Bibliography/Materials

Child Rep/GAL Seminar: July 15, 2015
Are these Kids Doomed?
Toward a Model of Best Practices

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TOWARD THE DIFFERENTIATION OF HIGH-CONFLICT FAMILIES: AN ANALYSIS OF SOCIAL SCIENCE RESEARCH AND CANADIAN CASE LAW*

Rachel Birnbaum and Nicholas Bala

Social science research and the courts have begun to recognize the special challenges posed by “high-conflict” separations for children and the justice system. The use of “high conflict” terminology by social science researchers and the courts has increased dramatically over the past decade. This is an important development, but the term is often used vaguely and to characterize very different types of cases. An analysis of Canadian case law reveals that some judges are starting to differentiate between various degrees and types of high conflict. Often this judicial differentiation is implicit and occurs without full articulation of the factors that are taken into account in applying different remedies. There is a need for the development of more refined, explicit analytical concepts for the identification and differentiation of various types of high conflict cases. Empirically driven social science research can assist mental health professionals, lawyers and the courts in better understanding these cases and providing the most appropriate interventions. As a tentative scheme for differentiating cases, we propose distinguishing between high conflict cases where there is: (1) poor communication; (2) domestic violence; and (3) alienation. Further, there must be a differentiation between cases where one parent is a primary instigator for the conflict or abuse, and those where both parents bear significant responsibility.

Keywords: High-conflict separation; differentiating high-conflict separation; high-conflict terminology; judicial differentiation of high-conflict families; understanding high-conflict terminology

Improved understanding of the conditions and problems faced by families in high conflict separations is essential for efficient dispute resolution by the family justice system and for effective service provision by professionals working with children involved in the justice system. Although there are serious clinical and legal gaps in understanding the problems faced by children and parents in these families, “high-conflict” disputes have gained increased attention among social science researchers, and use of the term by Canadian judges has increased dramatically over the past decade. This is a welcome development, as it is important to distinguish high conflict separations from other cases. However, the term “high-conflict family” has not been clearly operationalized by social scientists, and is used in an overly broad and inconsistent fashion by lawyers, judges and mental health professionals in the family justice system. In particular, there is a failure to adequately distinguish between conflicts and communication issues between parents that can be effectively addressed through legal or mental health interventions. The ability to make this distinction would allow for some form of shared parenting in some cases and would identify the more toxic levels of conflict in families where there are serious alienation or domestic violence issues that require greater restrictions on the involvement of an abusive parent in the lives of his or her children. Further, there must be a differentiation between cases where one parent is a primary instigator for the conflict or abuse, and those where both parents bear significant responsibility.

This article seeks to provide a context to the understanding of high conflict separations by exploring the social science literature regarding high-conflict separations. The existing research literature provides the context in which conflict is being used to describe the negative consequences.

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of post-separation parenting on children, though it does not provide adequate conceptual guidance and instruments to make the concept operational or differentiate between different types of high conflict. Second, the paper reviews Canadian case law using “high conflict” terminology, noting a dramatic increase in the last decade in the use of this terminology, which reflects an increased sophistication by judges, lawyers and mental health professionals. However, the concept of “high conflict” is often used in a vague and/or undifferentiated way. The goal of our analysis is to better understand the importance of distinguishing between different types of high-conflict separations, in order to allow the judicial system and mental health professionals to more effectively address the needs of children and their parents. As a starting point for differentiating cases, we propose distinguishing between cases where there are communication difficulties from those where there is significant domestic violence or alienation. Further, there must be a differentiation between cases where one parent is a primary instigator for the conflict or abuse and those where both parents bear significant responsibility.

THE IMPORTANCE OF DIFFERENTIATING HIGH-CONFLICT CASES

The relationship between conflict, domestic violence and negative post-separation adjustment has been well documented within the social science and legal literature. While much has been written regarding the emotional toll experienced by children due to high levels of parental conflict in post-separation families, there is no clear or workable definition of “high conflict” in the social science literature. The research on high conflict is largely theoretically based, and there is a lack of consensus and empirical research regarding the predictive factors of high conflict. The lack of empirical evidence to adequately define “high conflict” in the divorce literature has resulted in continuing debate about which factors should be considered when evaluating the presence of parental conflict. Birnbaum & Fidler and Kelly note that there are other factors that require analysis beyond the extent to which communication or cooperation between separated or divorced parents is relevant to the assessment and understanding of conflict—that is, the parent-child relationship. The term “high conflict” has been used as an umbrella term to describe cases where:

- there are high rates of litigation and re-litigation;
- there are high degrees of anger and distrust, and difficulties with communicating about the children;
- there are serious domestic violence issues, perpetrated primarily by one abusive spouse and continuing after separation;
- there is alienation of the child as a result of the conduct or attitude of one parent.

While more than one of these dynamics may be present in an individual case, it is theoretically and clinically important to distinguish between these types of cases. The intervention strategies required in domestic violence and alienation cases are more complex than in cases where there are parenting disputes over poor communication or child care time. Kelly cautions that an important distinction must be made between bilateral and unilateral conflict in order to address appropriate mental health and legal interventions. She suggests that the following questions need to be explored: (1) who or what is driving the conflict?; (2) what are each parent’s contributions to continuing hostility, disputes, and re-litigation?; (3) has either parent disengaged with the other?; and (4) can either parent change his or her behavior?

PREVIOUS RESEARCH ON MODELS/EXPLANATIONS OF HIGH-CONFLICT SEPARATIONS

In an attempt to understand the types of conflict found in divorce, Johnston proposes a conceptual model involving three dimensions of conflict: the domain, the tactics and the attitudinal dimensions.
Johnston argues that there is a need to distinguish among types of conflict to better explain which types of conflict are considered "normal high conflict," and can be addressed with both parents remaining actively involved in their children's lives, and which kinds of conflict signal pathology and a dysfunctional situation that may require one or both parents to have their involvement in their children's lives substantially reduced or suspended for a significant period of time.

The domain dimension refers to the type of the post-separation disagreements, such as ongoing financial support, property division, custody and access to the children, or differences in opinion regarding child-rearing practices. The tactics dimension refers to the manner in which divorcing couples try to resolve disagreements: by avoiding each other, by trying to resolve disagreements by verbal reasoning; verbal aggression; coercion; or physical aggression. Other tactics can include ways in which divorce disputes are formally resolved by the use of lawyers, negotiation, mediation, or litigation. The attitudinal dimension refers to the degree of negative emotional feelings or hostility directed by separating parents towards each other, which may be overtly or covertly expressed.

Hopper provides four explanations for conflict in divorce. First, conflict may stem from disagreements about resource issues and related power differentials in the ex-spouse relationship. Both parties often want to maximize financial gains from the marriage, but power imbalance may create conflict and make the resolution of disputes more difficult.

Gender can also play an important role in the conflict if, for example, the woman has been financially disadvantaged by the relationship and must fight hard for an equitable outcome. To the extent that some judges or other professionals may have "traditional" views about parental roles, gender may also undermine the claim of a father to custody of his children.

Second, conflict in the litigation process may be fuelled by the adversarial nature of the legal system and by the procedures and practices of lawyers. Within this system, ex-spouses are required to file affidavits and other documents in support of their positions. These documents can exacerbate and perpetuate conflict as a result of each party describing their perspective of the relationship and the causes and consequences of its breakdown. Such practices may create enemies out of spouses who were otherwise getting along quite well.

Third, conflict may exist in relationships before the divorce, and this conflict, often itself a cause of divorce, continues during the process of divorce and afterward.

Fourth, conflict may originate out of psychological responses to feelings of abandonment, betrayal, anger, hurt or humiliation as a result of the conduct by the ex-spouse, or by the divorce process itself. Individual psychopathologies also may play a role, such that aspects of the divorce begin to "resonate with long-standing vulnerabilities."

In 2001, Stewart reviewed the social science literature in an attempt to provide evidence for the early identification and streaming of cases of high conflict. He found that by its very nature, divorce usually includes some degree of conflict between the parents, but concluded that researchers were unable to agree on criteria to distinguish between the normal level of conflict found in separation and divorce and the toxic levels referred to as "high conflict." Stewart also noted that in the absence of any accurate psychometric measures for high conflict families, a number of researchers identified certain behavioral or emotional characteristics that typify what they referred to as "high conflict divorces." Stewart concluded that the field has made little progress in narrowing down the key factors associated with high conflict situations.

In 2004, Gilmour completed a review of the literature and sought responses from professionals in the field regarding their opinion of what constitutes a "high conflict case." His review, based on the work of Johnston, defined a "post-divorce impasse" as a situation in which the parents are frozen in the transition between a joint life and separate lives, and that these impasses can occur at three levels: external, interactional, and intrapsychic. Gilmour promoted the use of Garrity & Baris' scale to assess levels conflict from minimal, mild, moderate, and moderately severe to severe conflict increments. Severe conflict is when there is endangerment of a parent or child by physical or sexual abuse, drug or alcohol abuse to the point of impairment or severe psychological pathology. Moderately severe conflict is characterized as a situation in which the child is not being endangered physically, but is experiencing emotional trauma because the parents continue to endanger and provoke each other by
threatening violence, slamming doors, throwing things, verbally threatening harm or kidnapping, engaging in continual litigation, and attempting to form a permanent or standing coalition with the child against the other parent.

Friedman posits that in some high conflict situations, conflict is driven unilaterally. He argues that conflict must be understood from a systems perspective. That is, not just understanding the ways in which both parents create and maintain the conflict, but also how conflict is embedded and encouraged by the larger social system: the extended family and friends; support groups with their own political agendas; the therapists; lawyers; and the adversarial legal process. Personality disorders and accompanying cognitive distortions of one or both spouses may exacerbate conflict during marriage and after separation.

