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JUDICIAL INTERVIEWS WITH CHILDREN IN CUSTODY AND ACCESS CASES: COMPARING EXPERIENCES IN ONTARIO AND OHIO

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ABSTRACT

Social science research and the *Convention on the Rights of the Child* support children's participation in family law disputes, though there is not a clear consensus on how this should be done. Judicial interviews of children in custody and access cases are one method of involving children, and ascertaining their views and preferences, though the practice raises some complex and controversial issues. The extent to which judges meet with children, and their practices when they do so, varies greatly both within and between jurisdictions. This article reviews the social science literature and Canadian case law on judicial interviews and presents the results of a study based on interviews with 16 judges in Ohio and 30 judges in Ontario with judicial interviews on children in family law disputes. In Ohio, judges are statutorily mandated to interview children, and all the judges have extensive experience with this practice, while in Ontario, judicial experience with interviewing children varies from no experience to quite limited. The themes explored are (i) how often judges interview children, (ii) what factors do judges consider when deciding whether to interview a child or not, (iii) what concerns do judges have regarding interviewing children, and (iv) whether judicial interviews are helpful or not. The authors conclude with recommendations for when and how judicial interviews with children should be conducted, suggesting that the practice should be used more than at present in jurisdictions like Ontario.

INTRODUCTION

1. CHILDREN'S RIGHT OF PARTICIPATION AND THE VALUE OF JUDICIAL INTERVIEWS

Increasingly, children are regarded as having the *right* to participate in legal processes that resolve disputes about their care.[1] Furthermore, there is a growing body of research that recognises the value for both

decision makers and children in having the children actively involved in family dispute resolution processes. There is, however, great controversy about how to involve children in these processes, and in particular about whether and how they should communicate directly with the judges who will make the decisions that profoundly affect their future.

Canada is a signatory to the United Nations Convention on the Rights of the Child,[2] a treaty that clearly recognises the right of children to participate in the family justice system, with Article 12 providing that:

> 1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial . . . proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The United Nations Committee on the Rights of the Child (2009) responsible for monitoring implementation of the convention posits that it is not up to a child to prove his or her capacity but that the child's capacity should be presumed. Furthermore, children's meaningful participation in decision making can reduce the negative effects on them of family breakdown.[3] The existing empirical research on children's desire to be included suggests that they want to be kept informed, and want their needs and interests heard. Yet, there remains much less consensus on *how* and *when* children should participate during parental breakdown and have their voices heard. There are several different mechanisms for allowing for the participation of children in family proceedings in various countries, including Views of the Child Reports,[4] custody and access assessments,[5] child legal representation,[6] judicial interviews,[7] and the use of a child specialist in collaborative family law.[8] However, many of these processes remain within a traditional adversarial framework, with adults deciding whether and how children's voices will be heard.

Judicial interviewing of children raises conflicting opinions and emotive reactions from mental health professionals, lawyers, and judges. Some argue that putting children in the middle of their parents' dispute can increase the harmful effects of the separation and litigation process on children (Emery, 2003; Smart, 2002; Warshak, 2003) while others have argued that children want to be active participants in the decisions that affect their lives and should be part of the decision-making process following separation (Brown, 1998; Chisholm and Richard, 1996; O'Quigley, 2000; Paetsch et al, 2009; Parkes, 2009; Timms, 2003; Potter, 2008).

Despite the debate generated by adults on this important topic, there has been very little research about children's perspectives as to what *they* find helpful in having their voice heard in any of these processes (ie child custody/access assessment,[9] being represented by a lawyer (Birnbaum and Bala, 2009) or a lawyer and mental health professional together,[10] or being interviewed by a judge).[11] This is unfortunate given the social science research on the importance of children's participation during parental breakdown (Cashmore, 2003; Smith and Gollop, 2001; Rayner, 2003).

This article is part of a broader research agenda that begins to address these gaps in the research literature (Birnbaum, 2005; Birnbaum and Bala, 2009), addressing the attitudes and practices of judges regarding the judicial interviewing of children in family court proceedings.

2. OBJECTIVES OF THIS STUDY

This article focuses on the most direct method for the courts to hear from children – through judicial interviews (or 'conversations' or 'meetings') with children during a post-separation parental dispute. The extent to which judges meet with children, and their practices when they do so, varies greatly both within and between jurisdictions; this study compares Ohio and Ontario, two jurisdictions with very different practices and cultures concerning judicial interviews of children. Legislation governs judicial interviews with children both in Ontario and in Ohio, but the statutes give judges significant discretion, and there is considerable controversy about how to apply these statutes.[12]

Section 2 of this article briefly reviews the small body of empirical research from Canada[13] and some English-speaking jurisdictions[14] regarding the views and practices of judges in interviewing children in custody and access disputes providing a context and background to this study. Section 3 discusses the Ontario and Ohio legislation, and the jurisprudence interpreting these statutes.[15]

Section 4 describes the qualitative methodology[16] and results of this study with 30 judges in Ontario, Canada, and 16 judges in Ohio, USA. The results focus on four themes: (i) how often judges interview children, (ii) what factors judges consider when deciding whether to interview a child or not, (iii) what concerns judges have regarding interviewing children, and (iv) whether judicial interviews are helpful or not in judge's decision making. It is apparent that while children's participation is an important concern in judicial decision making, interviewing children to obtain their views is not without social, psychological, and procedural challenges. Moreover, while many judges believe that children's 'voices' should be 'heard' by the court in some way, there is no consensus on *how, when,* and, in particular, *whether* judges feel qualified to do so by

meeting with the children themselves. Section 5 concludes the article, with a discussion of lessons to be learned from the jurisprudence and empirical research regarding judicial interviews with children. The authors provide recommendations for when and how judicial interviews with children should be conducted, suggesting that the practice should be used more than at present in jurisdictions like Ontario.

