making levels when children's issues are being considered. *See* Barbara Bennett Woodhouse, *Enhancing Children's Participation in Policy Formation*, 45 ARIZ. L. REV. 751 (2003).

127. Article 5 of the CRC explicitly articulates this theme:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, . . . 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.

CRC, *supra* note 7, at Art. 5, *available at* 28 I.L.M. at 1459–60. *See also* Woodhouse, *Talking About Children's Rights*, *supra* note 52, at 109 (under the Convention, children have "the capacity for growth to autonomy and deserve the right to be treated in a manner consistent with this capacity."); Dr. Yehiel S. Kaplan, *The Right of a Minor in Israel to Participate in the Decision-Making Process Concerning His or Her Medical Treatment*, 25 FORDHAM INT'L L.J. 1085, 1088–89 (2002) (doctrine of "developing capacities" is formulated in Article 12 of Convention).

128. Article 13 complements Article 12 by directing that children have the right to freedom of expression, including the right to seek, receive, and impart information. *See* CRC, *supra* note 7, at Art. 13, *available at* 28 I.L.M. at 1462.

129. *See generally* Cynthia Price Cohen, *The Developing Jurisprudence of the Rights of the Child*, 6 ST. THOMAS L. REV. 1, 63 (1993) (discussing efforts in the European Union to give children a greater role in divorce proceedings); Hon. Claire L'Heureux-Dube, *A Response to Remarks by Dr. Judith Wallerstein on the Long-Term Impact of Divorce on Children*, 36 FAM. & CONCILIATION CTS. REV. 384 (1998) (reporting on efforts in Canada to enhance children's voices in family law cases).

the child's perspective.[130] Under New Zealand statutory law, judges must determine child custody and access in accordance with the child's welfare; judges are required to ascertain the child's wishes "if the child is able to express them" and must "take account of [the child's wishes] to such extent as the Court thinks fit, having regard to the age and maturity of the child." [131] Under that statutory directive, according to critics, New Zealand courts have taken an overly paternalistic stance and have too frequently disregarded or downplayed the expressed wishes of children. In particular, courts often have been willing to subordinate the child's wishes in order to implement an overriding policy, such as fostering contact between a child and her mother,[132] or ensuring contact with both parents.[133]

Tapp and Henaghan are critical of New Zealand courts for their tendency to ignore the child's voice when the expressed view is contrary to what the judge believes is best for the child. They argue that Article 12 requires decision-makers to learn how to listen to children and give more respect to the views expressed by children.[134] They question the common perceptions among judges about children's decision-making that allow judges to discount the child's preferences in custody cases.[135] "Too often," they write, "judges appear to see a conflict between the child's welfare and the child's views, rather than understand that the child's views are an element of welfare and that all the elements of welfare must be considered and balanced in a way which respects both children and their rights and is most likely to assist the child to develop into a healthy, autonomous adult."[136] Treating children with respect and taking their views seriously, however, does not mean that a child's view necessarily controls. Rather, under Tapp and Henaghan's approach, when a judge

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130. Pauline Tapp & Mark Henaghan, *Family Law: Conceptions of Childhood and Children's Voices—The Implications of Article 12 of the United Nations Convention on the Rights of the Child*, *in* CHILDREN'S VOICES: RESEARCH, POLICY AND PRACTICE 91–109 (Anne B. Smith et al. eds., 2000).

131. Guardianship Act, 1968 § 23(2) (N.Z.). For a critique of the Guardianship Act as overly paternalistic and insufficiently respectful of children's autonomy, see Anne B. Smith, Nicola J. Taylor & Pauline Tapp, *Rethinking Children's Involvement in Decision-Making After Parental Separation*, 10 CHILDHOOD 201 (2003).

132. *See* H v. C, 2 F.R.N.Z. 32 (1986); P v. P, 1 F.R.N.Z. 221 (1984).

133. F v. F, 8 F.R.N.Z. 400 (1991).

134. The authors contend that "[t]he Convention's focus on respect for the child and his/her perspective requires that the listener should have the skills to understand what the child is communicating. The listener should have regard to a child's context and may need to understand a child's communication not as adult 'objective reality', but as a window of opportunity to understand a child's perspective." Tapp & Henaghan, *supra* note 130, at 95 (citations omitted).

135. The authors question the common assumption that a child's pain is transient, for example, or that a child's views are subject to coercion or manipulation. They write, "It should not be assumed that a child's views will be the result of, or even open to, coercion to any greater degree than the views of an adult. Decision makers should be prepared to acknowledge the validity of the child's perspective for the child even if, from an adult perspective, giving effect to the child's views would not be for the welfare of the child." Tapp & Henaghan, *supra* note 130, at 105.

136. *Id.* at 104–05.

diverges from a child's wishes, the judge owes the child an explanation of why his or her views have not been implemented.[137] At least in recent cases, New Zealand courts seem to be showing children the respect of speaking with them and of ensuring that the decision is explained to them.[138]

The ratification of the Convention by almost all countries in the world affirms the child's right to be heard. As such, it is consistent with the position of most courts in the United States that children's wishes should be ascertained in custody proceedings. Similarly, the Convention's recognition that the weight to be given to children's views depends on the child's age and maturity comports with the law of most domestic states. On the other hand, the Convention's emphasis on the child as a possessor of rights and evolving autonomy could be interpreted to mean that children should be deemed presumptively competent to express their wishes in a custody dispute unless the judge is persuaded that a particular child is so immature that his or her expressed views are unreliable.[139]

Not surprisingly, the Convention does not address the procedural rights of parents or third parties who might be engaged in a custody contest over the child, although it does acknowledge the continued role of parental authority.[140] Commentators relying on the Convention have advocated for confidentiality in judicial interviews in order to create an atmosphere of trust and honesty with children.[141] Others, however, have taken the position that the child's sensitivities can be protected in an *in camera* interview even if the interview is conducted in the presence of lawyers and a stenographer.[142] The Convention's focus on enhancing children's rights and its goal of ensuring that the child's voice is heard, in other words, do not necessarily require the curtailment of parents' procedural rights.

IV. EVOLVING THEORIES OF CHILDHOOD

Evolving theories of child development and the sociology of childhood can inform the ways in which courts take account of children's views in the resolution of custody disputes. The science of child development has moved beyond notions of

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137. *Id.* at 104–06.

138. *See, e.g.*, T v. T, 17 F.R.N.Z. 133 (1998). *See generally* cases discussed at Tapp & Henaghan, *supra* note 130, at 104–05; cases discussed in Smith, Taylor & Tapp, *supra* note 131, at 210–11.

139. This "presumption of competence" has been proposed by commentators. *See* Smith, Taylor & Tapp, *supra* note 131, at 213 (suggesting that revision of New Zealand's Guardianship Act and other reforms are leading family courts toward "an assumption of competence independent of an age-related threshold").

140. Under Article 5 of the Convention, for example, States must "respect the responsibilities, rights and duties of parents . . . 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." CRC, *supra* note 7, at Art. 5, *available at* 28 I.L.M. 1448, 1459–60 (1989).

141. *See* Smith, Taylor & Tapp, *supra* note 131, at 212 ("Ethical procedures (including confidentiality) are particularly important when children are talking about things they have never discussed publicly before.").

142. L'Heureux-Dube, *supra* note 129, at 389.

fixed maturational stages but is still fundamentally shaped by the foundational work of Jean Piaget.[143] In one of his earliest and most influential books, *Judgment and Reasoning in the Child*,[144] Piaget posited that children pass through fairly well-defined stages of development. Those stages include the period of precausality (birth to years seven or eight) during which children are profoundly egocentric, cannot distinguish between the physical and the psychical, and lack self-consciousness;[145] the concrete operational stage (years seven or eight to about twelve) during which the child begins to understand concepts of logical justification and relations among objects and can differentiate between self and others;[146] and the stage of formal reasoning (year twelve and older), when children acquire the capacity for logical deduction and an understanding of abstract rules.[147] Piaget compared this evolution to "the gradual socialization of thought—ego-centrism, socialization, and finally complete objectivity."[148] Many contemporary theorists diverge from Piaget by emphasizing the fluidity of cognitive and emotional maturation,[149] the highly individualized nature of any one child's progress toward adulthood,[150] the observation of cognitive competencies in children younger than those described by Piaget,[151] and the constant influence of culture, language, and other environmental factors on children's thought processes.[152] Nevertheless, Piaget's developmental theories continue to provide a useful framework for research on children's cognitive capacities.

Young children within Piaget's pre-operational, egocentric stage (infancy through years seven or eight) have limited abilities to take in perspectives other than their own and have difficulty understanding that people possess both good and bad

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143. Publications by Piaget span much of the twentieth century. *See, e.g.*, JEAN PIAGET, JUDGMENT AND REASONING IN THE CHILD (1928); BARBEL INHELDER & JEAN PIAGET, THE GROWTH OF LOGICAL THINKING FROM CHILDHOOD TO ADOLESCENCE (Anne Parsons & Stanley Milgram trans., Basic Books 1958); JEAN PIAGET, THE CHILD'S CONCEPTION OF TIME (A.J. Pomerans trans., Basic Books 1969).

144. *Supra* note 143.

145. *Id.* at 23–24, 55–61, 202–03, 254.

146. *Id.* at 66–69, 74, 148.

147. *Id.* at 74, 133–34, 246.

148. *Id.* at 112.

149. *See, e.g.*, ROBERT SIEGLER, CHILDREN'S THINKING 49–57 (2d ed. 1991) (reporting that children's competencies develop at different rates in different domains).

150. *See, e.g.*, Eberhard Schroder & Wolfgang Edelstein, *Intrinsic and External Constraints on the Development of Cognitive Competence*, *in* CRITERIA FOR COMPETENCE: CONTROVERSIES IN THE CONCEPTUALIZATION AND ASSESSMENT OF CHILDREN'S ABILITIES 131–49 (Michael Chandler & Michael Chapman eds., 1991) (contending that children's cognitive developments are often slow and uneven, highly individualized, and influenced by their social worlds).

151. *See, e.g.*, Anne L. Dean & James Youniss, *The Transformation of Piagetian Theory by American Psychology: The Early Competence Issue*, *in* CRITERIA FOR COMPETENCE, *supra* note 150, at 93 (contending that researchers who challenge Piaget's theories by pointing to the appearance of competencies in very young children overlook the original framework of Piagetian theory about structures of thought).