PROGRAMS DEVELOPED TO DEAL WITH HIGH CONFLICT

Despite the lack of clear empirical evidence to guide practice, research and policy, significant time and resources continue to be devoted to families identified as “high conflict” by the justice system, mental health professionals, and child welfare agencies. For example, Johnston & Roseby devised an impasse-focused mediation model; the Los Angeles County Superior Court Child Custody Evaluation Office devised a fast track service model for high conflict cases; a triage model was developed for these cases for some courts in Ontario; British Columbia and Connecticut; and numerous other family dispute resolution interventions (i.e., divorce education, parent coordination, mediation) have also been created to match the characteristics of the family dispute with the appropriate dispute resolution process. While all of these approaches have attempted to differentiate levels of conflict in disputing families, only the Connecticut Judicial Branch’s Family Civil Intake Screen and the Dimensions of Conflict in Separated Families Scale are being empirically tested to differentiate families based on levels of conflict. The social science literature remains sparse in providing much needed assistance in tracking whether children and families are appropriately and adequately matched to service interventions based on their presenting level of conflict. Additionally, the existing tools to measure conflict have been critiqued for the lack of sensitivity to issues of emotional abuse, threats to safety, and issues of culture.

CONCLUSIONS ABOUT SOCIAL SCIENCE LITERATURE AND PROGRAMS

A number of conclusions can be drawn from these reviews of the social science literature and programs for high conflict separations.

First, high conflict language needs to be more clearly differentiated, which will allow mental health professionals and the family justice system to better address the needs of children and families. Conflict that is driven by a genuine desire by both parents to continue a significant and regular parent-child relationship post separation, versus conflict that is characterized through physical and other controlling strategies, can lead to very different custody and access interventions and parenting recommendations/decisions. In order to differentiate these cases, Kelly & Grych aptly state that clinicians must assess: (1) the intensity of the conflict; (2) the focus of the conflict; (3) the degree to which the conflict is expressed through the children; (4) the protective buffers for children; (5) the style of resolution of the conflict; and (6) interpersonal vs. legal conflict.

Second, high-conflict divorces that involve violence or alienation require specialized and coordinated service provisions between mental health professionals, lawyers, and the judiciary. In order to achieve this goal, researchers must collaborate with clinicians to develop and identify empirically based instruments that help differentiate levels of conflict, thereby assisting the judiciary in early case management of high-conflict cases and ultimately aiding their decision making.
CHANGES IN CHILD CUSTODY AND ACCESS LAW AND SOCIAL CONTEXT

The laws governing care of children have dramatically evolved over the past two hundred years, which reflects ever-changing patterns of family living, societal values, and social understandings. Until the twentieth century, the patriarchal common law provided that in the event of separation, a rare event during that period, the father was viewed as the “natural guardian” and had the legal right to custody of his children, while the mother did not even have a right to visitation, even if she left her husband because he was abusive or had committed adultery. Then, throughout much of the twentieth century, courts followed the “tender years” doctrine, with a strong presumption that the mother would be granted custody of the children in the event of separation, with the father usually only having a limited right of visitation, unless the mother demonstrated “moral unfitness” by committing adultery, in which case she would forfeit her claim to custody.30

By the latter quarter of the twentieth century, courts and legislatures began to adopt the individualized “best interests of the child” approach to decide disputes related to children.31 In theory, there is no presumption in favor of either parent under the best interests of the child approach; though if one parent had primary responsibility for the care of the child while the parties cohabited, that parent would often retain primary responsibility for the care of that child after separation, whether as a result of an arrangement made by the parents or a court order.

In the past three decades there have been a number of significant social changes that have affected custody litigation. The rate of divorce and separation escalated dramatically, resulting in more disputes. Fathers are now more involved than a generation ago in the care of children in intact families (though on average are still doing less child care than mothers), and hence in the event of separation are more likely to play a larger role in their children’s lives. This trend has resulted in the development and expanded use of joint custody and shared parenting in low conflict separation, but has also created greater potential for litigation in high conflict cases.

Although married women are more likely to be in the labor force than before, incomes of married men are generally higher and issues related to child support remain very contentious. Governments have introduced guidelines to set reasonable amounts for child support and have established agencies to enforce child support obligations. In practice this means that fathers often tend to perceive the state as allied with mothers regard to child support; the system may have also created economic incentives for men to seek a form of shared parenting, which may reduce amounts of child support payable under the applicable guidelines.

Gender-based advocacy and support groups are playing a role in “socializing” parents after separation. Further, the Internet has assisted parents and lawyers in using social science “research” to support their positions, or attack the other parent with the position of the other.32 As a result, the courts are confronted with an increasing incidence of cases that is now being referred to as “high conflict.” Neff & Cooper suggest that these cases involve 10 percent of disputing families and community professionals; however, they take up almost 90 percent of the court’s time.33

CANADIAN FAMILY LAW CASES AND THE USE OF “HIGH CONFLICT” RHETORIC

USE OF HIGH CONFLICT LANGUAGE IN CUSTODY AND ACCESS PROCEEDINGS

There has been a marked increase in the use of “high conflict” language in reported Canadian judicial decisions over the last decade. A search conducted on the Quicklaw (LexisNexis) computer database in June 2009 identified 420 family law cases since 1988 that involve child custody or access disputes where the judge, parties, or an expert witness labeled the family as “high conflict.” There was a dramatic increase in use of the term “high conflict” at the end of this period, with 114 cases (27%) from January 2008 to June 2009, comprising only 17 months out of 240 months in the study, and just 32 of the cases (8%) from 1988 to 1999. While there exists a growing recognition of the distinctive challenges posed by high conflict cases, there remains a lack of clarity and sound empirical research
about the concept of "high conflict" separations and much ambiguity in its use. For example, this
ambiguity allows descriptive terms such as "high conflict," "acrimonious," "toxic," "domestic
warfare," and "family violence" to be used indiscriminately and interchangeably. These descriptors are
also included in cases ranging from those where a parent on one occasion slams the door in the other's
face when delivering the child at an access exchange, to cases where a mother has convinced her
young child that she has been sexually abused by her father, even though this did not occur, to cases
where there are high levels of recurring physical violence. Before considering this lack of differen-
tiation further, we provide an overview of how parents, lawyers and judges involved in a child custody
proceeding use and misuse the language of conflict. 14

PARENTS AND THEIR LAWYERS—JOINT CUSTODY

The courts have often used "high conflict" terminology when deciding whether a case is not
appropriate for joint custody. 15 There is a presumption in case law in Canada against joint custody in
cases of "high conflict." For example, in one of the leading Canadian precedents, Justice Fraser of the
Alberta Court of Appeal in Richter v. Richter stated that, "as a general proposition, joint custody and
shared parenting ought not to be ordered when the parents are in substantial conflict with each other." 36
Similarly, in Kaplanis v. Kaplanis, the Ontario Court of Appeal reversed the decision of the trial judge
to impose joint custody for the care of a three-year-old child, with the condition that the parents
undergo counseling to improve their communication. Justice Weiler wrote: 37

The fact that both parents acknowledged the other to be "fit" did not mean that it was in the best interests
of the child for a joint custody order to be made. ... The fact that one parent professes an inability to
communicate with the other parent does not, in and of itself, mean that a joint custody order cannot be
considered. On the other hand, hoping that communication between the parties will improve once the
litigation is over does not provide a sufficient basis for the making of an order of joint custody. There must
be some evidence before the court that, despite their differences, the parents are able to communicate
effectively with one another. No matter how detailed the custody order that is made, gaps will inevitably
occur, unexpected situations arise, and the changing developmental needs of a child must be addressed on
an ongoing basis. When, as here, the child is so young that she can hardly communicate her developmental
needs, communication is even more important. In this case there was no evidence of effective communi-
cation. The evidence was to the contrary.

As a result of this judicial approach, parents (and their lawyers) who are seeking sole custody often
categorize their cases as "high conflict." 38 However, in many of these cases, courts find that the
parent is exaggerating the extent of the conflict, or the parent is purposely engaging in conflict to resist
an order for joint custody. This purposeful engagement in conflict was found in 11 out of 22 reported
cases in 2007–2009 where a claim for joint custody was resisted on the ground that it was a high
conflict case.

In T.J.M. v. P.G.M., for example, counsel for the mother argued that imposing a joint custody order
on the "highly conflicted parents" would increase the level of conflict to which the children would be
exposed; therefore an order of joint custody would not be appropriate. 39 The mother's primary
evidence of acrimony was that she herself made an unfounded report to child protection authorities
that the father sexually abused their daughter. In Ferguson v. Gilmour, the mother claimed that joint
custody was not working because of the conflict between the parties, which was mostly comprised of
verbal abuse, and that she should be awarded sole custody. 40 Similarly in MacKenzie v. O'Rourke and
Garrow v. Wychesken, one parent opposed joint custody on the basis of the level of high conflict
between the parties. 41 In Garrow, the court suggests that the mother actively sought to build up a
record of conflict, including a false allegation that the father assaulted her. 42

In all four of these cases, the courts rejected the argument in favor of sole custody because of high
conflict, and instead awarded some form of joint custody. In fact, there are several cases where courts
have essentially held that a party is estopped from making the argument that conflict precludes joint
custody, when they themselves are the instigator of such conflict. 43
A variation of using the language of high conflict to obtain sole custody was the argument that was used by the father in *Lawson v. Lawson*. He argued that "rather than [it] being a high-conflict situation, it is an ‘angry mother situation’" and that he was more than willing to cooperate with the mother to make joint custody work. The trial judge and Ontario Court of Appeal rejected his argument on the facts of the case, though Gillese J.A. observed:

"Joint custody is not appropriate where parents are unable to co-operate or communicate effectively. However, one parent cannot create problems with the other parent and then claim custody on the basis of a lack of co-operation."