PREVIOUS EMPIRICAL RESEARCH ON JUDICIAL INTERVIEWS

1. CANADA

In 2004, Williams[17] conducted surveys, interviews, and focus groups in British Columbia with family court professionals (lawyers, judges, social service providers) as well as with young people who experienced separation. Of the 20 judges surveyed, she found that many judges believed it was important for children to be given an opportunity to be more involved in the legal process that profoundly affects their lives. She also found that many judges ask parents and/or their counsel whether children wished to speak to the judge or write a letter to the judge in order to have their views and wishes made known.

Nine of the judges who took part in a discussion group expressed the opinion that they were struck by the incongruity of making decisions that may affect children's lives so profoundly – considering they have typically never met them, have little reliable information about them, and have so little input as to their concerns and/or perspectives on the issue. Of the 20 judges interviewed, many reported that they spoke to children: (i) in a case conference with lawyers present (sometimes with parties present and sometimes excluded), (ii) privately in their chambers with only a court clerk present, (iii) privately in chambers without a clerk present (counsel and parents were excluded), and (iv) on one 'rare occasion' in the witness stand during a trial (no transcript was made available for appeal purposes). Williams found that the judges surveyed had widely varying criteria for deciding whether to interview a child; she noted that there is broad discretion conferred on judges and hence great variation in whether a child is interviewed by a judge.

In the province of Quebec, the *Civil Code* creates a presumption that children will be directly heard by the court:[18]

> Art. 34. The court shall, in every application brought before it affecting the interest of a child, give the child an opportunity to be heard if his age and power of discernment permit it.

As a result of this provision, children as young as 8 years old who wish to communicate directly with the judge testify in family law cases in Quebec, though the normal court process is generally modified for these witnesses (Schirm and Vallant, 2004).

In recent years, judicial interviewing of children has become more common in Quebec, in part as a result of the 2002 Quebec Court of Appeal decision in *F.(M.) v. L.(J.)*,[19] which held that lawyers who represent children should adopt an advocate role, provided that the child gives clear instructions. It is not uncommon for children in family cases to actually come into the courtroom. Questions that counsel for the parents wish to pose are screened by the court and are asked by counsel for the child or the judge. It is also common for the parents to be asked to leave the courtroom while the child testifies, though their lawyers will usually be present. In some cases, the parents are not even given access to the transcript of the child's testimony unless an appeal is undertaken and the appeal court determines that this is appropriate (Schirm and Vallant, 2004).

2. UNITED STATES

There have been only a few studies in the USA of judicial attitudes to interview with children. There were two studies reported in the 1980s (Lombard, 1983; Scott and Reppucci, 1988). Atwood (2003) conducted the most recent study, a written survey of 110 state court judges and 50 tribal court judges who adjudicate child custody disputes in Arizona. Forty-eight judges[20] completed questionnaires about their practices and strategies in assessing children's wishes and preferences. She found that while most judges are committed to learning about the views of children, they disagree about the means of achieving this. Atwood (2003) concluded that the judge's decision to interview children is highly dependent on the circumstances of the child, as well as on the attitudes of individual judges. She found that judges profoundly disagree about the advisability of interviewing children and the methods for doing this.

Judges expressed divergent opinions about the advantages and disadvantages of a judicial interview. For example, 65% of the judges agreed that the child's preference is important in their decision making and 61% agreed that a judicial interview can provide a better understanding of the child and the parties. With respect to whether children benefit from a judicial interview, 51% agreed, while 38% disagreed that children benefit emotionally from meeting with a judge; 53% agreed and 36% disagreed that children have a right to be heard during their parent's dispute that affects them, if they wish.

3. SCOTLAND

Raitt (2007) interviewed 20 judges in Scotland about their perceptions and practices in relation to children's participation in family disputes. The majority of the judges reported that they would be happy to speak to a child if the child wanted to and no judge reported that they would

refuse to speak to a child who requested it. She found that judges speak to children for a variety of reasons. For example, judges speak to children because a child requested an interview or the judge received a letter from a child stating that the child wanted to meet with a judge. The judges believed that listening to a child has intrinsic value and sometimes presents unexpected insights.

4. NEW ZEALAND

Tapp (2006) interviewed 14 family court judges and one judge of the High Court in New Zealand in 2004. She also reviewed 829 written judgments in family court files where a mental health professional team was involved, analysed 24 written judgments that mentioned a child's views, and also reviewed 24 written judgments.[21]

She concluded from an analysis of the 829 written judgments that for the years 1990, 1994, and 1998, there was an increasing number (48% of the cases) of family court judges beginning to inquire about children's views. Yet, the dominant view was that children's voices were best obtained from an expert reporter who had the time and skill to communicate with children.