152. *See generally* CRITERIA FOR COMPETENCE, *supra* note 150.

qualities.[153] Even young children who are not yet capable of reasoned decision-making, however, may have a meaningful emotional or intellectual preference in a custody dispute.[154] Research suggests that children within this age range are capable of rational thoughts about the closeness of their relationships with parents, the time available for the child, stability within the child's day-to-day life, and the degree to which each parent is engaged in care giving.[155] On the other hand, while these young children may have a definite preference for one parent over another, conflicted feelings of loyalty may cause them to tell each parent individually that he or she wants to live with that parent.[156] At this stage, children are sensitive to parental conflict and are often unable to separate their wishes from the influences of their parents.[157] Also, the children's lack of cognitive ability to understand what the judge is attempting to elicit, their lack of emotional maturity to formulate a preference, and their lack of adequate verbal abilities may impede their ability to communicate a preference.[158]

Children falling within Piaget's operational stage of cognitive development (from about years eight to about twelve), are able to give reasoned answers from their own perspective, but they may still experience difficulties in deductive reasoning. As Piaget put it:

> Childish reasoning between the years of 7–8 and 11–12 will . . . present a very definite feature: reasoning that is connected with actual belief, or in other words, that is grounded on direct observation, will be logical. But formal reasoning will not yet be possible. For formal reasoning connects assumptions—propositions, that is, in which one does not necessarily believe, but which one admits in order to see what consequences they will lead to.[159]

A comprehensive study of nine- and ten-year-olds was conducted by Ellen Garrison to compare their competence in explaining custodial preferences with the competence of older adolescents.[160] The results indicated that the target group was as

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153. James H. Bray, *Psychosocial Factors Affecting Custodial and Visitation Arrangements*, 9 BEHAV. SCI. & L. 419 (1992).

154. Lois A. Weithorn, *Children's Capacities in Legal Contexts*, *in* CHILDREN, MENTAL HEALTH, AND THE LAW 44 (N. Dickon Reppucci et al. eds., 1984).

155. Lita Linzer Schwartz, *Children's Perceptions of Divorce*, 20 AM. J. FAM. THERAPY 324, 329 (1992).

156. Weithorn, *supra* note 154, at 44 (discussing "problematic emotional factors that may impinge on a child's decision-making" even without regard to age).

157. *Id.* at 45 (noting that until adolescence, children defer to "powerful others" and are greatly influenced by parents).

158. Linda Whobrey Rohman et al., *The Best Interests of the Child in Custody Disputes, in* PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 59, 75 (Lois A. Weithorn ed., 1987).

159. JUDGMENT AND REASONING IN THE CHILD, *supra* note 143, at 250–51 (citations omitted).

160. Ellen Greenberg Garrison, *Children's Competence to Participate in Divorce Custody Decisionmaking*, 20 J. CLINICAL CHILD PSYCHOL. 78 (1991). Garrison conducted her study by asking hypothetical questions to groups of children and then having the responses evaluated by family court judges. It was not a study of actual performance in custody decision

competent as fourteen-year-olds (the age at which many judges begin to defer to children's preferences) and eighteen-year-olds in formulating a reasonable preference, although developmental differences did appear in the reasons given by the children for their custodial choices.[161]

Robert Emery's work suggests that most children at divorce feel torn by loyalties to each parent,[162] and other research indicates that during the preadolescent period, questions regarding custodial preference can cause emotional turmoil.[163] As noted by Kaslow and Schwartz, "choosing one parent means not choosing the other and asks the young person to violate his/her own sense of loyalty to both parents—a behavior that can produce great guilt and anxiety."[164] Children of elementary school age may "chastise themselves for failing to be able to somehow find a way to smooth things over and be the 'glue' that holds their parents together."[165] One study of children age nine to fifteen years revealed feelings of self-blame for their parents' divorce, hopes for reunification, and the sense of being "in the middle" between the feuding parents.[166]

Children who have developed formal reasoning capacity (around years twelve and older) generally are able to understand others' perspectives, think hypothetically and compare alternatives, and see parents' strengths and weaknesses with some degree of objectivity.[167] Some researchers have concluded that adolescents possess an awareness of parental conflict that allows them to determine their true preferences independent of outside influences.[168] Adolescents are also generally capable of giving well-reasoned explanations for their choices.[169] Nevertheless, they are still susceptible to feelings of loyalty and betrayal, which may cloud their

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making and therefore did not address the age-related differences that might exist due to the emotional impact of the proceedings.

161. The younger children were less likely to cite parental stability and parents' relationship as reasons for custodial preferences, possibly due to the greater egocentrism in younger children. *See id.* at 85.

162. *See generally* ROBERT E. EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 3, 96–97 (2d ed. 1999). At the same time, Emery cautions against making global assumptions about children's adjustment to divorce, since children's psychological health depends on a multitude of factors, including age of child at separation, cultural traditions of the family, socio-economic status, degree of conflict between parents, and nature of parent-child relationship. *See id.* at 1–10.

163. *See, e.g.*, Richard Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399, 407 (1991); James S. Henning & J. Thomas Oldham, *Children of Divorce: Legal and Psychological Crises*, 6 J. CLINICAL CHILD PSYCHOL. 55, 56 (1977).

164. FLORENCE W. KASLOW & LITA LINZER SCHWARTZ, THE DYNAMICS OF DIVORCE: A LIFE CYCLE PERSPECTIVE 162 (1987).

165. *Id.* at 165.

166. Robert Kelly & Berthold Berg, *Measuring Children's Reactions to Divorce*, 34 J. CLINICAL PSYCHOL. 215 (1978).

167. *See* Rohman, *supra* note 158, at 76.

168. Schwartz, *supra* note 155.

169. *Id.*; Garrison, *supra* note 160.

judgment.[170] In addition, adolescents take more risks than adults, weigh short-term consequences more heavily than long-term consequences, and are more subject to peer influence.[171]

Studies also show that the manner in which children's views are elicited is often a delicate task requiring an understanding of the child's emotional vulnerabilities. Certain methods of questioning children, such as the practice of repeating the same question in different words, may inadvertently lead the child to give untrue representations of his or her custodial wishes in an effort to please the questioner.[172] Moreover, direct and seemingly invasive questions from a judge may violate the child's understanding of the rules of conversation and lead to insincere answers.[173] For pre-adolescent children, questions that encourage children to talk about everyday activities[174] and their feelings and ideas[175] would seem more likely to produce reliable responses than abrupt and potentially threatening direct questions. The work of Professor Robert Emery for this Symposium cautions us that giving children a voice in post-divorce decision-making may cause unnecessary psychological hardship for the child by burdening him or her with the responsibility for making adult decisions.[176] Professor Emery fears 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."[177]

Social science research thus suggests that even young children may have definite preferences that can be of value to the custody decision-maker, that children of at least the age of pre-adolescence are more likely to communicate reliable preferences, but that giving children decision-making power may not be in their best interests.

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170. Henning & Oldham, *supra* note 163, at 56; KASLOW & SCHWARTZ, *supra* note 164, at 189, 195.

171. *See* Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 161–68 (1997).

172. *See* MICHAEL SIEGAL, KNOWING CHILDREN: EXPERIMENTS IN CONVERSATION AND COGNITION 15–38 (1991).

173. *Id.* at 121–33.

174. *Id.* (recommending that the reasons for questioning be made clear to children and that the questioning be framed in children's everyday experience).

175. KASLOW & SCHWARTZ, *supra* note 164, at 117–18. According to Kaslow and Schwartz, children should never be asked with which parent they wish to live. "For a child to be placed in a position of making such a choice is to inherently make him/her guilty of disloyalty to the parent he/she does not choose; this constitutes an existential betrayal of a critical biological tie." *Id.* at 117. Instead, they recommend indirect questioning to provide "a kaleidoscopic picture of the child's perception of bonding." *Id.* at 118.

176. *See* Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003); Robert E. Emery, *Easing the Pain of Divorce for Children: Children's Voices, Causes of Conflict, and Mediation*, 10 VA. J. SOC. POL'Y & L. 164 (2002) [hereinafter *Easing the Pain*].

177. Emery, *Easing the Pain*, *supra* note 176, at 170.

Some children's rights advocates, relying on child development research showing that cognitive competencies exist in very young children, argue for greater decisional power for the child. Professor Kandel, for example, has advocated for greater autonomy for children in post-divorce custody arrangements than the law currently allows based in part on such child development research. She points to the work of Piaget on cognitive development and Kohlberg on moral development,[178] among others, to suggest that from early middle childhood on, children have the maturity to choose their custodians.[179] Two risks inhere in that line of argument. First, our understanding of the human brain is constantly evolving, and current research undermines Professor Kandel's position. Recent studies of brain development have overturned prior assumptions that the human brain reached maturity in middle to late childhood and then remained essentially static. Scientists now conclude that biological development within the brain continues through adolescence and in some cases into early adulthood through a process of complex maturation.[180] This research indicates that brain functions governing impulse control, judgment, and the ability to resist coercion are not fully operational until early adulthood.[181] Surely, these capacities are directly relevant to whether children's decisions about future custodial arrangements should control in a given custody dispute.

Second, children's rights arguments based on children's perceived decision-making capacities can readily be used to diminish legal protections for children in other contexts. The law shields minors from the consequences of their own choices in many areas, including the right to marry,[182] to enter into a binding contract,[183] to refuse medical treatment,[184] and, importantly, to commit a crime.[185] Such laws protect

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178. *See generally* LAWRENCE KOHLBERG, 2 THE PSYCHOLOGY OF MORAL DEVELOPMENT: THE NATURE AND VALIDITY OF MORAL STAGES (1984).

179. *See* Kandel, *supra* note 3, at 361–70. Professor Kandel also argued that giving children decision-making responsibility will help their psychological well-being and their ability to make decisions. *See id.* at 367–70.

180. *See* Frances J. Lexcen & N. Dickon Reppucci, *Effects of Psychopathology on Adolescent Medical Decision-Making*, 5 U. CHI. L. SCH. ROUNDTABLE 63, 78–81 (1998); Adolf Pfefferbaum, *A Quantitative Magnetic Resonance Imaging Study of Changes in Brain Morphology from Infancy to Late Adulthood*, 51 ARCHIVES NEUROLOGY 874 (1994); R. Grant Steen, *Age-Related Changes in the Pediatric Brain: Quantitative MR Evidence of Maturational Changes During Adolescence*, 13 AM. J. NEURORADIOLOGY 819 (1997).

181. *See* Lexcen & Reppucci, *supra* note 180, at 79–81.

182. Almost all states designate the age of eighteen as the age of consent to marry; when persons below the minimum age desire to marry, most states require parental consent or, for younger minors, both parental consent and judicial approval. *See generally* SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW 897 (2000).

183. Contractual capacity in almost all states now is achieved at the age of eighteen. Because the underlying policy is to protect minors from overreaching by adults, the power to disaffirm is usually held only by the minor. *See id.* at 893.