**COURT DECISIONS AND MENTAL HEALTH ASSESSMENTS**

Often, the custody decision of a judge is consistent with what was recommended by a court-appointed assessor involved with the family. The judge often gives considerable weight to the opinions and characterizations of the family provided by an assessor, who is an independent mental health professional who should have the education and training to properly identify high conflict families. However, there are many cases where judges have applied the label "high conflict" on their own, without expert evidence, but with significant consequences to parents. Further, Canadian judges have begun to quote social science literature on conflict and alienation to explain particular decisions in cases even in cases where an expert did not testify to "adopt" this literature. In some cases, the judge even appeared to accept the analysis in literature in preference to the testimony of a court-appointed assessor, despite the fact that appellate precedents suggest that a judge should only rely on social science literature if there is an expert who has "adopted" it as authoritative and can be cross-examined about its contents.

In *Griffin v. Bootsma*, the judge found that becoming a "high-conflict couple experiencing chronic difficulties in resolving parenting issues" constituted a material change in circumstances for the purposes of varying the parties’ earlier agreement on joint custody. Without the consent of the parties, the judge read and relied on social science literature to confirm his characterization of the couple as "high conflict" and to justify an order of sole custody to the mother, altering the previous arrangement of joint custody. The court’s ultimate disposition of sole custody was inconsistent with the recommendations for joint custody found in the report of the assessor retained by the Office of the Children’s Lawyer.

In *Petrie v. Petrie*, despite the assessor’s recommendation to the contrary, the court concluded that the level of acrimony between the parties precluded an order for joint custody. As far as the reported decision indicates, the parents, who were both police officers, had a great deal of anger towards each other. The mother’s anger and her new relationship resulted in her unilateral decision to move out of province with the child, a relocation that the court refused to sanction. The parties were able to communicate and there was no evidence of harm to the child from the joint custody relationship. To the contrary, the court-appointed psychologist, who recommended a continuation of joint custody, observed:

"Both mother and father have participated in the parenting of the child and are both ready, willing and indeed desirous of caring for the child. The love of the child which both have in common is one of the few areas of their joint lives not adversely affected by the acrimony that exists between them. The mother finds it difficult to restrain her anger. The father restrains his better but is, I think, no less emotional on the subject."

Notably, in many of the cases in which courts conclude that joint custody would be inappropriate or impractical due to conflict are not easy to differentiate on the facts from the cases discussed above, where it is the parent who characterizes the relationship as high conflict but the court concludes that joint custody is viable. For example, in *Hensel v. Hensel*, the conflict between the parties is similar to that in *Garrow*. In both cases parties had difficulty communicating and in both cases there was an
unsubstantiated allegation by the mother that the father assaulted her. However, unlike in Garrow, where joint custody was found to be appropriate by the judge, the judge in Hensel uses the language of high conflict to reject joint custody and make an award for sole custody.

The variety of circumstances in which the language of high conflict is used, whether by a party, an assessor, or the judge, illustrates a lack of a common understanding of what “high conflict” means, how to differentiate the levels of conflict and what, if any, are the implications for parenting recommendations and orders.

Though never beneficial for a child, parental disagreements and conflict alone are not necessarily harmful to children. What is critical is how parents express, manage, and resolve the conflict—an issue that is not often considered and articulated in judicial decision-making, other than by referring to “high conflict.” Thus, it is unsurprising that parties make use of the rhetoric of “high conflict” whenever possible, and in some cases a primary caregiver may instigate conflict in order to obtain a sole custody order.

**DIFFERENTIATION IN CASES INVOLVING CONFLICT**

In this section we sketch out a tentative classification scheme for distinguishing different types of high conflict cases, discuss the most appropriate parenting plans for different types of cases, and consider how Canadian cases fit into this analytical scheme. While Canadian judges sometimes use the term “high conflict” in a vague or unhelpful fashion, in some cases Canadian judges are implicitly making distinctions between different levels and types of “high conflict” cases, as recognized in the types of orders that they are making.

**CO-PARENTING AND ACCESS EXCHANGE CONFLICT**

By “co-parenting and access exchange conflict” we mean a level of verbal conflict and hostility that exists between separated parents who are unable to effectively communicate on a consistent basis, with the possibility that some exchanges of the children are characterized by verbal abuse. In this category we also place cases where parties may have called the police about each other, either because a child was not delivered to the other parent on time, or as a result of a minor physical altercation. While these cases certainly involve unfortunate levels of conflict, they are quite different from cases involving significant domestic violence and severe alienation.

Griffin v. Bootsma is an example of a custody dispute where the court describes parents who have difficulties co-parenting and delivering the child(ren) to one another as “high conflict.” Some of the access exchanges in Griffin involved neither parent speaking to each other and locked doors. The mother alleged that the father was harassing her via email and secretly taping their conversations. Further, the father was inappropriately discussing the legal proceedings with the child. The court ultimately made an order for sole custody in the mother's favor on the basis of the conflict.

As discussed above, many Canadian decisions dismiss the possibility of shared parenting if there has been a finding that it is a “high conflict” case. Yet the cases where sole custody is ordered are not necessarily the most conflict-ridden cases. For example, in Dreger v. Dreger, the degree of acrimony between the parties and their failure to communicate was used to justify an order of sole custody to the mother. However, the court does not indicate that the conflict reaches any higher level than failure to agree on some decisions regarding their children. Similarly in Moy v. Moy, the court found that the differences in the child rearing practices of the parents justified an order for sole custody. The Dreger and Moy cases are illustrative of judgements in which Canadian courts have used a high conflict characterization to justify an order for sole custody when the conflict involved is no more than the “co-parenting and access exchange” type of high conflict addressed earlier in this paper.

Some judges, however, are adopting a more sophisticated and nuanced approach to high conflict cases, and are prepared to make appropriate shared parenting orders in cases where the conflict reflects
communication issues. The court in *E.I.M. v. D.D.I.* concluded that joint custody was appropriate in a situation in which the mother had a history of alcohol abuse and the mother's niece had assaulted the child. The court stated:

It has been a practice in this court to make joint custody orders despite communication breakdown between the parents to encourage the parents to rebuild their relationship for the benefit of their child. There are, admittedly, some relationships that are so toxic that joint custody makes absolutely no sense as it leads to continued conflict which is harmful for the child. I do not find this parental relationship to be so irreparable that they cannot communicate about their child.  

Parallel parenting orders are sometimes made as an appropriate judicial solution for some high conflict parents with communication difficulties. A parallel parenting order gives each parent full control over the child while the child resides with that person, allocates decision-making for issues like education to only one parent, and structures exchanges so as to minimize contact between the parents. This regime does not contemplate joint decision-making, and limits interaction between the parents, but nevertheless gives each parent a significant role in their child's life and is a form of shared parenting. As Forgeron J observed in *Baker-Warren v. Denault*:

> "[a] parallel parenting regime is a mechanism which can be employed where there is high parental conflict, and where a sole custody order is not in the child’s best interests."  

This case involved a family with severe conflict, and the court determined that parallel parenting was the appropriate solution.  

DOMESTIC VIOLENCE

Perhaps more appropriate than the application of a "high conflict" label to parents who have communication problems is the use of the language of conflict in cases involving domestic violence. One example of this type of case is *MacVicar v. Darde*, where the parties separated because the father was arrested when he assaulted the mother in front of the children. After the parties separated, the police were involved on several occasions. In fact, the principal of the children's school had obtained an order preventing the father from entering school property as a result of his violent behavior.
The level of violence perpetrated by one parent against the other and the involvement of the criminal justice system in these types of cases make them substantially different from the "co-parenting and access exchange conflict" cases discussed in the previous section. While both involve conflict, professionals and the courts do not adequately distinguish between the two types of cases based on the high conflict language used in the reported decision.

In cases involving domestic violence, the safety of the children and their primary caregiver must be primary concerns, and the violent parent must be held accountable for his assaultive behavior. In cases of domestic violence, it is important for the primary perpetrator to be identified and the concept of high-conflict separation should not be used to inappropriately suggest that a victim of spousal violence has responsibility for the situation. Depending on the likelihood of recurrence of violence, it may be necessary to suspend or terminate contact between the abusive parent and child, and discontinue a joint custody arrangement that requires joint decision-making.

In Maltezos v. Maltezos, the court noted that there was a "long history of acrimony" between the parents. However, this was a case in which the husband had a significant history of abusing his wife, and the subject had actually been incarcerated for assaulting the wife. In this case, it is understandable that Rogers J. rejected the father's request for joint custody and awarded him only limited, defined access. Similarly in Escobar v. Campbell (White), a case that also involved domestic violence by the husband, the court rejected the assessor's recommendation for joint custody in favor of an award of sole custody to the mother because of the court's views on the "conflict" between the parties (i.e. the violence of the father).

Courts may also be prepared to make a parallel parenting order where there has been domestic violence, provided that the court is satisfied that the domestic violence will not recur and the safety of the children can be assured. In D.H.A. v. K.E.M., the father was convicted of assaulting the mother in an incident which occurred after separation. The court noted that the mother's behavior since the assault demonstrated her bitterness and her willingness to seek revenge by using the children as "pawns in the ongoing struggle." The court determined that a parallel parenting regime would be in the best interests of the children in the case.

ALIENATION

Courts also use the label of "high conflict" where one or both parents are involved in a campaign of alienating the child(ren) from the other parent. Judges, assessors, and parents apply the label of "alienation" to a wide variety of cases where a child refuses or does not wish to have a relationship with one of their parents. Cases in which one or both parents make false allegations of physical or sexual abuse in order to prevent the other parent from obtaining custody or access to the children have been characterized as alienation cases. These cases usually involve several reports to child protection authorities and the police about the alleged abuse. In some cases both parents make allegations of abuse against each other but more frequently, it is only one parent who makes a false claim of sexual or physical abuse of a child.