Most judges report that the interview with a child in the presence of his or her counsel lasts between 30 and 90 minutes. The purpose of the conversation between the child and the judge varies with the age and circumstances of the child. She reports that the conversation involves (i) explaining to the child that the judge has to make a decision; (ii) what the processes and roles of everyone are; (iii) making it clear to the child that while their views are important, it is the judge who must make the decision; (iv) inquiring as to how the child will feel if their views are not given effect; and (v) offering to show the child the courtroom to see what it looks like and encouraging the child to express his/her views. Judges typically tell children that they cannot promise confidentiality in the interview with the child.

5. AUSTRALIA

Parkinson and Cashmore (2007)[22] interviewed 20 judges from three states in Australia in 2005 and 2006 about their experiences interviewing children.[23] They found significant differences of opinions, experiences, and attitudes about interviewing children. Three quarters of the judges reported that they would never talk with children before reaching a final decision about a case or were extremely reluctant to do so. Four judges met with children prior to reaching a decision but had limited experience in doing so. One judge believed it would be helpful to meet with a child to assist in their decision making but had not done so, and four judges were prepared to talk with children prior to reaching

a decision but not for information gathering, only as an opportunity for the child to meet the decision maker purposes. One judge spoke to a child after making a decision to explain his reasons for that decision, and other judges expressed openness to that approach.

Judges were unanimous in believing that children's views needed to carry significant weight in making post-separation decisions and saw children's views as important in reaching a decision. The weight that children's views are accorded depended on (i) the child's age and maturity, (ii) indications of coaxing or manipulation by a parent, (iii) any protection concerns, (iv) the views of siblings where they may be kept together, and (v) the desirability of maintaining a parent–child relationship where a child does not have a good relationship with that parent. Additionally, judges believed that the older the child, the more weight will be accorded to the child's wishes.

The researchers also heard a number of concerns expressed by the judges regarding the challenges in interviewing children. These themes were summarised as follows: (i) not having the skill to interview children, which could lead to poor decision making; (ii) the lack of time to properly assess what children's views were; (iii) that interviewing a child in chambers could lead to concerns regarding the parent's due process rights and perceptions of fairness; (iv) the potential risks to a child; and (v) questioning the purpose of the interview with a child and whether it was part of their judicial role to interview children.

Parkinson and Cashmore (2007) summarised a number of benefits that the judges saw in the possibility of interviewing children. These themes were as follows: (i) hearing firsthand from children rather than relying solely on a mental health professionals report, (ii) the ability to explore more details with the child regarding the options that the judge may be contemplating in his/her decision making, (iii) hearing from children might expedite a decision in urgent cases and enforcement matters, (iv) where there are no services available to assist the judge in decision making or learning the child's views, (v) where the issues are narrow in the dispute, (vi) where the expense of a mental health professionals report is prohibitive to a family or takes too much time, (vii) using the conversation as a means of updating an earlier report done by a mental health professional, (viii) as a tool for settlement, and (ix) that talking to a child can be cathartic and/or therapeutic to a child.

ONTARIO AND OHIO LEGISLATION AND JURISPRUDENCE

1. ONTARIO

In Ontario, s. 64 of the Children's Law Reform Act[24] gives judges wide latitude to decide whether to interview children, and 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.

This legislation has been interpreted to give the trial judge a wide discretion to determine whether to conduct an interview with a child.[25] In a decision often cited in Ontario, Martinson J. in the British Columbia case of *L.E.G. v. A.G.* identified three purposes for a judicial interview of a child: 'obtaining the wishes of children; making sure children have a say in decisions affecting their lives; and providing the judge with information about the child'.[26] Such an interview should not, however, be used to obtain vital factual information otherwise unavailable to the court.[27] In *L.E.G. v. A.G.*, the mother in a divorce action requested that Martinson J. privately interview the children, but the father did not consent.[28] While concluding that a judicial interview of the children was not appropriate in this case, Martinson J. observed that a court has discretionary jurisdiction to interview children, even without the consent of the parents.[29] Such decisions must be based on an assessment of the general purpose of the interview, the benefits and concerns surrounding the process, the relevance of the information to be obtained, the issues to be decided, the reliability of the information, and the necessity of conducting the interview.[30] In earlier decisions, the courts of appeal in Saskatchewan and Manitoba also held that judicial interviews of children may be conducted without the consent of the parties involved.[31]

Although Ontario court judges have a wide discretion to interview children, the reported case law suggests that this power is rarely used (McLeod, 1992: 4(11)). In the frequently cited Ontario case of *Stefureak v. Chambers,* Quinn J. reviewed the various methods of bringing a child's views and preferences before the court, and after analysing the problems associated with judges interviewing children, stated this should be 'only

as a last resort'.[32] Quinn J. suggested that it was normally preferable that a mental health professional interview the child and testify about the child's preferences.