184. In general, parents have the authority to make medical treatment decisions for their children, and immature, unemancipated minors lack the legal right to decide otherwise. The "mature minor" doctrine is an inroad on parental power to the extent it authorizes minors with adequate competence to make medical decisions on their own. *See* Jennifer Rosato, *The Ultimate Test of Autonomy: Should Minors Have a Right to Make Decisions Regarding Life-*

minors from full legal responsibility for their conduct because of their presumed lack of capacity. Indeed, the juvenile justice system is based on the premise that children should be protected against the long term implications of their decisions made at a time when they lack sufficient capacity and experience to be held to a standard of adult responsibility.[186] Arguments for greater child autonomy in family dissolution, however, can be used to support arguments for increased criminal responsibility of juvenile offenders, on the logic that evidence of rational decision-making among minors justifies greater culpability. The risk that children's criminal culpability will increase as their rights increase, explained by Martin Guggenheim in this Symposium Issue,[187] has been noted by others.[188]

Nevertheless, while current social science research does not support a child's "right to decide," it clearly supports a child's interest in being heard in proceedings affecting his or her custodial status. Therapeutic jurisprudence, defined as the study of the role of the law as a therapeutic agent,[189] may provide additional insights on the

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Sustaining Treatment?, 49 RUTGERS L. REV. 1, 29–30 (1996). In the context of abortion, the United States Supreme Court has adopted what amounts to a "mature minor" doctrine to enable pregnant teenagers to undergo abortion without parental consent on a sufficient showing of maturity to a court. *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979).

185. Juvenile delinquency systems operate in every state, with jurisdiction over persons who were under eighteen at the time of the offense, but in some states the maximum age for juvenile court is as low as fifteen. Many states have statutory exceptions to the juvenile court's exclusive jurisdiction that are related to the minor's age, alleged offense, and history. *See* RAMSEY & ABRAMS, *supra* note 182, at 1049. The goals of the juvenile justice system are often in tension: to achieve the minor's rehabilitation, to promote the minor's sense of accountability, to protect the community from harm, and to identify minors for whom adult prosecution is advisable. *See* BARRY KRISBERG & JAMES F. AUSTIN, REINVENTING JUVENILE JUSTICE 1–4 (1993).

186. *See* Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 160 (1992); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights*," 1976 BYU L. REV. 605.

187. *See* Martin Guggenheim, *Maximizing Strategies for Pressuring Adults to Do Right by Children*, 45 ARIZ. L. REV. 765 (2003).

188. *See* Donald L. Beschle, *The Juvenile Justice Counterrevolution: Responding to Cognitive Dissonance in the Law's View of the Decision-Making Capacity of Minors*, 48 EMORY L.J. 65 (1999) (exploring possibility that greater recognition of autonomy rights for teenagers creates dissonance with idea that paternalism is still appropriate in criminal sphere); E. Hunter Hurst, III, *The Juvenile Court at 100 Years of Age: The Death of Optimism*, 49 JUV. & FAM. CT. J. 39 (1998) (suggesting that continued emphasis on children's rights has driven movement for imposing greater criminal responsibility on youth); Lexcen & Reppucci, *supra* note 180, at 64 (noting that court decisions giving adolescents greater autonomy in such areas as abortion have led to imposition of greater responsibilities on adolescents in criminal law for their behaviors); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709 (describing trend towards transfer of juveniles to adult court).

189. *See generally* LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick eds., 1996); THERAPEUTIC

question of ascertaining children's preferences. While many judges traditionally have been reluctant to question children because of their desire to prevent further trauma to the child, there are therapeutic arguments that point in the other direction. Some theorists argue that the value of *in camera* interviews is to give the child the opportunity to make a "psychological statement . . . of how he or she has resolved (or failed to resolve) the inevitable loyalty conflict that divorce and separation creates."[190] In other words, a child may receive a therapeutic benefit by the very act of formulating and then articulating his or her thoughts and preferences to the judge, without regard to the weight the judge gives such information.[191] In addition, scholarship increasingly recognizes that children may resent their exclusion from the post-divorce decision making involving their welfare. In her longitudinal study of children of divorce, Judith Wallerstein found that many young adults felt that their wishes as young children were ignored and should have been taken into account in structuring custody and visitation.[192] Mary Ann Mason has advanced a parallel theme in her work,[193] and British sociologist Carol Smart has shown that children in the aftermath of divorce often complain that their wishes are subordinated to the needs of their parents.[194] Likewise, Joan Kelly notes that children are harmed by two sorts of exclusions from participating in the divorce process: they are not informed about the

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JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990); David B. Wexler, *Introduction to the Therapeutic Jurisprudence Symposium*, 41 ARIZ. L. REV. 263 (1999).

190. Alan M. Levy, *The Meaning of the Child's Preference in Child Custody Determination*, 8 J. PSYCHIATRY & L. 221, 223 (1980).

191. On a similar note, one study suggested that children in contested divorces fared better on certain measures of psychological health than children in uncontested divorces. The authors surmised that the children in contested divorces developed stronger adaptive coping mechanisms and a stronger sense of personal influence on events than did the children in uncontested divorces because of more open discussion of family conflict in custody litigation, increased opportunities for catharsis, and pressures to resist parental lobbying. *See* Wolman & Taylor, *supra* note 163, at 408–09.

192. JUDITH S. WALLERSTEIN ET AL., THE UNEXPECTED LEGACY OF DIVORCE: A 25-YEAR LANDMARK STUDY 174–85 (2000) (reporting on psychological harm to children who did not have voice in post-divorce visitation scheduling); Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report From a 25-Year Study*, 36 FAM. & CONCILIATION CTS. REV. 368 (1998) (same). *See also* William V. Fabricius & Jeff A. Hall, *Young Adults' Perspectives on Divorce*, 38 FAM. & CONCILIATION CTS. REV. 446 (2000) (reporting on survey in which young adults whose parents had divorced during respondents' childhood expressed resentment about custodial arrangements that provided inadequate contact with fathers); KASLOW & SCHWARTZ, *supra* note 164, at 162 (not being consulted at all, especially among adolescents, leads to resentment and a sense of helplessness which may contribute to depression).

193. MARY ANN MASON, THE CUSTODY WARS 65–92 (1999).

194. *See* Carol Smart, *From Children's Shoes to Children's Voices*, 40 FAM. CT. REV. 307 (2002); Carol Smart & Bren Neale, *'It's My Life Too'—Children's Perspectives on Post-Divorce Parenting*, 30 FAM. L.J. 163 (2000).

changes happening to their families, and they are not asked to give their views regarding future living arrangements or other matters relevant to them.[195]

Similarly, New Zealand researchers Tapp and Henaghan have concluded that "[b]eing heard develops feelings of self-esteem, competence and relatedness which are vital to a citizen in a democracy."[196] In their view, if the legal system ignores children's perspectives, it not only misses crucial information but it also may inflict harm on children by excluding them from the process. They report that children, when asked why they should be included in decision making, consistently put at the top of the list "to be listened to," and put at the bottom of the list "to get what I want."[197] Other research supports the finding that children want to be consulted about their custody arrangements although they may not want to be the ultimate decision-maker.[198]

Moreover, American scholarship addressing due process values for adults has noted that an intangible benefit beyond the more concrete interest in results, what Jerry Mashaw calls the "dignity value,"[199] stems from participation in adversary proceedings. Speaking of an individual's right to be heard in administrative proceedings, Mashaw wrote, "To accord an individual less when his property or status is at stake requires justification, not only because he might contribute to accurate determinations, but also because lack of personal participation causes alienation and a loss of the dignity and self-respect that society properly deems independently valuable."[200] Under that view, personal participation in a proceeding affecting one's

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195. Joan B. Kelly, *Psychological and Legal Interventions for Parents and Children in Custody and Access Disputes: Current Research and Practice*, 10 VA. J. SOC. POL'Y & L. 129, 149 (2002) (citing studies suggesting that high percentages of children receive little communication about divorce from parents).

196. Tapp & Henaghan, *supra* note 130, at 95 (citations omitted). *See also* Gary B. Melton, *Decision Making by Children, in* CHILDREN'S COMPETENCE TO CONSENT 21 (Gary B. Melton et al. eds., 1983).

197. Tapp & Henaghan, *supra* note 130, at 97. *See also* Smith, Taylor & Tapp, *supra* note 131, at 207–08 (reporting on study in which children, when asked what advice they would give their separating parents, responded most commonly that children should be consulted).

198. *See, e.g.*, Smith, Taylor & Tapp, *supra* note 131, at 201, 205–08 (using empirical study of children of divorce to challenge the implicit assumption within family law that children will suffer "a burden of responsibility" if involved in decisions about their living arrangements); Smart & Neale, *supra* note 194 (reporting on post-divorce interviews with children showing that many children felt they should have voice in family decision-making but that more powerful adults should take responsibility for difficult decisions); Megan M. Gollop, Anne B. Smith & Nicola J. Taylor, *Children's Involvement in Custody and Access Arrangements After Parental Separation*, 12 CHILD & FAM. L.Q. 383, 396 (2000) (reporting on post-divorce interviews with children, showing that children vary in desired degree of involvement in family decisions but that most children appreciated and valued having their views solicited).

199. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50 (1976).

200. *Id. See also* Melvin Aron Eisenberg, *Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller*, 92 HARV. L. REV. 410 (1978); Robert S.

interests brings a benefit apart from enhancing the validity of result. Other scholars have extended this insight through empirical work showing that one's perceived influence on decision-making that impacts one's life is related to positive mental health.[201] Bruce Winnick, for example, has argued that full participation in civil commitment proceedings can result in significant therapeutic benefits for the person whose liberty is at issue.[202] Winnick argues that people may benefit emotionally if they are assured a voice in the proceedings and know their views are taken seriously, whether or not the court ultimately orders the commitment.[203] Just as adults may benefit from participating in proceedings affecting their liberty, children likewise may cope better with the inevitable changes brought about by divorce if they feel their views have played a role in the decision-making process.

V. RECOMMENDATIONS FOR REFORM

In resolving parental fights over children, courts face a daunting judicial task where emotions run high and the human consequences are profound and long-lasting.[204] As a result, many judges are frustrated with the adversarial process in resolving child custody disputes and intensely dislike the responsibility of allocating custody between two feuding parents.[205] While the best interests standard itself has had many detractors over the years,[206] the recommendations in this Part will not revisit that debate but instead will focus on the substantive relevance of the child's voice in determining best interests and the procedural mechanisms for incorporating the child's voice.

The child's right to be heard in custody proceedings, implicitly recognized under the law of almost all domestic states and expressly recognized under the norms

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Summers, *Professor Fuller's Jurisprudence and America's Dominant Philosophy of Law*, 92 HARV. L. REV. 433 (1978).

201. *See, e.g.*, Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV. 433, 439–40 (1992) (reporting that people perceive procedures as more fair when they are allowed to participate, and that people value the affirmation of their status by legal authorities as competent, equal, citizens and human beings). In Tyler's view, treatment by legal authorities plays an important role in defining peoples' feelings of self-esteem and self-worth. *Id.* at 442. *See also* Tom R. Tyler, *Governing Amid Diversity: The Effect of Fair Decisionmaking Procedures on the Legitimacy of Government*, 28 LAW & SOC'Y REV. 809 (1994); Gary B. Melton, *Parents and Children: Legal Reform to Facilitate Children's Participation*, *in* AMERICAN PSYCHOLOGIST 935 (1999).