Whether involving a false abuse claim or not, alienation cases present a unique type of conflict. However, they are described as "high conflict" cases in the same manner as the domestic violence or "co-parenting and access exchange conflict" cases discussed earlier.

In some alienation cases, courts are also prepared to make parallel parenting orders. While the court in T.J.M. v. P.G.M. expressed concern about ordering a type of joint custody where there is a high level of conflict, it ultimately concluded that the conflict did not preclude a parallel parenting order because the children are thriving. As Justice Aston stated: "[t]he focus in any particular case is not the parental hostility in a vacuum, but rather the consequence for the child."

Courts have also held that joint custody is appropriate in high conflict cases where there is an unfounded allegation of domestic violence that may reflect parental alienation. An example of the latter case is Garrow v. Woycheshen, where the court suggested that the mother attempted to build up a "negative record" of the father's behavior for the purposes of obtaining sole custody of the child.
involved. Despite this alienating behavior, the court made an order for joint custody, which signaled to the mother that her conduct would not be tolerated by the court, and threatened a reversal of custody if she did not desist.

The strongest response to a parent who alienates a child from the other parent is a transfer of custody to the rejected parent, and an order for no contact order between the alienating parent and the child. This is only appropriate if there has been severe alienation, the alienating parent has not responded to less intrusive responses, and the rejected parent has the capacity to care for the child through what may be a difficult transition.

CONCLUSION: THE NEED FOR DIFFERENTIATION

An analysis of existing social science literature and Canadian case law demonstrates that there is ambiguity and vagueness in the use of the language of “high conflict.” When judges or parents and their lawyers use the language of “high conflict,” they can be referring to situations involving varying degrees of violence, alienation, or abuse. In some cases, none of these elements are present and parents who are characterized as “high conflict” are only experiencing difficulty in communication and/or cooperation, as well as differences in parenting styles. In spite of how vague the language of conflict may be, it is used in powerful ways to justify arguments, parenting recommendations and decisions in the context of child custody disputes.

While an analysis of Canadian case law reveals that judges are beginning to differentiate between various degrees and types of “high conflict,” this judicial differentiation often occurs without full articulation of the factors that are taken into account in applying different remedies. There is a need for the development of more refined, explicit analytical concepts for the identification and differentiation of various types of high conflict cases. The increasing use of the language associated with high conflict disputes, without an accompanying analysis of the different nature and levels of conflict and their impact on children, can lead to uncertainty in custody and access decision-making in Canada. The broad application of the label of “high conflict” to cases which are factually very different from each other speaks to the need for more empirically driven research to assist families in obtaining appropriate interventions and to aid the court in providing direction and guidance in their decision-making.

Timely identification of types of conflict would allow for the earliest and most appropriate intervention with families, thereby reducing the associated risks to children. By providing a common language associated with high conflict, there would be a reduction in the extent to which multiple services (adult and children's mental health, child welfare, education, medical, police involvement and legal) are provided to these families without results. Further, having an empirically validated instrument that identifies different levels of conflict would assist mental health practitioners in targeting specific interventions thereby reducing the stress on children and families, and ultimately, would assist the courts in early case management of these families.

NOTES

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25. Grant et al., supra note 23.
26. Rachel Birnbaum & Michael Saini, “A Pilot Study to Establish Reliability and Validity: The Dimensions of Conflict Separated Families: Part II” (2007) 51 Ontario Assoc. of Child. Aid Soc. 1. 23. This scale was originally developed as a clinical tool by a sub-committee of the High Conflict Forum in Toronto, Ontario, Canada. The forum is made up of 30-40 social service agencies (child welfare, counseling, children’s mental health, and other assessment services) chaired by Howard Hurzitz (Clinical Director, Jewish Family and Child Services). The DCSFS scale is presently being tested in seven social service agencies in Toronto, Ontario to determine empirical reliability and validity. The research is financially supported by the Social Science and Humanities Research Council and is being conducted by Rachel Birnbaum, Nicholas Bala, Peter Jaffe and Lynn McCleary.
28. Kelly, supra note 5.
33. Ron Neff & Kat Cooper, supra, note 20. See also Ianet R. Johnston & Vivienne Rossey, supra note 19.
34. From January 2007 to July 2009, judges referred to high conflict in 64% of the cases; parents/lawyers argued that the case was high conflict in 13% of the cases; mental health professionals referred to the case as high conflict in 12% of the cases; and of the 13% where parents/lawyers argued high conflict, the judge disagreed with the language in 50% of the cases. Judges agree with parents in the use of high conflict language in 9% of the cases, mental health professionals agree with parents in the use of high conflict language in 9% of the cases, and the judge and mental health professional agree with parents in 14% of the cases.
36. Richter, supra note 35 at para. 11.
40. Ferguson, supra note 38 at para. 23.
41. MacKenzie, supra note 38 at para. 15; Garrow, supra note 38 at para. 4.
42. Garrow, id. at para. 16.
44. Lawson, supra note 35.
45. Id. at para. 15.
50. Griffin, supra note 49 at para. 33.
52. Id. at para. 2.
63. V.E.T., supra note 54.
66. See Jaffe, supra note 1.
67. Supra note 64.
69. Escobar, supra note 64 at para. 16.
72. Id. at para. 23.
77. Supra note 38 at para. 19.
78. Id.
79. See e.g. Garnon, supra note 38.
80. Id.

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CHILDREN’S EXPERIENCES WITH FAMILY JUSTICE PROFESSIONALS IN ONTARIO AND OHIO

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ABSTRACT

There is increasing recognition in law and social science research of the importance of having children participate in post-separation decision making, though there is not a clear consensus on how this should be done. This article reviews the social science literature about children’s participation in the family justice process and presents results of a study in Ohio and Ontario with 32 children between 7-17 years of age, who either met with a judge, had a children’s lawyer represent them, or spoke to a mental health professional in a custody evaluation. Themes focus on (i) what they remembered about their parents’ separation and how they felt about it; (ii) how they found out about the plans that were made for their care; (iii) their level of involvement in decisions about their parents’ post-separation arrangements; (iv) the plans for their care; (v) what they remembered about their participation in the family justice process; (vi) what they found helpful about the process, and what was not helpful; and (vii) what advice they would give to lawyers/social workers/judges who work with children and young adults to help others in similar circumstances. The authors conclude by challenging some of the myths that professionals have about the possible harms or problems with involving children in decision-making post-separation. Children should never be forced to participate or feel that they are making a choice between parents, but it is valuable for children to be given the opportunity to participate, including meeting with the judge, if that is what they want.

PART I: INTRODUCTION

1. INVOLVING CHILDREN IN POST-SEPARATION DECISION MAKING

Much has been written about the importance of consulting children and youths about issues that affect them. Internationally, there is a
movement to engage children and youth in the political process (Quinn, 1999) and to hear their views on issues regarding their sexuality, gender, and health-related matters (McCabe, 1996; Mitchell et al, 2003). Despite the advances in thinking about actively involving children in decision making and the 1989 Convention on the Rights of the Child, which guarantees children the right to express views on matters that affect them, in North America children are generally not involved in the making of decisions and plans following parental separation. In part, this absence is the result of the perceptions and assumptions of professionals and parents about childhood and the effect of parental separation on children, which has led to a presumption that children will be harmed if they are involved in any way in the decision-making process following parental separation.²

Until relatively recently, the prevailing view was that because of their vulnerabilities, children should be ‘protected’ from being involved in decision making about post-separation parenting plans (Kelly, 2003; Smart, 2003). A related assumption was that parents understand their children (O’Quigley, 2000; Timms, 2003), and hence, that children’s views and perceptions are adequately represented by their parents. However, Smith et al (2003) assert that children are more competent than was previously assumed. They argue that children’s resilience following separation will be increased if they are treated as competent actors who can be permitted to share their experiences and perceptions with adults involved in making decisions about their lives. Butler et al (2002) argue that:

Children do not experience their parents’ divorce passively. Their involvement is an active, creative and resourceful one. Recognizing children as competent (as well as relevant) witnesses to the process of family dissolution may further assist the process whereby their accounts are attended to and valued (p. 99).

Cashmore (2003), Kelly (2003), McIntosh (2009) and Wade and Smart (2002) have suggested that children want and will benefit from being part of the decision-making process, and are able to not only talk about their experiences but also to learn from others. Smart et al (1999) argue that children can provide a unique perspective to the discussion about divorce and family changes; they suggest that rather than excluding children:

We may have a lot to learn about divorce from children if we suspend the presumption that they are damaged goods in need of protection (p. 366).

The distinction between participation and choice is important. Children generally want to engage collaboratively with supportive adults during family transitions, but relatively few of them want or expect to make the decisions about post-separation living arrangements by themselves (Achim, Cyr and Filion, 1997; Bretherton, 2002; Cashmore, 2003; Neale, 2002).
There is a growing body of literature on involving children in post-separation decision making, though there is still a lack of consensus about whether and how to do this (Bagshaw, 2007; Bretherton, 2002; Cashmore, 2003; Dunn and Deeter-Deckard, 2001; Pike and Murphy, 2006; Smart, 2002, 2004; Smart and Neale, 2000; Smith et al, 2000). Further, there is very little research comparing children’s experiences with different methods of being involved in the process of post-separation decision making.

2. OBJECTIVES OF THIS RESEARCH

This article is part of a broader research agenda exploring children’s participation in the family justice system during parental separation and divorce (Birnbaum and Bala, 2009, 2010). The focus of this article is on how children felt about their involvement with different professionals in the family justice system, and what can be learnt from their experiences in the family justice process. Specifically, we report on a study of children in Ontario and Ohio who were interviewed by a judge, represented by a lawyer, or assessed by a mental health professional preparing a report for court.