In a number of reported cases, a judge in Ontario has refused to interview a child because the judge felt inadequately qualified to conduct the interview (McLeod, 1992: 4(11)). For example, in *Stefureak v. Chambers,* the parties were disputing the custody arrangement previously arrived at for their 7-year-old child.[33] In making their arguments, both parties were also trying to adduce evidence of the child's preferences, based on comments supposedly made to them by the child.[34] In refusing to interview the child, Quinn J. explicitly stated that 'a chambers interview is not feasible . . ., as I have no training or known skill in interviewing children'.[35]

Judges appear to be especially concerned about their ability to interview children in cases involving alienation,[36] attachment disorders,[37] or high conflict disputes;[38] the concern expressed is that such action, by an untrained person, could traumatise the child. In *S.E.C. v. G.C.*, where the father was claiming alienation of the child by the mother and the mother was alleging serious claims of domestic abuse against the father, Perkins C. decided not to interview the child or permit her to testify in court, observing, 'It would be ironic in the extreme on a custody and access issue, where the only factor is what is in the best interests of the child, if the litigation process were used so as to cause harm to the child for the ostensible purpose of ascertaining her wishes or even shedding light on her best interests'.[39] Judges will often decline to interview children on the basis that they feel that they will accomplish little by doing so and that greater information may be gleaned through the admission of the children's out-of-court statements, or via a children's lawyer or child assessment.[40]

Another reason that Ontario judges often cite for refusing to use their discretion to interview children is that such action, based on the specifics of the case at hand, would undermine the appearance of justice. Thus, in *Ali v. Williams,* where both parties were seeking sole custody of their two children, aged 12 and 14, Van Rensburg J. ruled that she would not interview the children in her chambers because neither of the parties was represented by a lawyer.[41] As the parties themselves could not attend the meeting a '"behind closed-doors consultation" with the judge alone, about such an important matter, [was] inconsistent with the appearance of justice'.[42]

A. FACTORS DETERMINING WHETHER ONTARIO JUDGES INTERVIEW CHILDREN

The paucity of reported case law in Ontario even mentioning judicial interviews suggests that judges frequently do not consider this possibility.

Even when one of the parties in a dispute specifically requests a judicial interview with a child, judges will usually decline to do so.[43] In particular, judges will refuse to conduct an interview with a child if they feel that the child is too young, immature, or not able to express his or her preferences. In *England v. England*, the court had previously held that the respondent father had kept his three daughters, ages 10, 7, and 5, in Canada contrary to the Hague Convention on International Child Abduction.[44] In a final effort to prevent his daughters from being returned to their mother in the UK, the father requested that the court interview the two oldest children to ascertain their preferences, noting that the Hague Convention s.13(b) expressly stipulates that a court 'may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views'.[45]

In coming to the decision that neither of the older children's views should be taken into consideration, Glenn J. noted that the Hague Convention applies to children up to the age of 16 years and that while the court may be influenced by the views of a child close to this age, previous decisions clearly found that children of 5 or 6 years of age are far too young and immature to have the court considered their preferences.[46] While the children in question in *England* were 7 and 10, Glenn J. was still unable to find 'any case where the views of children this young have prevailed in a Hague Convention application'.[47] Furthermore, she considered that a 7-year-old 'simply lacks the maturity necessary to make sound determinations that are referred to as "views" in Article 13 of the Hague Convention', while she could not be sure the 10-year-old had the maturity to make such a decision, without proof that she had previously made 'other decisions . . . of a substantial nature that would demonstrate her ability to make wise choices for herself', the judge declined to interview the girl.[48]

In contrast to *England* is *DaSilva v. Pitts*, where the court gave effect to the wishes of a 14-year-old boy, who was not returned to his mother in Ontario after going to visit his father in Oklahoma.[49] In holding that the Ontario courts should decline their admitted jurisdiction in the case, the court of appeal deferred the decision to the Oklahoma courts, which had previously found that the child should remain in Oklahoma with his father.[50] The Oklahoma judge based her decision on s.13(b) of the convention; she had interviewed the child in her chambers without the parties or their counsel presentand found that the child had 'a well-developed understanding of his situation and the positions of his parents' and that he had 'attained an age and degree of maturity' such that his views should be given considerable weight.[51]

While there is no specific age at which children's wishes will be determinative of the parent with whom they will primarily reside, judges in Canada will generally only give considerable weight to the preferences

of children in their teen years, as to do otherwise is often impractical. It can be very difficult to force older children to live where they do not want (Bala et al, 2005). The preference of the teenager must, however, not be contrary to what the judge deems are his or her best interests.[52]

In *Ward v. Swan*, one of the parties asked the judge to meet a 15-year old girl 'to sort out conflicting evidence of the parties' on certain contested matters that allegedly occurred during access visits, involving herself and her younger siblings. Harper J. noted that a social worker who had interviewed the children gave detailed evidence about their wishes and preferences. He declined to see the girl, concluding that it:

> [I]s not proper to use the judicial interview process in order to contest evidence that may be disputed. The prejudice to the litigants far outweighs any potential probative value. These children have already been excessively involved in this litigation. The care givers have talked to them and, in some cases, involved them in this litigation. They have already talked to . . . j their lawyer and a social worker on numerous occasions. I will not place Sarah in a position where, through questioning by the judge, where she will be at the centre of a storm that may go further to destroy future family relationships rather than preserve the potential of necessary familial re-integration.[53]

B. PROCEDURES WHEN ONTARIO JUDGES INTERVIEW CHILDREN

The reported case law in Ontario demonstrates that judges rarely invoke their authority to interview a child. Furthermore, when they do so, the lack of guidance in the legislation and appellate case law has resulted in significant variation in how it is done. The only statutory requirements are that the interview is to be recorded and the child is entitled to have counsel present.[54] Beyond counsel for the child, the judge has discretion as to whether others are to be present. While the Ontario legislation only stipulates that the interview is to be 'recorded', and presumably would allow for audiotaping, the case law suggests that this is always done by having a court reporter present during the interview.[55]