202. *See* Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37 (1999).

203. *Id.*

204. In states such as Arizona, the task may be all the more daunting because of the discretion inherent in the best interests standard and the lack of procedural guidelines for implementing that standard. *See supra* notes 8–12, 53–60 and accompanying text.

205. *See* App. B (reproducing responses to an open-ended question on the Arizona Survey inviting suggestions for reforms).

206. *See* Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987); Mary Anne Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1365 (1986); Mnookin, *supra* note 1.

of international law, derives from the fact that he or she is the person with the most vital interest in the proceeding.[207] Although that interest does not necessarily give the child a right to participate as a named party,[208] courts at a minimum should consider the child's views if the child is capable of making her views known and wants to make them known.[209] The child's right to be heard in any proceeding in which her custody is at stake should not be construed as a right to decide but as the right to have her views seriously considered.[210] Such a right to be heard recognizes the child's personhood and dignity, and it ensures that information of potentially unique significance will reach the court. As noted in Part IV, studies of children's cognitive and emotional development indicate that even very young children may be able to communicate material and relevant information, and, moreover, may benefit emotionally from the process of being consulted. When the child is allowed to speak, even if through a representative, the child's satisfaction with the proceeding is enhanced.[211]

Any attempt to fashion policy in this sensitive area must draw on the experience and expertise of family court judges. The Survey revealed that judges in

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207. *See, e.g.*, J.A.R. v. Superior Court, 877 P.2d 1323, 1330 (Ariz. Ct. App. 1994) (child has interest in outcome of custody modification action, although not a named party); Veazey v. Veazey, 560 P.2d 382, 386 (Alaska 1977) (child is person most interested in outcome of custody dispute).

208. Children generally are not formal parties to custody disputes, but the law of most states permits the appointment of attorneys or guardians ad litem to represent children in custody litigation. *See, e.g.*, *J.A.R.*, 877 P.2d at 1331 (upholding denial of child's right to intervene in custody proceeding, based on presence of alternative methods available to court to protect child's interest in outcome, such as *in camera* interview and appointment of independent counsel for child); Reed v. Reed, 734 N.Y.S.2d 806, 811 (N.Y. Sup. Ct. 2001) (child in custody dispute has no due process right to testify and confront witnesses). *See generally* Katherine Hunt Federle, *Looking for Rights in all the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1551–56 (1994) (reviewing variations in state laws regarding appointment of representatives for children).

209. Interestingly, a majority of the respondents in the Arizona Survey agreed with the proposition that children have a right to be heard in custody litigation. *See* App. A, Tbl. 7, discussed Author at note 44–49 and accompanying text.

210. Woodhouse, *Talking About Children's Rights*, *supra* note 52, at 124. Perhaps older adolescents should be deemed to possess the "right to decide," at least where they demonstrate on a case-by-case basis sufficient maturity to appreciate the nature of the decision and its consequences. *Id.* The approaches of courts to decision-making by minors in other contexts provide useful analogies. The constitutionally protected rights of pregnant adolescent girls regarding abortion, for example, require courts to make an individualized determination to assess the girl's maturity and level of understanding. If the judge is persuaded that the girl is sufficiently mature to make an informed decision to terminate pregnancy, her decision controls. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). Similarly, under the "mature minor" doctrine, courts have developed methods of evaluating the desires of adolescents to refuse medical treatment under certain circumstances. *See generally* Mlyniec, *supra* note 3 (applying concepts of informed consent and voluntariness to children's choices in abortion, medical treatment, and juvenile justice systems).

211. *See supra* notes 189–203 and accompanying text.

Arizona give more weight to the custody preferences of older children than those of younger children, but a majority of judges characterized the wishes of children as young as pre-school or early elementary school as at least "possibly significant."[212] Moreover, the Survey respondents gave greater weight to a child's psychological maturity than to his or her chronological age.[213] The discretion allowed by Arizona's statutory scheme permits judges to gauge on a case-by-case basis the weight to give to any child's stated wishes. The adoption of an absolute age guideline, such as that codified in Georgia where the child's choice governs unless the preferred custodian is unfit,[214] would constrain that discretion and would be inadvisable for several reasons. Although most judges already defer to the wishes of older children as a practical matter, courts should retain the authority to "overrule" even the older child where the circumstances point convincingly in the other direction.[215] Rather than limiting court discretion to cases where the preferred custodian is deemed "unfit," judges should be permitted to look behind the child's expressed preferences to the underlying reasons. Social science research reminds us, moreover, that teenagers are still evolving and in some cases still need to be protected from their own decisions. Finally, when a statute explicitly provides an age minimum above which children's wishes control, there is a real danger that courts will tend to discount altogether the wishes of children below the designated age.

The right to be heard does not mean that the child must always communicate directly with the decision-maker. It should be recalled that respondents to the Survey preferred to receive information about children's preferences through means other than the *in camera* interview.[216] Judges may be more comfortable receiving information from court-appointed custody evaluators, mental health experts, guardians ad litem, or counsel for the child. Where the child is able and willing to articulate preferences, the appointment of independent counsel for the child may be particularly helpful in high conflict cases as a means of getting the child's views before the decision-maker.[217] The lawyer's role in such cases has been the subject of intense

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212. *See* App. A, Tbl. 1.

213. *See* App. A, Tbl. 2, discussed *supra* at notes 20–24 and accompanying text.

214. *See* GA. CODE ANN. § 19-9-3(a)(4) (2003).

215. *See, e.g.*, *In re* Guardianship of Janke, 500 N.W.2d 207 (S.D. 1993) (court did not defer to preference of fourteen-year-old boy seeking to live with father where evidence showed that father had made "economic hostages" of son and his sister by purchasing clothing, computers, and musical instruments which they were only allowed to use while in father's home).

216. *See* App. A, Tbl. 4, discussed *supra* at notes 28–35 and accompanying text.

217. *See* J.A.R. v. Superior Court, 877 P.2d 1323 (Ariz. Ct. App. 1994). For contrasting proposed standards governing legal representation of children, see *American Bar Association Proposed Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases*, 29 FAM. L. Q. 375 (1995) (attorney should advocate child's articulated preference, should recognize that child's disability from immaturity is incremental, and should advocate legal interest if child will not or does not express preference); *American Academy of Matrimonial Lawyers Standards for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings*, 13 J. AM. ACAD. MATRIM. LAW. 1 (1995) (attorney must advocate wishes of "unimpaired" child, and should act only as conduit of information for "impaired" child); *Recommendations of the Conference on Ethical Issues in Legal Representation of*

debate within the last decade, with disagreement focusing on such fundamental questions as whether appointment of counsel should be mandatory, how a lawyer should determine a child's capacity to direct the legal representation, or what the lawyer should do for children who lack that capacity.[218] Those difficult and important questions are beyond the scope of this Article, but judicial discretion would seem particularly valuable on the question of the appointment of guardians ad litem and legal counsel. A flat rule requiring appointment of counsel poses significant practical problems because of the monetary and emotional costs of introducing another lawyer into custody dispute resolution. Instead, judges should retain discretion to select on a case-by-case basis the best procedural mechanism for ensuring that the child will be heard, with due regard for family dynamics and the particular child's willingness and ability to express her views. In some cases, a court-appointed advocate for the child may be able to help the court decide which procedures would best serve the interests of the child.[219]

Less adversarial methods of dispute resolution have been widely recommended for custody contests, and comments from judges in the Survey reveal that many judges would like to remove custody disputes from the courts altogether.[220] Mediation as an alternative has been particularly popular since the 1980's, and many praise it as a more effective, less destructive, and more satisfying form of dispute

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Children, 64 FORDHAM L. REV. 1301 (1996) (attorney must follow child's expressed preferences and attempt to discern wishes in context in developmentally appropriate way if child is incapable of expressing viewpoint); JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 16 (1997) (attorney should develop relationship with child over time and interpret child's wishes in context).

218. For an insightful examination of the child's limited capacity to direct counsel, see Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999). *See also* Katherine Hunt Federle, *The Ethics of Empowerment: Rethinking the Role of Lawyers in Interviewing and Counseling the Child Client*, 64 FORDHAM L. REV. 1655 (1996) (exploring ways in which lawyers can redefine their role *vis a vis* the child client); Federle, *Looking for Rights*, *supra* note 208 (advocating mandatory appointment of legal counsel for child in all custody proceedings as means of ensuring child's right to be heard); Catherine Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1579 (1996) (advocating mandatory appointment of independent counsel for children in high conflict divorces).

219. In *Reed v. Reed*, 734 N.Y.S.2d 806 (N.Y. Sup. 2001), for example, the "law guardian" for the child in a custody dispute persuaded the trial court that neither an *in camera* interview nor testimony in court would be in the child's best interests, since the six-year-old child had been interviewed by multiple persons and transcripts of prior interviews were available.

220. *See* App. B. One judge, for example, commented that "custody disputes shouldn't even be in the courts." *Id.* In that judge's view, the adversarial nature of custody litigation interferes with children's best interests, making mediation or arbitration a better alternative. Another judge suggested that there should be "[a]utomatic referral to in-house custody evaluators for dispute resolution." *Id.* Still another judge wrote that "great emphasis on mediation or other informal, out of court resolution of issues would save the parties significant legal expenses, the court a lot of time and result in better compliance by parents and adjustment by children." *Id.*

resolution.[221] About one-half of the states now authorize family courts to order mediation at their discretion, and about one-quarter of the states mandate mediation in custody disputes.[222] Even in mediation, however, the ultimate resolution of the dispute may be enhanced if children are participants in the process. In some models of mediation, for example, interviews with the children occur early in the mediation process so that parents are sensitized to the reality that the children's interests are separate from their own.[223] Thus, the recognition that the child has a right to be heard should extend beyond the formal litigation context to non-litigative methods of resolving child custody disputes.

Litigants to a custody dispute have a deep interest in the outcome of the action, an interest that is clothed with constitutional protection. In a series of cases beginning in the early twentieth century, the Supreme Court has recognized that parents have a constitutionally protected liberty interest under the Due Process Clause to direct the upbringing and education of their children.[224] It recently reaffirmed that constitutional principle in *Troxel v. Granville*,[225] where it struck down a Washington statute that authorized visitation with a child by "any person" over parental objection on a mere best interests showing.[226] Although the case produced six different opinions, none of which garnered a majority vote, all Justices except Justice Scalia agreed that the Due Process Clause protects parents' rights to make decisions concerning the upbringing of their children.[227] As Justice O'Connor explained for a

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221. *See generally* ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION (1994).

222. *See* Carrie-Anne Tondo, *Mediation Trends: A Survey of States*, 39 FAM. CT. REV. 431 (2001). For an excellent overview of the methodologies of mediation and the attendant advantages and drawbacks, see CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS AND FUTURE PROSPECTS (2001).