Part II reviews the growing body of social science and research literature on children’s participation in family justice decision making. Part III describes the methodology, design, and the participants of this qualitative study. Part IV describes the thematic results focusing on (i) how the children found out about the plans for their care, (ii) the level of their involvement in developing these plans, (iii) whether they felt ‘heard’ by different family justice professionals who spoke to them, and (iv) what did they find helpful or not about their involvement with those professionals and providing advice to these professionals about listening to children. Part V concludes with recommendations about children’s participation in decision making during family breakdown.

The central theme of this article is that many children want to be involved in decision making about their future, though relatively few want to make the decisions. Too often children feel that their voices are not being adequately heard. The authors argue that children have a right to be heard and should be involved in the decision making that so profoundly impacts their lives during parental breakdown. The decisions being made by adults (i.e., judges, lawyers, mental health professionals, and their parents) have both short- and long-term social and psychological impact on children. To treat children as only passive subjects who should be protected from the decision-making process is not in their best interests, as has been increasingly recognised internationally, and now is being expressed by children themselves.
PART II: SOCIAL SCIENCE RESEARCH ON CHILDREN'S PARTICIPATION

1. WHAT DOES CHILDREN’S PARTICIPATION MEAN?

At the broadest level, children’s participation in decision making relating to parental separation can be as varied as having an opportunity to be involved directly or indirectly when parents are making arrangements without any professional assistance, having input into services that are being provided to them upon separation, having a role in mediation or court-based dispute resolution, or participating in discussions about broader policy and law reform issues relating to parental separation (Birnbaum, 2009; Lansdown, 2001).

There are different levels of participation. Hart’s (1992) ‘ladder of participation’ in decision making has eight rungs. As one moves up the ladder, children become more involved. At the lower level of the ladder, children do what adults say. At increasingly higher levels, children can take part in planning a family or community activity or to provide their thoughts and feelings – but without being given the responsibility for making decisions. At the highest level of the ladder, children are able to set the agenda themselves and invite adults to participate in an advisory capacity.

Shier (2001) suggests there are pathways to participation associated with children’s involvement that have a range of openings, opportunities, and obligations. Similar to Hart’s ladder, there are succeeding levels of participation from just listening to children to providing children with opportunities to share power and responsibility for decision making with adults.

Sinclair (2004) describes children’s participation as having four dimensions: (i) the level of active engagement in participation (eg degree of power sharing between adults and children); (ii) the focus of the decision making that involves children (eg decision making within the family versus in the context of publicly provided services); (iii) the nature of the participation activity (eg consultation exercises, youth forums, or advisory groups or ongoing involvement in the governance of institutions); and (iv) the children involved. Sinclair’s (2004) model begins with the premise that, given the diversity among children, it is important to start with the fourth factor – the children or youth involved – and to consider, for example, their age, gender, culture, economic, and social circumstances, as well as individual ability or disability. The latter dimension must then be matched with all other dimensions relating to the nature of the activity, purpose, and the decision-making context, if children are to meaningfully participate in decisions that affect their lives.

Spicer and Evans (2006) suggest that a hierarchical structure or ladder of participation as outlined above may not best describe the
complex interplay of different factors that can enhance or impede children's involvement. Rather, it is more useful to describe different levels of participation such as (i) informing children about their rights, (ii) consulting with them about their views and opinions, (iii) forming a partnership characterised by information sharing and valuing the opinions of children as well as adults, and (iv) delegating control by devolving the responsibility and power of exclusive decision making by adults. These types of participation are not mutually exclusive; they interrelate and are often overlapping.

With respect to children's level of participation in the making of post-separation plans for their care, studies from a number of countries demonstrate a low level of consultation with children in relation to custody and access cases (Achim et al., 1997; Birnbaum and Bala, 2010; Butler et al., 2002; Parkinson and Cashmore, 2008; Smart et al., 2001; Smith et al., 2003). Further, children generally report that neither are they well prepared for their parents' separation nor are they informed about the process (Butler et al., 2002; Dunn et al., 2001; Taylor, 2006). Graham and Fitzgerald (2010) interviewed 12 children in Australia to understand their level of participation in decision making during family breakdown. They found that all children expressed the view that they should have a say in decision-making processes. For children, having a say meant being listened to by adults and having their views taken into account – having a chance to influence the decisions being made on their behalf. The children believed that the benefits of participating would lead to better decision making and reported that being excluded from participation made them angry and resentful. This is a recurring theme that is being heard across the globe (Butler et al., 2002; Dunn-Deeter-Deckard, 2001; McIntosh, 2009; O'Quigley, 2000; Smith et al., 2003).

Birnbaum (2009) suggests that in the context of mediation or other alternative dispute resolution processes specifically, children's involvement is highly varied; mediators have not adopted any one model of participation. In considering how children are currently being included from the perspective of where their participation fits along the various participation models identified above, children are usually involved at the lower end of the spectrum. That is, children, even older children, are not automatically given 'voice' in the decision-making process but, rather continue to rely on adults asking them first. In turn, this leaves children feeling less empowered in the decision-making process.

2. THE DIFFERENT WAYS CHILDREN ARE HEARD

In the context of family justice decision making, children's involvement is highly varied, both within and between jurisdictions (Birnbaum,
In contested custody and access disputes, children's voices are ascertained by (i) direct evidence from the child either as a witness in court or an interview in the judge's chambers, (ii) indirect evidence related by a parent or other witness through hearsay (including a videotape or audiotape), (iii) the evidence of a mental health professional who has conducted a custody and access assessment for the court, (iv) written statements from a child in the form of a letter or affidavit, and (v) child legal representation.

3. SUMMARY OF RESEARCH ON CHILDREN'S INVOLVEMENT WITH DIFFERENT PROFESSIONALS

A. Mediation

In a review of a number of studies from the United States, the UK and Australia on private and public sector mediation, Saposnek (2004) reported that mediators sought children's direct input between 4-47 per cent of all completed mediations, with most studies reporting participation by children in less than 10 per cent of cases.

In Australia, McIntosh (2007) compared child-inclusive (CI) mediation (child specialist meets the child and provides parents with feedback on the needs of their particular child) versus child-focused (CF) mediation (where parents are educated about the needs of children in general) in terms of effects on resolution of parental conflict, enhancing parent-child relationships, and reducing distress on children. Of the 150 families who participated, the researchers reported that both interventions lowered inter-parental conflict and child distress 1 year later (McIntosh et al., 2008). However, the CI group demonstrated better outcomes with increased father satisfaction with parenting arrangements, more father involvement in their children's lives, and less court litigation compared to the CF group, suggesting that there is real value in providing children with a voice in the mediation process.

Goldson (2006) in New Zealand explored a programme of child-inclusive mediation with 17 families and 26 children between the ages of 6-18 years. In this programme, the mediator met alone with the child, and reported a summary of the child views to their parents. The children were told that what they said would generally be discussed with their parents, but were provided with an opportunity to identify information that they did not want shared with their parents. After the parents, taking account of the child's views, developed a tentative plan with the mediator, the parents and children were then brought together in a joint session to discuss the proposed parenting plan. A subsequent session with parents, child, and mediator was held a few weeks later to discuss how the implementation of the parenting plan was working, as well as to examine any outstanding concerns. Goldson (2006) found
that children uniformly reported that they liked having their voice heard and were more satisfied with the final parenting plan as they had an opportunity to voice their feelings. Of significant note, as a result of hearing their children’s views, parental conflict was reduced and there was an increased likelihood of a mediated agreement rather than a judicial resolution. Goldson (2006) further observed that there was an increase in the parents’ awareness of the impact of the conflict and the significance of working together on behalf of their children. As a result of the parents hearing their children’s views, the children reported feeling more relaxed and better able to adapt to their parents’ separation.

B. Child Legal Representation and Social Work Investigations

Taylor et al (1999) interviewed 20 children in New Zealand between the ages of 8 and 15 years of age about their experiences having a lawyer represent them in parental disputes. The children had varying experiences: 20 per cent disliked their lawyers, 25 per cent liked them, while the remaining children expressed ambivalence. When asked about what advice they would give to lawyers who represent children, the children suggested that lawyers need to listen more carefully to children, talk on their level, and take the time to get to know them, be friendly, and respect children’s confidentiality.

Masson and Oakley (1999) conducted interviews and observations of 20 children between 9 and 15 years of age in the care of the state in England to study their experiences with their guardian ad litem (or ‘GAL’) (an independent social work investigator) and their lawyers. The researchers found that most of the children had a good understanding of the role of their GAL and trusted them. The children had less of an understanding about the role of their lawyers, and many seemed confused about the lawyer’s role. Most children did not see the full reports filed in court by their GAL’s and did not have an opportunity to discuss the report with their lawyer. In addition, most of the children were not kept informed by their GAL or lawyer about the outcome of their case.

Similar findings were reported by Birnbaum and Bala (2009) in their study of 11 young adults (19–21 years of age) who reflected on their experiences as children with their lawyer from the Ontario Office of the Children’s Lawyer (OCL) during their parents’ custody dispute. For example, they reported that while they were glad to have been able to speak to someone who was independent, most felt that their lawyer really did not explain the process enough to them, and more importantly, paid little attention to their wishes.