In 1997 in *Coda v. Coda*, Stach J. was urged by counsel for both parents and a written recommendation from a pre-trial judge to interview the two children, aged 14 and 11 years, involved in the custody dispute.[56] He decided to conduct the interview soon after the trial began, allowing counsel for both parties and the court reporter to be present for the entirety of the process.[57] The judge effectively allowed the 14-year-old to decide with whom she would live, noting that she was 'of an age where courts will normally take her wishes into account in determining the custody issue'. He also placed significant reliance on the interview

to determine that the 11-year-old girl should not be forced to visit with her father as what emerged 'during our meeting was an expression of fear for her father along with a strong feeling of a loss of trust'.

In 2008, in *McAlister v. Jenkins*, at a pre-trial case conference, the therapist for a 12-year-old girl who was the subject of a custody dispute told the trial judge that the girl felt it was very important 'that the judge heard "from her" as she was feeling that no one was listening to her'.[58] Justice Harper, with the consent of both parents, interviewed the child in the presence of her therapist, the court reporter, and the court services officer. The judge remarked:

> I was gowned for the interview. I told Stephanie that I wanted to hear from her about the problems that she was having. At first, Stephanie stated that she was a bit nervous and told me that [her therapist] . . . had told her to write things down in order that she not forget anything she felt was important. After a few minutes, Stephanie appeared to be comfortable. I told her that everything that was said in this interview would be taken down by the court reporter and a transcript of what was said would be given to her mother, father and [step mother]. Stephanie appeared to have no difficulty with everyone knowing what took place in the interview.[59]

The judge placed significant weight on the information that he learned in this interview and quoted quite extensively from it in his reasons.

In 1996, Speyer J., in *Demeter v. Demeter*, at the request of counsel for the father, and with the consent of counsel for the mother, conducted separate interviews for the two children, aged 8 and 13 years, with only the court reporter present. The judge provided the parties with only a summary of the statements of the children, namely that they wished to reside with their mother and visit with their father, commenting:

> I have received . . . a statement of their views and preferences as to the parent with whom they wish to reside. I think it inappropriate to disclose to the parties the full contents of my interview. I do not wish to embarrass the children and potentially to damage their future relationship with either parent. However, I do find it appropriate to advise the parties at this stage, prior to argument, in general terms of the children's stated wishes.
>
> I have chosen to disclose these results to the parties at this time so that they can be taken into account during argument as a factor pertaining to the best interests of the children. In my view, it would be unfair to both parties not to know, at least in general terms, the views and preferences of the children as they were expressed to me yesterday . . . .
>
> Not to advise the parties of the results that I have set forth would put counsel in a position of being unable to address this aspect of the case in argument. I hope that, by disclosing the children's views as expressed to me yesterday, the children are protected from embarrassment and potential damage on the one hand, while at the same time permitting counsel to know and address this factor in their submissions.[60]

Some judges are of the view that anything disclosed to them by a child during an interview should remain confidential. In 1987, Vogelsang Prov. Ct. J., in *Montgomery v. Rendell*, explained:

> I interviewed the children [aged 9 and 10 years] privately with counsel at one point in the trial. The interview . . . was transcribed. Counsel, the children and I, at the outset, decided it would be better if all statements made were not disclosed to the competing litigants. As a result, should this matter go further, I direct that this portion of the transcript . . . be sealed and made available only to the tribunal hearing the appeal.[61]

2. OHIO

The Ohio provision governing judicial interviews is considerably more detailed and directory than the Ontario provision, requiring an interview if requested by any party and restricting who may attend, with s. 3109.04 of the Domestic Relations Code reading:

> (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(B)(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'.[62]

There is much more reported case law in Ohio than in Ontario on judicial interviewing, which reflects the fact that this practice is much more commonplace in Ohio. Judges in Ohio are more concerned with how to interview children rather than whether they should interview children.

A. Factors Determining Whether Ohio Judges Interview Children

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)(b) 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, or the judge decides 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.

Because of the directory nature of the Ohio provision, failing to conduct an interview when requested by a parent is a basis for reversal of the trial judge's decision and remanding the case for a new hearing. In 1997, in *Badgett v. Badgett*, the Ohio Court of Appeals held that a new trial must be ordered if a judge fails to interview the child after a request from either party, regardless of how 'careful and conscientious' the judge was in weighing all of the evidence presented.[63] More recently, in 2006 in *Hill v. Hill*, Slaby J. of the court of appeals observed, 'The plain language of [the] statute absolutely mandates the trial court judge to interview a child if either party requests the interview'.[64]

Even if no request for a judicial interview is made by a party, the judge may use his or her discretion in deciding whether or not to interview any or all children involved.[65] As noted above, even if an interview is requested by a parent, s. 3109.04 (B)(2)(b) gives a judge conducting an interview the authority to decline to interview a child to ascertain the child's wishes and concerns. In 2008, in *Hendersen v. Hendersen*, the Ohio Court of Appeals upheld the decision of the trial judge to award custody to the father, despite the fact that the judge denied the mother's request that the children be interviewed. The appellate court held that the trial judge was justified in refusing this request based on the opinion of a psychologist, who expressed that the children, in kindergarten and grade 1, were not mature enough to be interviewed.[66]