223. *See, e.g.*, Kelly, *supra* note 195, at 155–62 (describing various models for including children in mediation process).

224. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (imposing clear and convincing evidence standard before state may terminate parental rights); Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding right of Amish parents to train children within Amish traditions); Stanley v. Illinois, 405 U.S. 645 (1972) (striking down on Due Process and Equal Protection grounds state law that conclusively presumed unmarried father to be unfit for custody of child); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding right of parents to control education of their children).

225. 530 U.S. 57 (2000).

226. The Washington statute provided:

> Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances.

WASH. REV. CODE § 26.10.160(3) (2000).

227. Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Ginsburg and Breyer, concluded that the Washington statute as applied violated the due process right of the objecting parent to make decisions concerning the care and custody of her children. 530 U.S. at 60–76. Justice Souter reasoned that the Washington statute was unconstitutional on its face. *Id.* at 75–80. Justice Thomas concluded that the statute was invalid because it lacked even a legitimate governmental interest, reasoning that the fundamental right of parents to rear their

plurality, the Due Process Clause provides heightened protection against governmental interference with fundamental liberty interests.[228] She wrote, "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[229] In *Troxel*, the state impermissibly infringed on the mother's liberty interest by overriding her desires concerning visitation with her children by the paternal grandparents.[230] That same liberty interest, a function of substantive due process rights, logically requires the state to afford parents procedural due process protections when they are involved in custody litigation *inter se.* Concededly, *Troxel* was a dispute between a parent and a non-parent, and the Court's decision turned largely on the outsider status of the grandparents' application for visitation.[231] Nevertheless, the same constitutional interest is implicated in a custody battle between parents since a custody decree may significantly deprive one or both contestants of physical access to and legal authority over a child. The custody decree, although modifiable,[232] potentially shapes the parent-child relationship for years to come and can directly limit the parents' contribution to the child's development.

Recognizing that litigants in private custody disputes have important liberty interests at stake does not answer the question of the procedural protections that are necessary to protect those interests. While the Supreme Court has addressed the procedural due process rights of parents when confronted with state efforts to remove children from their care, [233] it has not directly addressed the procedural due process implications of interparental custody litigation. Certain principles, however, seem clear. The heightened procedural protections that must be observed when the state attempts to sever the parent-child relationship do not govern the private custody

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children requires a strict scrutiny standard of review. *Id.* at 80. Justice Stevens dissented, but agreed that "parents have a fundamental liberty interest in caring for and guiding their children." *Id.* at 87. Similarly, Justice Kennedy dissented, but agreed that parents have a constitutionally protected liberty interest "to determine, without undue influence by the state, how best to raise, nurture, and educate the child." *Id.* at 95.

228. *Id.* at 65.

229. *Id.*

230. Justice O'Connor's plurality opinion emphasized the fact that the trial judge gave no deference to the wishes of the mother (who had agreed to limited visitation) and, indeed, seemed to have required the mother to disprove that visitation was in the children's best interests. *See id.* at 69–70.

231. Justice O'Connor described the Washington statute as "breathtakingly broad" in its authorization of visitation for any person at any time on a finding that visitation would serve the child's best interests. *Id.* at 67.

232. Because of the strong policy favoring continuity for children, a final custody decree is generally nonmodifiable except upon a showing of changed circumstances affecting the child's best interests. *See* UNIF. MARRIAGE & DIVORCE ACT § 409, 9A U.L.A. 439 (1998).

233. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745 (1982) (imposing clear and convincing evidence standard on state before it can terminate parental rights); Stanley v. Illinois, 405 U.S. 645 (1972) (requiring state to afford biological father procedural due process before presuming him unfit upon death of biological mother); Armstrong v. Manzo, 380 U.S. 545 (1965) (requiring state to give father notice and opportunity to be heard before terminating his rights to child in adoption proceeding).

dispute when the state is mediating between parties who will retain legal parenthood. Nevertheless, in light of the liberty interest recognized most recently in *Troxel*, the Due Process Clause still requires the state to afford each parent adequate procedures that are fundamentally fair before it can reshape the parent-child relationship. What constitutes "adequate" can be examined under the familiar framework of *Mathews v. Eldridge*[234] by assessing the private interests that will be affected by the governmental action, the government's interests and goals, and the risk of erroneous deprivations through the use of a given procedure.[235] Although the categorization and balancing technique underlying *Mathews* has been soundly criticized,[236] it nevertheless provides an analytical tool with which one can identify the competing interests at stake in a custody dispute.

As discussed in Part IV, states disagree markedly on the procedural protections that should be extended to litigants in private custody disputes, especially with regard to the conduct of the *in camera* interview with children. Although the interview may not be a favored mechanism in ascertaining children's wishes, its widespread use raises due process concerns that cannot be avoided. In any custody proceeding, the child, the parents, and the state share a presumed substantive interest in achieving the best custodial arrangement for the child, but the parents' interpretations of that interest typically diverge. Each parent may pursue the goal of retaining or obtaining maximum custody and control of the child as against the other. If a court chooses to ascertain a child's wishes in an *in camera* interview, the child has not only the abstract interest in his or her welfare being protected but may also have a firm preference for a particular custodial arrangement. The child, moreover, may have an immediate interest in maintaining as much confidentiality as possible to avoid the prospect of parental recriminations and to reduce the emotional trauma of the proceeding. In contrast, a parent presumably wants access to all of the evidence that a judge may rely on in reaching a decision. The paramount governmental interest concerns the protection of the child's present and future welfare. To effectively safeguard the child's well-being, the state needs access to all relevant evidence, and

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234. 424 U.S. 319 (1976). *Mathews*, of course, involved the very different context of a governmental effort to withhold disability benefits under the federal Social Security program.

235. As Justice Powell explained for the majority in *Mathews*, due process challenges in the administrative context require courts to evaluate the degree of potential deprivation, the fairness and reliability of existing procedures, and the costs and benefits to the public of requiring additional procedural safeguards. *Id.* at 342–49. *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 674–77 (2d ed. 1988). Professor Starnes likewise has concluded that parents have a due process right to challenge the accuracy of children's statements in an *in camera* interview, and she suggests that the risk of emotional harm to children can be lessened by downplaying the role of children's preferences. *See* Starnes, *supra* note 3, at 143–67. Relying on the ALI's proposed presumption, she contends that "[p]ast caretaking should . . . determine custody except in extraordinary cases involving children near majority whose preferences are so fiercely held as to make arrangements inconsistent with that preference unworkable and therefore harmful." *Id.* at 167.

236. Scholars have forcibly argued that the balancing approach of *Mathews* is susceptible to unprincipled adjudication and that it imposes an impossible task on courts when faced with incommensurable interests. *See generally* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Mashaw, *supra* note 199.

confidential *in camera* interviews can further that evidentiary goal by increasing the likelihood that children will be open and frank. If a confidential interview is an efficient means of securing honest communication from children, one must ask, under *Mathews*, whether the secret *in camera* interview is likely to lead to erroneous decisions. The risk of error seems beyond debate, and numerous courts have acknowledged that serious due process problems can arise if a trial judge relies on unrecorded statements from children in reaching a custody resolution.[237]

Given the weight of the parents' liberty interest and the possibility of error if *in camera* interviews are not recorded, the *Mathews* analysis points to the need to safeguard parents' rights. Although children may suffer additional hardship by the absence of confidentiality, most states in the United States have not allowed that possibility to defeat the parties' due process rights.[238] The use of an *in camera* interview, private but recorded, still shields the child from having to testify in open court and may be the optimal accommodation of the potentially conflicting interests of parents and children. Consistent with the practice of a majority of the Survey respondents, trial judges should have considerable discretion in ascertaining children's views through indirect questioning, a method that psychologists view as the least traumatizing to younger children.[239] Although some states have gone further and required by statute that counsel be present and allowed to submit questions,[240] that additional protection would potentially harm the child and seems unnecessary so long as the parties are allowed access to the record and the opportunity to make arguments based on that record.

The primary argument against a requirement of recordation of the *in camera* interview is that the child will not be forthcoming or, if the child is frank, that the child will suffer because of divided loyalties to the divorcing parents. Due process, however, is sufficiently flexible to accommodate the child's interest in avoiding undue emotional anguish. The child, who should be informed that the interview will be

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237. *See, e.g.*, Watermeier v. Watermeier, 462 So. 2d 1272 (La. Ct. App. 1985) (without record and opportunity for parties to challenge child's statements, trial judge might rely on "wild or false" accusations that child may have made "perhaps in his fancy"); Foskett v. Foskett, 634 N.W.2d 363 (Mich. Ct. App. 2001) (trial court erroneously relied on "impressions" from *in camera* interview about mother's misconduct lacking in trustworthiness).

238. *See* cases cited *supra* at notes 67–86 and accompanying text.

239. In this respect, the contrary conclusion of the Michigan Court of Appeals in Molloy v. Molloy, 637 N.W.2d 803 (Mich. Ct. App. 2001), *vacated on other grounds*, 643 N.W.2d 574 (Mich. 2002), rests on an unnecessary premise. The court of appeals concluded that a judge's wide-ranging questioning of the child *in camera* about issues other than the child's preference raised due process problems for the litigants. The perceived due process problem in *Molloy* was triggered by the court's conclusion that the record should be sealed for appellate review. *See id.* at 810-11. The concerns in *Molloy*, however, are accommodated if the parties are presumptively given immediate access to transcripts of the *in camera* interview, without regard to whether the scope of the interview went beyond the child's preferences. On a practical level, the court acknowledged the difficulty of its own guidelines because *in camera* interviews often touch on a wide variety of topics if the judge attempts to ascertain the reasons for the child's stated preferences.

240. *See supra* note 70 and accompanying text.

recorded and shared with her parents, may choose not to speak at all, or she may choose to speak about indirect factors but not to express a clear preference.[241] The fact that a majority of courts across the United States require some form of recordation suggests a consensus that the relative privacy and informality of the interview setting, even if the interview itself is not kept confidential, provides a measure of emotional protection for children.[242] The Arizona Court of Appeals recognized the elasticity of the due process framework more than 20 years ago when it upheld the use of a private but recorded *in camera* interview in juvenile court dependency proceedings. In *In re Appeal in Maricopa County Juvenile Action No. JD-561*,[243] the court observed that in conducting a due process inquiry, "[t]he various interests must be considered, weighed and adjusted before determining the safeguards essential to due process," adding that the common concern of all parties should be the "current and future welfare of the child."[244] The court concluded that a private but transcribed interview with the child in chambers provided a means of accommodating the competing concerns:

> [The recorded *in camera* interview] protects the child against the possible harmful effects of direct confrontation with its parents in an unbridled episode of cross-examination and at the same time affords the parent an opportunity to know what is going on, what is being said, to present rebuttal evidence, and to include a transcript of the proceedings on any appeal.[245]

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241. For a description of children's varying levels of comfort with *in camera* questioning, see Kelly, *supra* note 195, at 153–54.