Douglas et al (2006) surveyed 15 children (8 boys and 7 girls) in England between 7 and 17 years of age to explore their experiences
with their social worker and lawyer, and with the legal process. They found that in general children believed that if their parents could not resolve their difficulties, a neutral judicial authority was necessary. The children appreciated having someone neutral to talk to about the court process. Younger children appreciated having a social worker while older children wanted to speak to a lawyer. The children wanted the social worker to accurately report to the judge on what the children said, but were upset if they discovered that their confidence was breached when information was provided to their parents and the court. They wanted to be kept updated about developments in the case by their social worker and lawyer, as they believed that information received from these professionals would be more reliable than that provided by their parents. The majority of the children reported that they felt secure and trusting of their social workers or lawyers. They also reported feeling more confidence in having their views made known to the court and more importantly appreciated the experience of being treated with respect—a theme echoed in studies from other countries.

Tisdall et al. (2004) conducted a study in Scotland to examine how best to take children’s views into account during family court proceedings. Four focus groups involving 26 children were conducted, and 17 children were interviewed individually; the children were between 8 and 18 years of age. The different groups were (i) children who were represented by a lawyer or had a guardian ad litem (social worker) in child welfare proceedings in court, (ii) children whose cases were dealt with in family court but who were not represented, (iii) children who had experienced parental separation but were not involved in court proceedings, and (iv) children who had not experienced parental separation or divorce. The children who were represented by lawyers generally spoke positively about their experiences. They stated that their lawyers provided them with an opportunity to be able to express them, were friendly in their approach, and provided a relaxed atmosphere to share their views. The children also felt that their lawyers explained things clearly to them. Some of the children expressed relief in having a lawyer so that they did not have to talk in front of a group of strangers (in a court room), or having to be present and speak in front of their parents. One child spoke of the negative impact of the long delays in court resulting in stress on the family as well as negative effects on schoolwork. The researchers concluded that children—both those who had legal representation as well as those that did not—wanted to have their views considered in making post-separation plans.

Stotzel and Fegert (2006) surveyed 52 children and youths in Germany concerning the role of the guardian appointed to represent their interests in family proceedings. They found that most children understood the role and duty of the children’s guardian. Of the
children who expressed views, 30 children reported positive experiences with their guardian, 2 were critical, and 12 children reported both positive and negative views. The majority of the children were satisfied with the process to the extent that they felt supported, and believed that their feelings were being accurately reported back to decision makers.

C. Judicial Interviews
Atwood (2003), Parkinson and Cashmore (2007), Raitt (2007) and Williams (2006) have surveyed judges in Canada, the United States, Scotland, and in Australia. They found responses amongst the judges varied from those who would interview children to learn more about them and get to know them to other judges who reported that they did not feel qualified or that there was not any need to bring children into the parental dispute.

Morag et al (2009) undertook research in Israel regarding a governmental pilot project on the participation of children 6–18 years of age in family court proceedings. According to the model applied in the project, a child participation unit has been established within the family courts. The unit is staffed by social workers and psychologists (hereafter referred to as Participation Workers). The child is invited to the participation unit and offered the possibility of meeting directly with the judge who is hearing the case, or of transmitting his/her thoughts, feelings, and opinions about their parents’ dispute to the court through a participation worker. Of the 448 children in the study, about half (48 per cent) invited to participation unit came to the unit and exercised their right to participate, 26 per cent of these children met with the judge and 74 per cent decided to convey their views through the participation worker. A vast majority of the children in the study stated that it was a good idea to ask children to participate (93 per cent) and they [children] would advise a friend to speak to either a judge or a participation worker (92 per cent); a significant majority indicated that participating in the process helped them (62 per cent). The researchers found that the lawyers for parents were more supportive of the project as it went on, resulting in more parental support for their children’s participation.

4. SUMMARY OF RESEARCH ON CHILDREN’S VOICES IN THE FAMILY JUSTICE PROCESS
There is great diversity in different jurisdictions in how children are involved in the family justice process. While there are no definitive conclusions about whether one professional group or the other is better suited to interviewing children, one common theme is that, regardless of which professional is involved with the child, children
want to be consulted when decisions are being made about their future and want to be part of the decision-making process.

PART III: METHODOLOGY OF THIS STUDY

1. CHILDREN'S PERSPECTIVES ABOUT FAMILY JUSTICE PROFESSIONALS

In 2010, children were recruited from closed family court files, where trials or hearings occurred between 2000 and early 2010\textsuperscript{11} in three Ontario court jurisdictions (different court levels) and four Ohio court jurisdictions.\textsuperscript{12} The study was guided by an inductive qualitative design using grounded theory strategies. Grounded theory is an approach that develops knowledge in an area that has been the subject of relatively little inquiry – children’s views of their involvement with family justice professionals (Creswell, 1998; Cutcliffe, 2005). Themes emerged from the semi-structured audiotaped telephone interviews with the children. The information provided was systematically gathered and analysed throughout the research process, allowing thematic themes and patterns to emerge (Fossey et al., 2002). Journaling included observations and reflections of the interviews as suggested by an audit trail (Charmez, 2006; Fossey et al., 2002; Lincoln and Guba, 1985).

A semi-structured interview guide was used and each child was asked several open-ended questions. Examples of the questions were:

- what do you remember about your parents’ separation and how you felt?
- how did you find out about the plans that were made for your care?
- how were you involved in decisions your parents made about living apart?
- did plans for your care change over time?
- what can you remember about your participation in the process?
- what did you find helpful in the process, and what was not helpful? and
- what advice would you give to lawyers/social workers/judges who work with children and young adults to help others in similar circumstances?

Each parent\textsuperscript{13} and child between the ages 7 and 17 years old\textsuperscript{14} was contacted by letter advising them about the study with a consent form requesting their child’s involvement in an interview about children’s experiences with various family justice professionals. Both parents and the children were advised of the confidential, voluntary nature of the study. Each child who participated received a $25.00 honorarium for their time.
PART IV: THEMATIC RESULTS

1. WHAT DO YOU REMEMBER ABOUT YOUR PARENTS' SEPARATION?

Virtually, all the children expressed feelings of sadness and angst over their parents' separation, regardless of their age or length of time since their parents' separation, and had vivid recollections of their parents' separation. In contrast, while each child correctly remembered which type of professional they met (as verified by the researcher's search of court files), few could recall the names of the family justice professional with whom they were involved. None of the children reported feeling any negative effects as a result of their interviews with any of the professionals. Five children initially did not want to discuss their...
parents’ break-up with the researcher, but then acknowledged that the separation was probably best in the end:

I knew she [mother] could not look after us and as much as I wanted to stay with her, it is better with my father. (age 10)

I really wish they could have worked it out, even though they were always fighting. (age 12).

They fought [verbally and physically] all the time ... my brother and I were scared a lot. (age 10)

Mother was on pills and tried to kill herself, now not so depressed [mother]. (age 15)

I got into trouble ... blew up a car ... got into criminal stuff. (age 16)

A majority of the children reported feeling very confused and experiencing school difficulties after their parents’ separation, as reflected in the comment of a child whose court file had very recently been in the sample closed:

I am having a hard time coping with the break-up and my grades dropped. (age 12)

2. HOW DID YOU FIND OUT ABOUT THE PLANS THAT WERE MADE FOR YOUR CARE?

A majority of the children (19/32: nearly two-thirds) stated that they were not consulted about their living arrangements by anyone. The majority of the children also reported that they were told by one or both of their parents of the separation — some as a result of a domestic violence incident between their parents. All of the children who were 10 years of age and over at the time of separation reported that they expressed their views about their living arrangements to their parents, but most indicated that their parents did not listen to their views. Five children stated that their parents asked them where they wanted to live. Comments ranged from:

I didn’t have any say ... they [parents and professionals] need to listen to children, they [children] are humans no matter how old they are, they need to have say. (age 15)

I would have liked to be at court, after all it is my life. (age 11)

No one told me and one night a big fight between mom and dad. Dad was drinking ... he got charged and we left. (age 13)

I was told it [arrangements] was none of my business. (age 9)

I remember seeing a social worker and not knowing why until it was too late [that this meeting could have a significant effect on my future]. (age 13)
My parents went to court and then OCL showed up. (age 13)

Similar findings have been reported by Butler et al (2002), Cashmore and Parkinson (2008), Dunn and Deeter-Deckard (2001), Hawthorne et al (2003), and McIntosh (2009) where children reported neither being consulted about their living arrangements nor told of what was happening in their family, despite the research on children’s coping capacity being enhanced when their views are respected and their autonomy is supported (Smart et al, 1999, 2001).

3. WHAT DID YOU FIND HELPFUL OR NOT ABOUT TALKING TO A FAMILY JUSTICE PROFESSIONAL?
Interestingly, the children who met a judge remember being asked whether they wanted to do this. However, children who had a lawyer or met with a mental health professional could not recall being asked whether they wanted to do this. Regardless of whether they met with a judge, lawyer, or mental health professional, the children unanimously stated both that it was important for them to be heard, and that they did not want to make the final decisions. As one child stated:

So instead of saying what they [children] want... [just] good to have a say. (age 12).