While age is a factor seriously considered by judges in both jurisdictions when deciding whether to interview a child, based on the reported case law, judges in Ohio are much more willing to interview and consider the preferences of younger children. Thus, in *Badgett*, the Ohio Court of Appeals held that the trial judge erred in not interviewing a 6-year-old child who was the subject of a dispute between divorced parents over which school the child would attend, and remanded the case, while the judge in the Ontario case of *England* was unwilling to interview a 10-year-old.[67]

Aside from the age of any children involved, judges in Ohio – like judges in Ontario – take into consideration the existence of any reports or assessments carried out by qualified professionals when deciding whether to interview a child. For example, in *Braden v. Braden*, the Court of Appeals upheld the custody decision of a trial judge who rejected a father's request to interview the children boys, aged 4 and 9 years, observing that:

> Due to the age of the children, the circumstances of the situation and the fact that a custody evaluation had been performed by a physician as well as

an investigation by two guardian *ad litem*, we cannot conclude that the trial court abused its discretion by failing to interview the children regarding their wishes.[68]

While s. 3109.04 (B) (2) (b) gives judges some discretion as to whether to decline to interview a child, despite a parent's request, it is interesting to note that the case law under this provision focuses on the age of the children, their capacity, and whether there is reliable evidence from other sources (ie reports). Unlike in Ontario, judges in Ohio decisions did not express a concern about the due process rights of the parents or their lack of qualifications to interview children.

B. Procedures When Ohio Judges Interview Children

While the legislation for Ohio is more specific than the legislation for Ontario regarding who should be in attendance when a judge interviews a child, it does not address the recording of such interviews. As a result, the issues that have developed regarding the procedure of judicial interviews with children in Ohio are somewhat different from those in the Ontario jurisprudence.

In Ohio some judges have held that interviews must be recorded, and others concluding that recording is dependent on the request of the parties involved.[69] Recently, case law appears to show greater support for the latter position. In the 2009 case of *Wilson v. Wilson*, Farmer J., of the Court of Appeals, concluded that since 'the statute is silent as to whether the in camera interview must be recorded, a majority of Ohio appellate courts agree . . . that courts must ensure that the interview is recorded, but only upon proper request'.[70]

The Ohio legislation leaves it to the judge's discretion as to whether or not counsel for the parties should be allowed to observe an interview, and by clear implication the court can (and usually will) exclude the parents. *In Re. White*, the court of appeals rejected the argument of the mother that the trial court erred by not allowing her counsel to be present for her child's interview. Farmer J., wrote:

> [W]hile parents enjoy a fundamental liberty in the care . . . of their children, it is often important for a judge to ascertain the desires and concerns of a child in relation to custody issues. Often this can best be accomplished in the isolation of chambers, exclusive of courtroom formalities and the unpleasantness of cross-examination.[71]

The contentious issue in Ontario of whether a judge may decide to have the transcript of the interview with a child sealed has been resolved by the Ohio Court of Appeals in *Myers v. Myers* where Edwards J. wrote:

> [The] requirement that the trial court's in camera interviews of minor children in child custody proceedings be recorded is designed to protect the

due process rights of the parents; due process protection is achieved by sealing the transcript of the in camera interview and making it available only to the courts for review.[72]

It is significant that no trial judgment in Ohio has been reversed on appeal because a judge had an interview with a child unnecessarily, but only for a failure to have an interview when required by statute. Furthermore, no trial judgment has been reversed because of a concern by the appellate court about the subjects addressed or the manner of judicial questioning of the child. Appellate courts in Ohio have shown considerable deference for how trial judges conduct interviews of children, provided that the legislative requirements are satisfied and minimal due process rules are followed.

STUDY OF JUDICIAL PRACTICES AND ATTITUDES

The 30 judges in Ontario and 16 judges in Ohio who participated in this study were selected through purposive sampling;[73] they were selected as they were highly experienced judges in family law disputes, who had varying experiences with judicial interviews of children, and agreed to participate in this study. The sampling of judges also took into consideration both rural and urban settings as well as gender. There were in-person interviews with 17 female and 13 male judges in Ontario, and with 6 female and 10 male judges in Ohio.[74] The interviews took place between May and September 2009 and each lasted for approximately 1 hour.[75]

1. THEMATIC ANALYSIS

The interviews with the judges revealed a broad range of differing opinions across and within jurisdictions. One central theme that resonated strongly throughout all the interviews in Ontario and Ohio had to do with the 'culture' and 'philosophy' of the judiciary about interviewing children. In Ohio, there is almost a universally receptive attitude to judicial interviews with children, as illustrated by the comments of three judges from that state:

It's a great law.

You see the case through the children's eyes.

Maybe [I value it] because of the system and grew up in it.

Conversely, most Ontario judges expressed a real reluctance to undertake interviews with children, and a couple of judges advocated the repeal of even the permissive statutory provision in the Children's Law Reform Act s. 64. One Ontario judge remarked, 'It's [judicial

interviews] kind of old fashioned, I think'. In contrast, some Ontario judges were more receptive to consider the practice: 'You [researchers] are helping us think outside the box'.