242. The Mississippi Supreme Court recently recognized the trade-offs:

> We agree with our sister states that a record of in-chambers interviews with children must be made and become a part of the record. . . . A record must be made by a court reporter physically present during the in-chambers interview. We are mindful that a child may be uncomfortable in an in-chambers interview with even one adult, and that discomfort might be exacerbated by the presence of a second adult with the attendant equipment of a court reporter. However, we are confident that the chancellors in our state will be able to provide an atmosphere in which the child is able to converse freely with the chancellor, without attention being drawn to the reporter. It will be at the court's discretion whether to seal the interview, which may by order of the trial or an appellate court be unsealed for review.

Robison v. Lanford, 1999-CT-01836-SCT, 841 So. 2d 1119, 1125–26 (Miss. 2003).

243. 638 P.2d 717 (Ariz. Ct. App. 1981).

244. *Id.* at 721 (holding that father was not denied due process by his exclusion from *in camera* interview by juvenile court independency action so long as transcript of interview was made available to him; due process is flexible and allows court to protect child from trauma of face-to-face confrontation). Although *Maricopa County Juvenile Action No. JD-561* was a dependency proceeding rather than a private custody dispute, the court drew on precedents from the custody arena and explicitly analogized the two contexts. *See id.* at 724 n.3 ("We view those cases in which parents are vying for custody of children as in contested divorce actions as highly analogous to dependency proceedings, in that both are civil in nature, the issues and relief sought are often parallel, and the welfare of the child is always involved.").

245. *Id.* at 725.

The Arizona court's analysis strikes an uneasy but justifiable balance between the protection of children's sensitivities and the recognition of parents' due process rights, an approach that other courts have endorsed as well.[246]

The discussion of state law in Part IV shows a range of approaches to the question of accommodating children's interests and parents' procedural due process rights, with some states going further than necessary in protecting parents' rights and others not going far enough. While a few jurisdictions impose a recordation requirement as absolute and non-waivable by statute,[247] the approach more consistent with due process analysis is to recognize that parties can waive their right to have the interview transcribed.[248] Indeed, in this arena, parents and care-givers sometimes choose altruistically to spare the child the potential added trauma of having the child's words made known. On the other hand, a few states have stopped short of requiring that litigants have access to the record of *in camera* interviews and instead have concluded that sealing the record from all but the appellate court is necessary for the protection of the child.[249] That approach allows appellate courts to see the actual record, thereby purportedly protecting the integrity of the judicial process, but withholds the record from those most likely to know whether it contains truth or falsity. By placing the aggrieved parent in the position of challenging an unknown, the sealing of the record for appellate review seems flatly inconsistent with traditional interpretations of procedural due process. Although scrutiny by an appeals court may prevent some trial court errors, an aggrieved party is in a unique position to point out gaps or misrepresentations.

A case study described by Professor Woodhouse provides a useful illustration of the risks inherent in not disclosing the content of *in camera* conversations to custody litigants. In an article advancing a children's rights perspective in child custody litigation, Professor Woodhouse describes a dispute in which two parents have agreed to split custody of their three children, with the mother taking the two younger daughters and the father taking the teenaged son. The judge learns in a private *in camera* interview with the son that the father "is an alcoholic and emotionally abusive. [The son] agreed to the plan because he wants to protect mother

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246. *See, e.g.*, *Robison*, 841 So. 2d at 1125–26 (holding that due process requires that record be made of *in camera* conversation with child and urging trial judges to be sensitive to child's discomfort from having court reporter present).

247. *See supra* notes 67, 69 and accompanying text.

248. For example, in Marshall v. Stefanides, 302 A.2d 682 (Md. Ct. Spec. App. 1973), the court stated:

> "We are confronted . . . with an attempt to balance the right of the parents to present evidence as to what they deem to be in the best interest of the child as against possible severe psychological damage to the child. We believe that a Chancellor's interview of a child in a custody case out of the presence of the parties to be proper . . . .
>
> In all cases, unless waived by the parties, the interview must be recorded by a court reporter. Immediately following the interview its content shall be made known to counsel and the parties . . . ."

Id. at 685.

249. *See supra* notes 72–74 and accompanying text.

and his sisters and thinks father's having primary custody of him will defuse father's anger."[250] According to Professor Woodhouse, both parents withheld information about the father's problems from their attorneys and the judge for fear the father would be fired from his job.[251] We are told that in the actual case, the judge rejected the agreement of the parents and ordered the children to remain in the mother's custody.[252]

Professor Woodhouse uses the scenario to show how children benefit from involvement in custody proceedings and how their involvement can contribute valuable information to the process. The case is illuminating for an additional and distinct reason. The scenario shows how children's private communications in chambers can contain quite damaging allegations about parents in a custody dispute. Without an opportunity to read the transcript of his son's statements *in camera*, the father in the case would not know the basis of the judge's decision. If the case were one in which each party had sought sole custody, the son's allegations of alcoholism and emotional abuse against the father surely would have been determinative of the ultimate outcome. If the interview were recorded and made available to the litigants, the father would have had an opportunity to challenge the accuracy of the boy's statements or to argue against the implications of the statements. Without the transcripts, the father's opportunity to be heard is meaningless.[253]

When courts choose to ascertain children's wishes by means other than a direct interview, due process similarly requires that any reports or evaluations considered by the judge be made available to the parties with full opportunity to rebut the proffered observations. Thus, parents should have access to reports of guardians ad litem, custody evaluators, and expert witnesses and, in general, should be given the opportunity to cross-examine the person who has produced the report.[254] Some states,

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250. Woodhouse, *Talking About Children's Rights*, *supra* note 52, at 126–27.

251. *Id.* at 127.

252. *Id.*

253. In *Watermeier v. Watermeier*, 462 So. 2d 1272 (La. Ct. App. 1985), the court persuasively identified the same problem:

> [W]hereas we are impressed by the very plausible argument . . . that an interview by the judge alone (without a record being made and without the ominous presence of parents and counsel), would relieve the child of the fear and tension so that he would be more inclined to talk freely and truthfully, we cannot agree. To do so would do violence to the basic concerns of our adversary system because the attorneys and parties, as well as the appellate court, would be forced to trust completely and without reservation the discretion of the trial judge as to the propriety of his questions, his assessment of the veracity of the answers, and his entire judgment without ever knowing what was told to him.
>
> . . . [T]here would be no way for a party to ever contest, disapprove, or argue on appeal about any statement or accusation, no matter how wild or false, that the child may have made (perhaps in his fancy)—unless he knows what the child said to the judge.

Id. at 1274–75.

254. *See, e.g.*, Leinenbach v. Leinenbach, 634 So. 2d 252 (Fla. Dist. Ct. App. 1994) (trial court erred in relying on report of guardian ad litem where father was not afforded

including Arizona, have statutorily protected the right of cross-examination of persons who conduct custody evaluations,[255] and numerous courts have recognized the role of cross-examination in custody disputes as a critical component of the truth-seeking function of a trial.[256] If the child's wishes are communicated through an independent counsel, the opportunity for cross-examination will be more limited because of the attorney-client privilege. The parties, however, still should retain the right to question the lawyer's representations of the child's views and the implications of those views for the central question of custody.

Moreover, by ensuring that parents' due process rights are protected, courts ironically reinforce the singular importance of the child's voice. If a court is permitted to cloak an *in camera* conversation with a child in a veil of secrecy, the child's voice is trivialized. The child's statements will mean as much or as little as the judge believes appropriate. The judge may choose to discount information from the child, or to credit it strongly, but as long as the child's expressed views remain confidential, those views lack independent meaning. In contrast, once the child's expressed views are made part of a record, they then take on a significance and value of their own within the dispute resolution process.

VI. CONCLUSION

This Article has focused on the role of the child's voice in custody litigation, with particular attention to the competing goals that family courts face: achieving a custodial arrangement that best serves the child's interest; protecting the child from emotional harm; safeguarding the parties' due process rights; and promoting the integrity of the judicial system. The growing legal recognition of children's rights and our improved understanding of child psychology strongly support the conclusion that family courts should take into account the views of children able and willing to

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opportunity to rebut contents of report); Richardson v. Richardson, 774 So. 2d 1264 (La. Ct. App. 2000) (parent's due process rights were violated where trial court barred parent's lawyer from revealing *in camera* report of therapist); Fuge v. Uiterwyk, 653 So. 2d 707 (La. Ct. App. 1995) (parent's due process rights were violated where trial court did not allow parent to see psychologist's report in custody dispute).

255. *See, e.g.*, ARIZ. REV. STAT. § 25-405(B) (2003) (permitting court to seek advice of "professional personnel" in custody dispute and providing that advice must be in writing, must be made available to counsel on request, and that "[c]ounsel may examine as a witness any professional personnel consulted by the court, unless that right is waived"); ARIZ. REV. STAT. § 25-406 (2003) (permitting court to order custody investigation, requiring court to mail investigator's report to counsel ten days prior to hearing, and permitting any party to examine investigator and any person whom he or she consulted); IND. CODE § 31-17-2-12 (2003) (granting right of access to reports of custody investigators and right to cross-examine); N.D. CENT. CODE § 14-09-06.3 (2003) (same).

256. In *Luedtke v. Shobert*, 776 A.2d 233 (N.J. Super. Ct. App. Div. 2001), for example, the court reversed a trial court's custody decree based, in part, on the lower court's erroneous failure to permit a mother to cross-examine expert witnesses. The court stated, "Clearly, the right to cross-examine expert witnesses is of central importance in custody matters. Indeed, the right of cross-examination is a critical component of the adversary system." *Id.* at 242.

express them. On the international front the child's right to be heard in custody proceedings is emerging as a function of the child's entitlement to basic human rights—including respect and dignity—and his or her gradual progression towards autonomy. Child development studies, moreover, indicate that children's capacities are constantly evolving, that young children may possess greater abilities to formulate and express emotional reactions than was previously thought, and that even very young children may be able to provide information that is highly relevant to parental custody. Without the child's perspective, judges may have little ability to understand the practical or emotional impact on a child of a given custody or visitation order. New empirical research also suggests that children may experience greater long-term psychological hardship if they are *not* consulted than if they are consulted during a custody and visitation dispute.

The Survey showed significant agreement on a child's "right to be heard" but considerable variation among judges in how they elicit children's views and the weight they attach to those views. The child's voice is incorporated in custody proceedings in Arizona through a variety of methodologies, including the use of expert testimony, testimony by the parties, court-ordered custody evaluations, the appointment of counsel or guardian ad litem for the child, and the *in camera* interview. The best procedure in one case is not necessarily the best procedure for all cases, since children and families have unique concerns and limitations. The court's duty to protect the immediate well-being of the child should be a factor in the court's choice of methodology. Contemporary understandings of children's psychological, emotional, and cognitive development should inform the ways in which judges elicit and evaluate children's perspectives.[257] Ideally, the child's views will be elicited by people who are skilled in the sensitive task of listening to children.[258] In short, courts should retain the ability to exercise discretion on a case-by-case basis to determine *how*, but not *whether*, the child's voice should be integrated into the dispute resolution process.