4. JUDICIAL INTERVIEWS
All 16 children who spoke to a judge reported that they were initially anxious about meeting with the judge, but they wanted to speak to the judge to let the judge know how they were feeling. All the children reported that the judge made it clear to them at the beginning of the interview that the meeting would be private; the judge would not tell the parents exactly what they said, and would only tell their parents what the judge thought about the situation. Only 4 of these 16 children reported that the judge taped the child’s interviews; 2 judges did not allow the parents’ lawyers in the room and in 8 cases the child’s lawyer or guardian-ad-litem was present. The children made the following statements about meeting the judge:

I saw the judge, twice I think. I wanted to and felt good about it. (age 12)

Not great about seeing judge, but [the judge] made me feel comfortable. (age 10)

Judge told me the decision and I was not happy about the decision, but felt it was good for the judge to see who I was... I knew the judge was struggling with the decision. (age 14)

I wanted to be heard as it was about me... judge never heard about lot of stuff. (age 10)
Yes, it was good to see the judge, even though I did not get what I wanted. (age 10)

Nice to talk to someone who had direct input and decision-making . . . told judge what I wanted and would have been upset had it not worked out. (age 12)

Didn’t get what I wanted, not worth it [judicial interview], but did get my point across. (age 14)

At first nervous, but judge really nice and I felt that judge listened. (age 9)

5. IF YOU HAD A CHOICE, WOULD YOU ALSO HAVE LIKED TO MEET THE JUDGE?

Children who were represented by a lawyer or who met with a mental health professional in the course of an assessment were asked if they would also have liked to have met with the judge. Six out of the 16 children responded that they would have liked to meet with a judge if they had known it was an option. The following comments were made by those who would have wanted to speak to the judge:

That would be a good to speak to a judge, but I did not get that chance . . . mother did and my lawyer did. (had child lawyer, age 17)

Want a say and not a report on me . . . [would like to have met the] judge for sure. (had both a child lawyer and mental health professional, age 14)

I didn’t know I could talk to a judge . . . yea something like that is good. (had child lawyer, age 12)

I went to court but did not get a chance to talk to the judge . . . my mother did. (had child lawyer, age 12)

I would have asked to see a judge [if I had known]. (had mental health professional, age 12)

In contrast, a number of children indicated that they did not have an interest in meeting the judge, making comments such as:

Would prefer a lawyer. (had a child lawyer, age 12)

I would probably want talk to my parents first. (had a mental health professional, age 9)

I would say a lawyer because if you actually have a lawyer, they kind of help with some kind of problems with court and stuff, so I choose a lawyer. (had a child lawyer, age 10)

I really liked what [social worker] did, so I was ok. (had a mental health professional, age 11)

6. LAWYERS

Of the nine children who were represented by a lawyer, several of the children also had previously met with a mental health professional and
spoke to a judge as well. The children reported the following about their views of their lawyers:

I did talk to a social worker and a lawyer, but not sure how helpful it was though. (age 17)

It is helpful that the court knows what the child wants and what the child is going through . . . the lawyer was ok. (age 13)

OCL was helpful . . . looking for someone with skills on making better parenting but did not see it too much. (age 12)

It was helpful to me, but wanted more time with the lawyer. (age 12)

I had two lawyers . . . lots of fighting by the lawyers. (age 10)

Many of the children who had lawyers did not know that there were other ways of being heard. However, they all expressed that wanting to be heard was important to them.

7. MENTAL HEALTH PROFESSIONALS

Seven of the children were interviewed by a mental health professional as part of a court-ordered assessment. Comments from these children included:

She was really good and listened to me . . . I got what I wanted. (age 9)

Not sure how much help the worker was in the end. (age 10)

OCL [social worker] . . . was not really helpful and her choice [was] not good about how often I have to see my other parent. (age 16)

It was ok I guess, but really can’t remember as it was a long time ago. (age 17)

8. WHAT ADVICE WOULD YOU GIVE TO PROFESSIONALS ABOUT HEARING CHILDREN'S VIEWS?

The 32 children interviewed had many suggestions for professionals involved in the family justice system, including judges, lawyers, and mental health professionals, about the importance of listening to children, as well as some advice for children experiencing separation. The themes presented in this study have resonated in previous studies from several countries. The children’s comments included:

Advice to Lawyers

Be patient and just listen. It is hard for kids.

I want lots of details about what is going on.

Be really gentle with kids. We need to know that we are important.
Advice to Mental Health Professionals

Listen and not keep changing the subject.
Want follow-up and check in every six months to see how we are doing.

Advice to Judges

Be straight up with how you feel and what you want.
Try to get to understand what the child is going through and believe the child.
It is not child's decision, but the child should have a say and judge should hear it.
Don't be biased and be open-minded to what a child says.

Give children an opportunity to see and talk to a judge before judge makes a decision.

Two young adults who did not get what they wanted from speaking with the judges in their case nevertheless clearly stated that it was important for them to meet the judge:
In every case, a judge should give a kid a chance to talk to them.
Yes, it was good to see the judge even though I did not get what I wanted.

PART V: CONCLUSIONS - MYTH BUSTING

Much of the small body of research on children's participation in the family justice process is based on interviews with professionals or parents. The purpose of our study was to hear directly from children about their involvement with different family justice professionals, without having their experiences filtered through the lens of the adults. This study reports on some important findings in two very different jurisdictions: Ohio, where children are often interviewed by a judge and Ontario where the practice is rare.

While children can be interviewed by a lawyer, a mental health professional, or a judge, at present in most jurisdictions it is generally the adults who make the decisions about who, when, and how they will be interviewed if at all. This study revealed a similar pattern: children were told they had to meet 'with their lawyer' or 'the court's mental health professional'. The children who met with a judge, however, all reported that they were given a choice of whether to meet the judge. Of the children who reported that they 'did not get what they wanted' (4 of the 16) after meeting with a judge, nevertheless all stated that it was still important to have the judge hear from them, and that they would do it
again. That is, they all thought that it was important for them to speak directly to the decision maker.

Not all children in Ontario or Ohio have an opportunity to speak to a family justice professional, and the reality is that not all children need to speak to a professional in the process of having plans made for post-separation parenting. However, *choice, opportunity, and availability for children* should be part of all family justice processes that address children's future well-being and post-separation decision making.

What is clear and consistent from all the interviews with the children was that they want to be asked *whether* they will participate in decision making, and many want to be heard and listened to and be part of the decision making that affects their lives. Children need to know that what they feel and think is important and worthy or useful to be listened to.

At the start of the separation process, children will have no experience with it and likely very little knowledge about how they can be involved, but as the process continues, children will start to gain an appreciation of how they might be involved. Inevitably, at the start it is the parents who will be the first to tell their children about their separation, and who will start to provide them with some information about the separation process. In many cases, the parents make their own arrangements without involving professionals. In attempting to do so, the parents are usually the first to solicit their children's views. While it is very important for professionals to caution parents against drawing their children into taking sides, it is also important for professionals to recognise that the parents are likely to have communicated with the children before the dispute resolution process commenced, and that they will be communicating with them after it is over (Kelly and Kisthardt, 2009).

For those cases that will be resolved with the assistance of family justice professionals, whether mediators, lawyers, judges, or mental health professionals, those professionals can be of great assistance and support to children by explaining the legal process and answering their questions about what is happening in their family situation in appropriate child focused language. Irrespective of the level and type of conflict, all children should be heard to affirm that their views and feelings are important and valued, be it by their parents in mediation, their lawyer, or a judge. Education on interviewing children can be of benefit to all professionals in the family justice system. Even a single meeting of a child with a judge, mediator, mental health professional, or child lawyer can be valuable for giving the professional some insights about the child and more importantly, can be empowering for the child. However, children's expressed views and preferences may change and be affected by such factors as who brought the child to the meeting, cultural nuances, and so on. Therefore, no professional whether it is a judge, mediator, lawyer, or assessor should *ever* rely on just one interview to establish a child's views and preferences.
It has often been said that children should be protected from the negative effects of their parents' separation, and it is widely recognised that parental conflict that involves the children is harmful to them and therefore children should not be put in the middle of their parent's dispute. We agree, but with one important cautionary note. If parents are unable to agree on a parenting plan without involving professionals or the court process, it is very likely that children are already caught up in the conflict between their parents. We argue that allowing children to express their views in a safe, neutral, non-judgmental way to a family justice professional, and even a judge, can go a long way in assisting children's positive post-separation adjustment. While children should never be pressured to express their views or preferences, they should always be afforded the opportunity to share their perspectives.

The concern expressed by some judges, lawyers, and mental health professionals that judges may harm children with even a short interview has not had any support in this study (Birnbaum and Bala, 2010; Kelly, 2003). The event that the children remembered most vividly and traumatically was the day their parents separated - not their interviews with a judge, lawyer, or a mental health professional. Perhaps, professionals overemphasise the importance of their direct involvement in the lives of children.

We found that many children, including those that had an interview with a mental health professional or a lawyer, wanted to speak to the judge, because they wanted to speak to the final decision-maker, a similar theme echoed by Cashmore and Parkinson (2008) in their study. We are not suggesting that one type of professional is 'better' at engaging children in post-separation decision making. In fact, children's interests may be served by meeting with different professionals at different points during the separation and court process. It is often said that divorce [for adults] is a 'process' (emotionally and financially), so too, is it for children.

To build an ethic for children's participation in post-separation decision making requires that the various family justice professionals listen respectfully and engage with children in a dialogue respecting their strengths and capabilities - not focusing on their limitations. Finally, regardless of which professionals meet a child, the child's voice must be heard and considered in the decision-making process. It is no longer when, or if, but now that they be heard.

ACKNOWLEDGEMENTS

This is a revised version of a paper presented at the Ontario Bar Association, 'Family Law Boot Camp: Kicking It Up A Notch', 4 February 2011, Toronto, Ontario, Canada. The paper is part of a broader research initiative on children's participation in family law decision making. See Birnbaum and Bala...
(2009) on hearing children’s views about their child legal representation and Birnbaum and Bala (2010) on a comparative analysis about judicial interviews of children’s between Ohio and Ontario. All interviews with the children were conducted by the first author in Ontario and Ohio. Dr Francine Cyr is in the process of interviewing children and judges in Quebec, where children are more inclined to speak to a judge than anywhere else in Canada as a result of Article 34 of the Quebec Civil Code that creates a presumption that children will be directly heard by the court. It truly takes a village to conduct research about children’s participation in the family justice system and to learn firsthand about their experiences with the different family justice professionals. The authors wish to thank and acknowledge, Ohio Judge Denise Herman McColley, Magistrate Richard Altman, Magistrate Pamela Heringhaus, Dr Kathleen Clark, Programme and Grant Administrator, Marion County Family Court, Ohio, and Anne Marie Predko, Director, Family, Policy and Programmes Branch, Court Services Division, Ministry of Attorney General, Ontario. There are many law and social work students who assisted with the countless administrative and research tasks over the course of this study; we are most grateful to all of them. The authors also wish to acknowledge funding support from the Social Sciences and Humanities Research Council of Canada. Finally, and certainly not least, we thank the children who shared their stories with great humility of their experiences with judges, lawyers, and mental health professionals. They overwhelmingly asked for one thing – to be heard and part of the decision-making process. We hope we have done that – bringing their voices forward so that ‘we’ adults (judges, mental health professionals, lawyers, and researchers) can hear them and learn from them, and that other children may benefit from being heard in the future.