Judges in Ohio interview children as their ordinary practice, and almost all expressed strongly held views about involving children in the family justice process, with a majority of the Ohio judges stating that they welcome the opportunity to have a meeting with children to hear about their interests and concerns. A theme expressed by the majority of the judges can be summarised by the statement made by one judge:

> [I]t is a valuable tool and in right circumstances cuts through all litigation . . . you get to visually see the child.

In contrast, in Ontario, the majority of the judges have much less experience with interviewing children and do not see it as part of their regular routine or their role. The differences in culture and philosophy in Ontario are reflected in the statements of several judges:

> [T]he prevailing judicial philosophy is that it is really dangerous to interview children . . . could be a self-fulfilling thing that may or may not have basis in real life. . . [when a judicial interview of a child is done], it's a 'dirty little secret'.

> [D]on't talk of it [judicial interviews] mostly . . . [There is a concern that] if people could [do this,] the floodgates would open . . . other judges say [to their colleagues who interview children], who do you think you are interviewing children.

Similar comments were made by eight other Ontario judges. Overall, 20 of the 30 Ontario judges reported that they were aware that their colleagues did not approve of judges interviewing children. Similarly, 15 of the Ontario judges conveyed the impression that while some of their colleagues may have the experience and skills needed to interview children, some judges may not. Among the comments of Ontario judges was the following:

> [S]ome of us are warm and fuzzy by temperament than others . . . the quality [of the interview] is driven by temperament.

2. HOW OFTEN DO JUDGES INTERVIEW CHILDREN?

In Ohio, 14 of the 16 judges[76] reported interviewing an average of two to three children per month. Children's ages varied from 5 to 17 years, with the average being 14 years. Several judges interviewed children as young as 3 years of age. Four judges reported that they would interview children more often if they felt better trained. No judge reported that they would allow a child to testify in court in a custody or access dispute.

The Ohio interviews with children last an average of 50 minutes and are typically conducted once in the judge's chambers or in the courtroom. Two judges reported that they usually interview a child on two separate occasions, as they want to follow-up on how the child is adjusting to the new parenting schedule. Five judges reported that they have invited a child to hear the decision while the parents are present. Two Ohio judges reported that they rarely interview children, with one stating:

> [I]t [judicial interviews] is rare . . . we let local attorneys know it is not the preferred method [of learning the child's views and wishes].[77]

In Ontario, only 12 of the 30 judges have ever conducted a judicial interview of a child. However, eight more judges stated that if they were better trained, they, too, would like to interview children or have contemplated interviewing a child. Comments ranged from, 'I would love to do it' and 'it's an exciting thing to think about' to 'I worry that I do not know the context enough' and '[I am] not qualified to do it'. Of the Ontario judges who have interviewed children, the children's ages ranged from 5 to 15 years. Six of the 12 judges who reported interviewing a child did so in a child welfare dispute, with one of them meeting with a child three times over the course of a year to monitor the child's adjustment, and six judges interviewed a child in a custody dispute. The average number of interviews among the judges who interviewed children was five per year, with an average age between the ages of 12 and 15 years. The interviews lasted an average of 20 minutes. Only two judges in Ontario had ever allowed children to be present in the courtroom during a child custody or access dispute.[78]

3. FACTORS JUDGES CONSIDER WHEN DECIDING WHETHER TO INTERVIEW A CHILD

In Ohio, the majority of judges regard interviewing a child as recognition of their right to be heard. As one judge commented, '[f]rom a moral perspective, it is the right thing to do . . . child ought to have input'. However, only four of the sixteen judges indicated that they would initiate an interview on their own without a request from the child, either parent, or a guardian *ad litem*.[79] Many judges stated that the older the child (12 years of age and older), the more weight[80] they would give to the child's views and preferences. Five judges reported that children have asked their guardian *ad litem* if they could speak to the judge.

All the Ohio judges preferred that the interviews with children take place before a hearing, or before a final decision is made in a case. The reasons for interviewing children before a hearing varied from understanding children and their circumstances better, to giving

children their voice in the process like their parents. The reason given for hearing children after all the evidence has been heard is to let the child know the reason for the judge's decision. The majority of the judges reported that the interviews are typically recorded, in the presence of the child's guardian *ad litem* or a clerk of the court if there is no guardian *ad litem*. Only four judges reported interviewing a child without recording it, but these judges all had a clerk or the guardian *ad litem* present.

Fourteen judges in Ohio indicated that they viewed the primary purpose of the interview as learning more about the child and his/her circumstances (ie what the child likes/dislikes about school and friends, what the child does with each parent, etc.) rather than seeking their stated wishes and preferences, or having them choose between their parents.

Judges stated that they want to:

> Get a feel of the child.
>
> Hear what concerns the child has with either parent.
>
> For stated preferences [their thoughts and ideas] but not real preferences [where they wanted to live.].
>
> Not for what they want, but why they are stating something.

In Ontario, where judicial interviews occur much less often, 22 judges[81] suggested that some, but not all, of the following conditions would have to be met before they would interview a child:

- both parents were in agreement;
- the child was of sufficient age and capacity;
- the child's lawyer agreed to it;
- a mental health professional who had worked with the child recommend an interview and reported that the child wished to speak to the judge;
- there was delay in obtaining other services;
- there was no child legal representation;
- the child custody assessment was based on dated information; or if,
- it was a relocation issue and there was some urgency to make a decision.