At the same time, courts need to accommodate the concurrent but sometimes conflicting interests of the parents or care-givers in full protection of their due process rights. The dispute resolution structure should promote the judicial system's substantive interest in determining the best custodial arrangement for the child as well as its institutional interest in ensuring competent trial court adjudication and meaningful appellate review. The Survey revealed a split in opinion among judges as to whether parties have a right to a record of any *in camera* interview, and the judges follow diverse practices in that regard.[259] Among the judges who maintain confidentiality, the fundamental concern is to protect the child from emotional harm. Ironically, however, keeping the child's perspective "secret" may diminish the worth

257. Consistent with this idea, most American courts defer to the custodial wishes of older adolescents—whether by statutory mandate or as an act of discretion—recognizing the child's increasing autonomy as the child approaches maturity. *See supra* notes 59–60 and accompanying text.

258. The task of incorporating children's views in legal proceedings presents unique challenges because of the inherent limitations and vulnerability of children. *See* Buss, *supra* note 218; Smart, *Children's Shoes*, *supra* note 194.

259. *See* App. A, Tbl. 6, discussed *supra* at notes 38–43 and accompanying text.

of the child's views. In contrast, revealing the child's expressed observations to the litigants—who may then offer their own interpretations—underscores the unique significance of the child's voice. Consistent with the growing national consensus and traditional understandings of due process, courts should afford the parents access to a verbatim record of any conversation between the judge and the child as a minimum procedural protection. Similarly, if a custody evaluator or mental health expert is the source of information, parties should have access to the report and full opportunity to cross-examine.

The persistence of fierce custody litigation, while a small fraction of the total divorces filed, shows us that some portion of separating parents will make use of the traditional adversary model so long as it is available. Until a mandatory alternative is in place, the courts should strive to create a dispute resolution structure that incorporates the child's right to be heard, through the *in camera* interview or otherwise, while also safeguarding the parents' interests in procedural due process. The recommendations in this Article will not satisfy every member of the judiciary, especially those who believe that children should never be consulted or that, when children are consulted, the interview should remain confidential. By offering concrete recommendations, I hope to stimulate a constructive and focused debate about alternative ways of accommodating the competing interests of children, custody litigants, and the judicial system.

APPENDIX A

TABLE 1. SIGNIFICANCE OF CHILD'S PREFERENCE BY CHRONOLOGICAL AGE*

	Not Sig	Possibly Sig	Sig	Very Sig	Extremely Sig
Ages 0–2	72.9	18.8	—	4.2	2.1
Ages 3–5	35.4	50.0	6.3	4.2	2.1
Ages 6–10	6.4	48.9	34.0	8.5	2.1
Ages 11–13	2.1	19.1	38.3	34.0	6.4
Ages 14–17	—	4.3	14.9	36.2	44.7

*Table 1 shows responses, in percentages, to the following question:

In adjudicating child custody disputes, how significant to you are children's preferences within the following age brackets? In answering this question, assume you have found that the parties seeking custody are equally fit to exercise custody. Please use a 5-point scale, with 1 = of no significance whatsoever, 2 = possibly

significant, 3 = significant, 4 = very significant, and 5 = extremely significant (i.e., the child's preference is the presumptive custodial arrangement, absent a strong showing to the contrary).

A. Infancy to 2 years
B. 3 to 5 years (early childhood)
C. 6 to 10 years (elementary school age)
D. 11 to 13 years (middle school age)
E. 14 to 17 years (high school age)

TABLE 2. FACTORS AFFECTING WEIGHT TO BE GIVEN CHILD'S PREFERENCE*

	Not Sig	Possibly Sig	Sig	Very Sig	Extremely Sig
Child's age	4.2	4.2	22.9	35.4	33.3
Child's psychological & cognitive maturity	—	4.2	12.5	45.8	37.5
Child's apparent emotional health	—	6.3	20.8	39.6	33.3
Intensity of child's preference	—	16.7	54.2	18.8	10.4
General impression of child's relationship with parties	2.1	4.2	27.1	52.2	14.6
Reasons for child's preference	2.1	4.2	25.0	37.5	31.3
Wishes of siblings	2.1	29.2	41.7	18.8	8.3

	Less	Same	More
Child's wishes given less weight, same weight, or more weight in modification proceeding than in original custody proceeding	2.1	57.4	40.4

*Table 2 shows responses, in percentages, to the following questions:

A. In deciding on the weight to give a child's wishes or preferences as to custody and visitation, how important to you are the following factors? In answering this question, assume you have found that the parties seeking custody are equally fit to exercise custody. Please use a 5-point scale, with 1 = of no significance whatsoever, 2 = possibly significant, 3 = significant, 4 = very significant, and 5 = extremely significant.

1. *The age of the child*
2. *The psychological and cognitive maturity of the child*
3. *The apparent emotional health of the child*
4. *The apparent intensity of the child's preference*
5. *Your general impression of the child's relationship with each party*
6. *Your understanding of the reasons for the child's preference*
7. *The wishes or preferences of siblings*

B. In general, do you tend to give children's wishes or preferences more weight, the same weight, or less weight when the proceeding is for a modification of custody as compared to a proceeding for an initial custody decree?

1. *Less weight in modification proceeding than in original custody proceeding.*
2. *Same weight in modification proceeding as in original custody proceeding.*
3. *More weight in modification proceeding than in original custody proceeding.*

TABLE 3. JUDGES' PERCEPTIONS OF WHAT CHILDREN WANT*

	Disagree Strongly	Disagree	No Opinion	Agree	Agree Strongly
A. Custody with least disruption to continuity in daily life	2.1	6.3	2.1	58.3	31.3
B. Custody with parent with closer emotional bond	—	—	6.3	66.7	27.1
C. Custody with more freedom and less discipline	8.3	37.5	29.2	22.9	2.1
D. Custody to avoid contact with parent's new partner	—	37.5	25.0	33.3	4.2
E. Custody to avoid contact with abusive parent	2.1	6.3	8.5	50.0	33.3
F. Custody choice out of sympathy for parent	2.1	10.4	27.1	54.2	6.3

*Table 3 shows responses, in percentages, to the following question:

Indicate your agreement or disagreement with the following statements about children's preferences in custody litigation. Please use a 5-point scale, with 1 = disagree strongly; 2 = disagree, 3 = no opinion, 4 = agree, and 5 = agree strongly.

A. Most children prefer a custodial arrangement that poses the least disruption to their continuity with home, school, and friends.
B. Most children prefer to be in the physical custody of the parent with whom they have the closer emotional bond.
C. Most children prefer a custodial arrangement that offers them more freedom and less discipline.
D. Children often prefer a custodial arrangement that will allow them to avoid contact with a parent's new partner.
E. Children often prefer a custodial arrangement that will allow them to avoid contact with an abusive parent.
F. Children often express a preference in custody litigation that is based on sympathy for a parent or care-giver.

TABLE 4. METHODS OF ASCERTAINING CHILDREN'S PREFERENCES*

	Never	Occasionally	Regularly	Very Often	Almost Always
Open court	80.9	19.1	—	—	—
In camera interview	25.0	56.3	4.2	12.5	2.1
Parties' testimony	6.3	31.3	14.6	22.9	25.0
GAL	13.3	44.4	13.3	15.6	13.3
Child's attorney	26.1	41.3	15.2	4.3	13.0
Mental health expert	—	33.3	29.2	20.8	16.7
Court personnel	22.2	24.4	20.0	17.8	15.6

*Table 4 shows responses, in percentages, to the following question:

Which of the following methods, if any, do you use in ascertaining a child's wishes or preferences as to custody? Please indicate if your answer varies according to the age of the child. Please use a 5-point scale, with 1 = never, 2 = occasionally (about 25 % of the time), 3 = regularly (about 50 % of the time), 4 = very often (about 75% of the time), and 5 = always or almost always.

A. Testimony by child in open court, subject to cross-examination.
B. In camera interview of child.
C. Testimony by parties.
D. Report from guardian ad litem (GAL).
E. Submission from child's attorney.
F. Testimony by mental health expert.
G. Evaluation by court personnel.

TABLE 5. FACTORS INFLUENCING LIKELIHOOD OF JUDGES' INTERVIEWING CHILD, ORDERING CUSTODY EVALUATION, APPOINTING GAL, OR APPOINTING ATTORNEY FOR CHILD*

	Never	Occasionally	Regularly	Very Often	Almost Always
A. Judicial Interview of Child					
1. Request by party	34.0	40.4	14.9	4.3	6.4
2. Agreement by parties	17.0	29.8	17.0	17.0	19.1
3. High degree of conflict	25.5	27.7	21.3	14.9	10.6
4. Allegation of child abuse	29.8	27.7	27.7	4.3	10.6
5. Allegation of domestic violence	29.8	31.9	19.1	8.5	10.6
B. Custody Evaluation					
1. Request by party	2.2	43.5	26.1	13.0	15.2
2. Agreement by parties	2.1	10.6	21.3	23.4	42.6
3. High degree of conflict	2.1	14.9	31.9	31.9	19.1
4. Allegation of child abuse	4.3	23.4	27.7	27.7	17.0
5. Allegation of domestic violence	4.3	27.7	21.3	31.9	14.9
C. Guardian Ad Litem					
1. Request by party	14.9	42.6	12.8	19.1	10.6
2. Agreement by parties	10.4	22.9	20.8	14.6	31.3
3. High degree of conflict	6.4	36.2	21.3	27.7	8.5
4. Allegation of child abuse	8.7	28.3	32.6	19.6	10.9
5. Allegation of domestic violence	10.9	39.1	26.1	15.2	8.7

	Never	Occasionally	Regularly	Very Often	Almost Always
D. Attorney for Child					
1. Request by party	26.7	44.4	11.1	8.9	8.9
2. Agreement by parties	20.0	20.0	20.0	15.6	24.4
3. High degree of conflict	20.0	35.6	22.2	17.8	4.4
4. Allegation of child abuse	20.0	40.0	22.2	11.1	6.7
5. Allegation of domestic violence	20.0	48.9	17.8	8.9	4.4

*Table 5 shows responses, by percentages, to the following series of questions:

Indicate the circumstances under which you would be likely to interview a child, order a custody evaluation, appoint a GAL, or appoint an attorney for the child. Please use a 5-point scale, with 1 = never, 2 = occasionally (about 25 % of the time), 3 = regularly (about 50 % of the time), 4 = very often (about 75% of the time), and 5 = always or almost always.