NOTES

1 Canada is a signatory to the United Nations Convention on the Rights of the Child, but the USA is not. Nevertheless, as discussed in this article, children in many American states have a broader right of participation in court proceedings than children in Canada.

2 S.R. v. C.S., 2006 BCPC 2, [2006] BCJ 8 at para. 18, Sknick Prov. Ct., stated (emphasis added): ‘At the conclusion of the evidence, counsel for the Respondent [father] made an application to have the children interviewed by myself as the trial judge, outside of the courtroom and in the absence of the parties or counsel. The application was opposed by counsel for the Applicant [mother]. As a general rule, it is my view that parties should be discouraged from involving children directly in court proceedings. In a case such as this, where there is acrimony between the parents, it is generally unfair and emotionally cruel to do something which might make a child feel responsible for the making of a decision which will to fundamentally affect his or her future relationship with the parents. Whatever decision this court reaches will likely be unsatisfactory to at least one of the parties. Under no circumstances should this child be brought to appear or feel responsible for a decision that may add to discord in the home. Children in this position generally ought to be sheltered and protected from any emotional fallout from the break-up of their parents’ relationships and should be free from any subsequent guilt or blame that may be placed upon them, either spoken or otherwise’ – ultimately, the judge granted the application only because there was no independent evidence about the children and their views; rather, than the child’s right to be heard.

3 Cyr (2009), Paper presented in Moncton and published in proceedings of the colloquium. La place de l’enfant au sein de la famille séparée. Entre le droit et l’intérêt de l’enfant: Une question de responsabilité parentale, November (2008), Moncton, New Brunswick, Canada where she stresses the importance of hearing children without giving them the responsibility or the belief that they can make the decision – rather, to meet them and hear them during the separation/divorce process. Also see
Williams (2007) for a review of relevant provincial statutes referring to the views of the child and the qualifiers to hearing the child's views. There have been two legal conferences sponsored by the Continuing Legal Education Department of the Law Society of Upper Canada, Ontario on the Voice of the Child in 2009 and 2010. In 2009, in conjunction with the University of Toronto, Faculty of Law and UNICEF Canada, in celebration of the 20th anniversary of the Convention on the Rights of the Child, The Best Interests of the Child: Meaning and Application in Canada was held in Toronto, Ontario. The National Family Law Programme in July 2010 in Victoria, British Columbia, Canada also held panel discussions and debates on children's participation, especially regarding judicial interviews with children. The authors encourage further discussion with all the family justice professionals to unpack the myths from realities as well as the assumptions and barriers that may exist to hear from children directly. Of course, this should include a discussion and debate about the different types of child legal representation in North America.

A qualitative methodology was selected because it captures the breadth and depth of the children's views and experiences with the different family justice professionals. A qualitative approach generates a representation of themes from the children who were interviewed and allows the reader to draw their own conclusions. Qualitative research is not about generalising results; rather, it is about drawing out the complexities and tensions that are inherent in the real world – in this case, the varied experiences the children had with the different family justice professionals.

Since 2004, children are participating more and more in mediation. However, there remains little consistency in approach across North America. At the Family Mediation and Psycho-Social Expertise Service at the Palais de Justice in Montreal, Quebec, children are included in the mediation process that is similar to the McIntosh et al. (2008) child-inclusive approach. More significantly, children are mailed a follow-up survey to comment on whether the mediator heard them, understood their wishes, and also asked about their views on the mediation process. This is the only consistent, structured mental health approach to including children in the mediation process in Canada.

Holtzworth-Munroe et al. (2010) are replicating the McIntosh study in the USA but using random assignment of family cases to both types of interventions as well as comparing them to traditional divorce mediation. The study is ongoing and no data are available as of this writing.

The children's guardian can be a mental health professional, a lawyer, or non-professional who represents the interest of the child.

See Birnbaum and Bala (2010) for a more thorough review of judicial interviewing of children. Further information about this pilot project will be published in the next issue of this journal.

Similar to the methodological challenges of the Birnbaum and Bala (2009) study of attitudes towards children's lawyers, the addresses of parents in court files were dated and many letters were 'returned to sender'. Twenty parents (15 fathers and 5 mothers) inquired as to whether the researcher [Birnbaum] would provide their child's whereabouts if the other parent responded to the interview. The parents were reminded of the confidential nature of the study and that no identifying information would be released to any parent, even if both parents agreed to their child being interviewed. Ten parents consented to the interview but their child did not, hence, no interview took place.

In Ohio, the highest level of trial court is the Court of Common Pleas, of which there are four divisions—general, juvenile, domestic relations, and probate. Each county has its own Court of Common Pleas, but the divisions are arranged differently. Closed files were reviewed in domestic relations courts (parents are married) and juvenile division courts (unmarried parents). These two courts deal with the majority of family law disputes and both courts interview children in custody and access disputes as well as child welfare matters.

If the parents had joint decision-making authority, each parent signed a separate consent form to have their child/children interviewed as well as all the children.

It was important that all children sign consent for their individual participation. Both written and oral consent are reflected in the CFSA where children aged 7+ years need to provide written consent to be adopted and children aged 10+ years must provide written consent to release their medical records. More importantly, having children sign consent to participate validated them and made the process transparent to their participation in the study.

There were five subsets of siblings that were part of this sample.
provinces, and states. As a result, changes had to be made to the methodology with ethics approval along the way. While the affects of relocation was not part of the study, it does raise another research question about the impact, if any, a move had on the child and the reason for the custodial dispute. See Parkinson et al (2010) and Taylor et al (2010) about interviewing children who have relocated. There is little, if any empirical research on children's views about the affects of relocation on their lives and the qualitative work of these scholars is both timely and necessary.

While some children had experiences with more than one professional, children were only interviewed about their experiences with the last professional to interview them.

Before and after each interview with a child, each parent was thanked for providing their consent for their child's participation. The brief conversations also allowed the researcher several opportunities to hear how the child was feeling about the interview both pre- and post-interview. In addition, each child was given time after the interview to talk about whatever they wished that allowed for another opportunity to assess their reactions and feelings. No child had to be reported to a child welfare agency due to concerns expressed during the interview or provided with names of a counsellor.

All ages reported are at the time of the interview of the study.

Some of these children also had siblings who were interviewed by the same judge. According to the children, the judicial interviews ranged from 10 to 50 minutes. The children's ages at the time of the study ranged from 7 to 16 years of age. While the majority of the judicial interviews with children took place in Ohio, some took place in Ontario: for reasons of children's confidentiality, the judge's location, level of court, and the child's gender are not being disclosed in this paper. Family law disputes about children take many pathways over the course of a child's life and some of these cases could be back before a court for variations about custody or access.

In Ontario, the Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 64 provides for a judicial interview. Judges have wide latitude to decide whether to interview children. The legislation establishes some minimal procedural rules that are to be followed when judges choose to interview a child:

**Child entitled to be heard**

64 (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.

**Interview by court**

(2) The court may interview the child to determine the views and preferences of the child.

**Recording**

(3) The interview shall be recorded.

**Counsel**

(4) The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.

The Ohio Revised Code, ss. §3109.04 and 3109.051, which governs judicial interviews in domestic proceedings is considerably more detailed and directory than the Ontario provision, requiring an interview if requested by any party, and restricting who may attend. Para. §3109.04 of the Domestic Relations Code provides:

(B) (1) ... In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities ... the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:
(c) The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview. The Ohio legislation further indicates some preference for judicial interviews, as a means of ascertaining the child's views, with s. 3109(3) providing 'shall' not 'consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters'.

Unlike in Ontario, Ohio judges are obliged to interview a child upon the request of either party to the proceeding, though s.3109.04 (B)(2) gives a judge conducting an interview the authority to decline to ascertain the child's 'wishes and concerns' at an interview if the child lacks the capacity to do this. Further, the judge may decide that there are 'special circumstances' such that it would be in the child's 'best interests' not to interview the child to determine the child's views. Unlike Ontario, in Ohio, the majority of the judges receive training in interviewing children.

In Ohio, some courts have court-connected mental health professionals who also conduct child interviews and report their findings to the judge. In this study, seven of the children had also been interviewed by a mental health professional prior to a judicial interview in an attempt to resolve the custody dispute.

22 Cashmore and Parkinson (2008) found similar results in their study of 47 children. In their study, children stated that the best person to speak about their wishes was their parents first (n = 12) and then a judge (n = 8).

23 In March 2009 and 2010, the Law Society of Ontario held educational programmes on children's participation in family proceedings; at both of the programmes, lawyers from the OCL indicated that in their experience with representation in this type of cases, very few children had ever requested an interview with a judge. They reported that they had canvassed colleagues at the OCL whose experiences were similar. They also stated that these requests were generally in the context of alienation cases.

A Committee has been established in Ontario to address the question of judicial meetings with children in family cases. We support the development of policies for both the courts and the OCL that will ensure that children are afforded the opportunity to meet with the judge, and that their lawyers will support them in making this decision, and exercising this right.

REFERENCES