A. Judicial interview of child

1. *When a party requests such an interview*
2. *When the parties agree to such an interview*
3. *When there is a high degree of conflict between the parties*
4. *When one party alleges child abuse by the other*
5. *When one party alleges domestic violence by the other*

B. Court-ordered custody evaluation

1. *When a party requests an evaluation*
2. *When the parties agree to an evaluation*
3. *When there is a high degree of conflict between the parties*
4. *When one party alleges child abuse by the other*
5. *When one party alleges domestic violence by the other*

C. Appointment of guardian ad litem

1. *When a party requests that a GAL be appointed*
2. *When the parties agree to such an appointment*
3. *When there is a high degree of conflict between the parties*
4. *When one party alleges child abuse by the other*
5. *When one party alleges domestic violence by the other*

D. Appointment of attorney for child

1. *When a party requests that counsel be appointed for the child*
2. *When the parties agree to such an appointment*
3. *When there is a high degree of conflict between the parties*
4. *When one party alleges child abuse by the other*
5. *When one party alleges domestic violence by the other*

TABLE 6. METHODS EMPLOYED DURING *IN CAMERA* INTERVIEWS*

	Never	Occasionally	Regularly	Very Often	Almost Always
1. I permit attorneys to attend and require court reporter	70.0	22.5	—	2.5	5.0
2. I permit attorneys to attend but do not allow recording	95.0	5.0	—	—	—
3. I require court reporter but do not permit attorneys to attend	52.5	10.0	10.0	2.5	25.0
4. I require electronic recording but do not permit other persons to attend	79.5	12.8	5.1	—	2.6
5. I do not permit other persons to attend and do not allow recording	62.5	5.0	12.5	2.5	17.5
6. I ask child directly for preferences	40.0	35.0	15.0	7.5	2.5
7. I ask indirect questions to reveal preferences	5.0	12.5	25.0	30.0	27.5
8. I question child to reveal quality of relationships	10.3	30.8	12.8	28.2	17.9
9. I explain that preferences not binding	10.0	2.5	15.0	15.0	57.5
10. I explain that child's statements are confidential	20.0	7.5	5.0	25.0	42.5
11. I explain that child's statements are shared	50.0	25.0	10.0	10.0	5.0
12. I make record available to parties	62.5	12.5	—	5.0	20.0

	Never	Occasionally	Regularly	Very Often	Almost Always
13. I seal record and make available only if appeal	60.5	13.2	2.6	10.5	13.2
14. Estimate of time spent in interview	24.2 minutes (mean for all respondents)				

*Table 6 shows responses, in percentages, to the following question:

In those cases in which you do interview children, which of the following techniques or procedures do you follow? Please use a 5-point scale, with 1 = never, 2 = occasionally (about 25 % of the interviews), 3 = regularly (about 50 % of the interviews), 4 = very often (about 75% of the interviews), and 5 = all or almost all judicial interviews.

A. I permit attorneys to be present during the interview, and I require that the interview be transcribed by a court reporter.
B. I permit attorneys to be present during the interview, but I do not allow any stenographic or electronic recording.
C. I do not permit attorneys to be present during the interview, but I do require that the interview be transcribed by a court reporter.
D. I do not permit any other persons to be present during the interview, but I do require that the interview be recorded electronically.
E. I do not permit any other persons to be present during the interview, and I do not allow any recording to be made of the interview.
F. During the interview, I ask children directly for their preferences as to custody and parenting time.
G. During the interview, I avoid direct questions, but I ask children indirect questions that will reveal their preferences as to custody and parenting time.
H. During the interview, I ask children questions that will reveal the quality of their relationship with each parent or care-giver but I do not try to ascertain their preferences.
I. During the interview, I explain to children that their stated preferences are important but are not binding on me as the decision maker.
J. During the interview, I explain to children that what they tell me will remain confidential.
K. During the interview, I explain to children that what they tell me will be shared with others.
L. I make available to the parties a record of the interview.
M. I seal the record of the interview and make it available only in the event of an appeal.
N. My interviews with children generally last about _____ (Please state in minutes.)

TABLE 7. JUDICIAL VIEWS ABOUT *IN CAMERA* INTERVIEWS*

	Disagree Strongly	Disagree	No Opinion	Agree	Agree Strongly
1. Children benefit emotionally	12.8	25.5	10.6	38.3	12.8
2. Parties may settle more readily	17.0	29.8	31.9	17.0	4.3
3. Children have right to be heard	6.4	29.8	10.6	31.9	21.3
4. Children's expressed preference is important evidence	6.5	15.2	13.0	52.2	13.0
5. Judge can acquire better understanding of child and parties	15.2	6.5	17.4	43.5	17.4
6. Children's expressed preferences are unreliable	4.4	28.9	24.4	31.1	11.1
7. Children may suffer emotionally if must choose	—	6.4	6.4	44.7	42.6
8. Judges lack necessary training	6.4	31.9	17.0	34.0	10.6
9. Parties' procedural due process rights at risk if interview unrecorded	8.9	26.7	13.3	33.3	17.8

*Table 7 shows responses, in percentages, to the following question:

Indicate your agreement or disagreement with the following assessments of the judicial practice of interviewing children to ascertain their preferences during custody litigation. Please use a 5-point scale, with 1 = disagree strongly, 2 = disagree, 3 = no opinion, 4 = agree, and 5 = agree strongly.

A. *Children may benefit emotionally by expressing their preferences or wishes to the judge during custody litigation.*
B. *Parties may settle more readily if children's preferences are communicated to the judge.*
C. *Children have a right to be heard during litigation affecting their interests.*
D. *The child's expressed preference is important evidence in a judge's determination of the child's best interests.*

E. By use of an in camera interview, the judge can acquire a better understanding of the child and the parties.
F. Children's expressed preferences are unreliable because children are subject to influence and manipulation by parents or care-givers.
G. Children may suffer emotionally if they feel that they must choose one parent or care-giver over another.
H. Judges generally lack the necessary training to interview children and evaluate children's statements.
I. Parties' procedural due process rights are at risk if judges rely on unrecorded in camera interviews in resolving custody disputes.

APPENDIX B

Please identify two ways in which the procedural or substantive law of child custody dispute resolution could be improved.

1. (A) Automatic referral to in-house custody evaluators for dispute resolution.
   (B) Automatic referral to education sources for instruction re "best interests" of child instruction.
2. (A) Maybe custody disputes shouldn't even be in the courts. When there are ongoing relationships between the parties, adversarial contested custody proceedings with lawyers, rules of evidence, objections, and procedural posturing and maneuvering really get in the way of what's best for kids and for encouraging parties to be at least civil to one another for an extended period of time.
   (B) What about more arbitration mediation, or having trained professionals decide child custody matters?!
3. Find an *effective* way to convince parents they harm their children when they try to use them to influence the process. Parent-education as it currently stands is less than effective.
4. (A) Prompt and unannounced evaluations.
   (B) Use of dispute resolution programs before making a Final Judgment.
5. There are no guidelines at all on this. If the ARS 25-403 is to remain then guidelines or rules should be developed so there is a standard. I hate interviewing kids and prefer a health care professional do the interviews. Because the factor is mandated by state statute the kids are required to be in the middle.
6. I believe that all custody disputes should be resolved by Court paid evaluators. I believe that independent evaluators cause the emotional damage to the children/families to escalate. If all parties had to come to the Court for the evaluation, and were unable to choose their own evaluator, the number of custody evaluations would decrease dramatically. All custody disputes should be thoroughly evaluated to determine how much intervention is needed.
7. (A) Require parties to undertake parent education class prior to filing for divorce/custody. Currently, the class is required *after* filing and a lot of damage has occurred by that time.
   (B) Require *mediation* of dispute to occur within 30 days of Response filing. Early resolution would benefit children & reduce "gamesmanship."
8. (A) Allow hearsay evidence, i.e. statements of children to be admissible.
   (B) Directly allow *in camera* interviews with children without permission of parties or counsel.
9. (A) Mandatory counseling in divorce proceedings.

(B) Mandatory mediation.
(C) Administrative hearings prior to trial.

10. I think therapeutic assessments away from Court are the key to obtaining children's input on custody and access in a way that is least detrimental to a child. The therapist, once engaged, is then in a position to advise on further contact between child & judge.

11. (A) Change traditional notion of custody to parenting responsibilities and parenting time.
(B) Focus greater attention on parenting planning and parenting plans.

12. (A) More research on issue in general and dissemination of results to judges.
(B) Availability to judge of low cost _____ of GAL, atty & evaluations in these cases.

13. (A) A greater emphasis on mediation or other informal, out-of-court resolution of issues would save the parties significant legal expenses, the court a lot of time and result in better compliance by parents and adjustment by children.
(B) Perhaps thought should be given to providing an opportunity to older children (10+?) to meet privately with the mediator or other court officer and be told a little about what to expect and to give them an opportunity to write their wishes to the judge with the assurance that no one else will ever see it. If this were done routinely it would provide information to the court without making a big deal of it at trial and would assist the judge privately.

14. (A) More qualified personnel to implement the existing laws and regulations, and
(B) more money to pay them.

15. (A) Have a rule like in medical malpractice cases that in the original dissol. proceedings that a mandatory settlement conference must be conducted before a settlement judge (pro-tem or commissioner) prior to the trial - (say at least 20 days before trial). Also may be conducted by private mediator.
(B) Require mediation attendance (telephonically, if necessary) in Conciliation Court by parents in any contested modification of custody proceedings.

16. (A) Early court intervention - evidentiary hearing within 90 days of filing.
(B) A requirement that the parties submit to mediation immediately upon the filing of the Petition/Response.

17. I don't see a problem with it at this time.

18. (A) The judge should have significant training. The bias - particularly against fathers being custodial parent is pervasive. The understanding of child development, the effect of divorce on children is very limited.
(B) Procedurally there should be clear temporary orders regarding parenting time as soon as possible. The children need clear rules and need to know that each parent loves them. More involvement by experts in the field is appropriate.

19. Appointment of CASA or GAL available at court expense in every contested dissolution involving custody or parenting time (as in

dependency cases per ARS § 8).

20. Over 17+ years as a judge, I have come to realize how very complex child custody cases are and how ill equipped (trained) I am to deal with these complexities. There is a fine line between being the decider of the facts and an investigator of the facts. Talking to children *in camera* has very limited usefulness because we don't see what happened to the kids before they got here. Does the judge then go to the children's home environment and try to observe them there? It is a slippery slope.
I realized a long time ago that there are professional people that have the training, experience, and time to do what we can't. Their professional evaluation is worth much more than my few minutes with a child that is scared half out of their wits. I also could do much more damage than good to the child.

21. (A) More research on issue in general & dissemination of results to judges.
(B) Availability to judges of low cost experts, GAL, attorneys, and evaluations in these cases.

22. (A) Greater parent education.
(B) Stronger intervention with parents to resolve their life issues: substance abuse, low education, lack of employment, criminal activity, unresolved psychiatric issues, counseling needs, peace-building tools.