Yet, three of the twenty judges who reported that they had done or would consider doing a judicial interview indicated that they would do so whether or not the child had legal representation. In other words, they believed it was important to hear from the child irrespective of child's counsel being present or not in the case.

In response to what the objectives and reasons for a judicial interview of children should be, two of the Ontario judges stated:

> [T]hey [children] are faceless and voiceless . . . that is my client/customer and that is why I am doing my job.

> [P]rocess was humanized [for the child] and [child] saw judge as a person and parent.

Eight Ontario judges indicated that there were no circumstances in which they would interview a child; they prefer that the child's wishes come from the child's lawyer, a mental health professional, or any other neutral professional. However, these same eight judges see merit in the possibility of a meeting with a child following decision making, in some cases, particularly if the decision was not what the child had articulated through others or just to have the child hear from the judge the reasons for the decision. Only two Ontario judges reported having had carried out post-decision meetings with a child: one judge had this meeting in order to tell the children that they had to obey the court's order, just like their parents while the other judge wanted to bring the child 'on board with the decision'.

Ten judges reported that even if they would interview a child, they would not do so if either parent stated that their child requested it or either party was unrepresented. Many of the judges believed that they would have concerns about the child being coached or that the child was merely parrot what the parent wanted the child to say.

All the Ontario judges are aware that the Office of the Children's Lawyer (OCL) has concerns about judges interviewing children. As one judge commented:

> The OCL can say to the judge: 'listen to the child', but . . . [we] are not allowed to and are expected to listen to the OCL speaking for the child.

However, a majority of judges stated that the concerns of the OCL would not, in appropriate cases, deter them from interviewing a child. However, the judges indicated that they would listen carefully to any specific concerns raised by the OCL before undertaking an interview. All the Ontario judges reported that they were generally satisfied with the OCL lawyers and clinical investigators reporting about the child's wishes to the court.

4. WHAT CONCERNS DO JUDGES HAVE REGARDING INTERVIEWING CHILDREN?

The judges in Ontario raised more concerns about interviewing children than those in Ohio. Among the concerns expressed by Ontario judges about interviewing children were:

- the need for more time to properly interview a child;
- a child might be coached;
- the person who brought the child to the interview might unduly influence the child's report;
- in cases of alienation, the child will only parrot what the alienating parent wants them to say;
- the prospects of emotionally harming the child, especially if the child feels pressure to choose one parent over the other;
- a desire to avoid drawing the child into the conflict of their parents;
- lack judicial training and qualifications to interview children;
- no child-friendly place in a courthouse for a proper interview with toys, games, etc.;
- that they (judge) would become a witness as opposed to the decision maker; and
- issues of confidentiality.

While some of the Ohio judges shared some of the concerns of the Ontario judges, the majority of the Ohio judges had found ways of directly addressing these concerns without giving up on interviewing children. For example, the Ohio judges reported that if a child needs more time to feel comfortable in an interview, they will make the time or see the child on more than one occasion, if necessary. Five Ohio judges reported doing follow-up interviews with children to see how they are doing. The majority of the Ohio judges acknowledged that a child could have been coached; however, if they hear statements from the children that seem to be either parroting a parent, they give little weight to the child's views.[82] Twelve of the 16 Ohio judges stated that they do more than simply ascertain the children's wishes; they look for children's explanations of why they want certain things and then compare the children's concerns with what the parents are reporting. As one judge explained:

I listen intently, but not for what they want, but why they are asking for it.

Eight of the Ohio judges expressed a concern that the person who brings a child to the interview could have an undue influence on the child. A majority of the judges stated that they listen for any influence, and all try to have a neutral person bring the child to the interview. Four judges stated that they usually do not know who brings a child to the interview but were aware of the issue of influence and listen for it.

The majority of Ohio judges believed that, in general, more emotional harm is done if the child does not have an opportunity to be heard by the judge than if they are interviewed. A theme echoed by the majority of the Ohio judges was:

> I have no concern of interviewing kids . . . . [I] feel strongly of how they [child] would feel by not being heard.

Some of the Ohio judges volunteered that they had concerns about the possibility of being a witness in future child protection proceedings if a child disclosed abuse by a parent in the interview. The majority of the judges, however, had no concerns about the possibility of a child making disclosures of abuse, as when this occurs, they telephone child welfare authorities themselves, speak to the parents about the allegation, or have the child's guardian *ad litem* deal with the issue. In fact, the majority of the judges specifically inquire about any concerns the child has with each parent (ie alcohol, drug abuse, disciplinary practices).

With respect to issues of confidentiality, the responses were more varied. Ten of the 16 Ohio judges reported that they made it clear to the child that nothing will be kept confidential as the interview is being taped recorded or transcribed, by a clerk, and that their parents' could have access to the transcript. Three judges stated that they do not record the interview, but do have a clerk present, and tell the child that while they cannot promise to keep the interview confidential, they will find a way to make a decision without giving away everything that the child says in confidence.

Most of the judges in Ontario with experience in judicial interviewing ensure that the interviews are recorded, though some reported that in some situations (eg at case conferences) that they did not record the interview and did not tell the parents everything the child told the judge. All of the Ontario judges who have interviewed children had the child's lawyer or a clerk, or both, present. Some judges told the child that while they could not promise that the interview was confidential, they would try their best not to provide all the details to their parents about the interview. However, all the judges in Ontario were cognisant that any decision they made needed to be based on legally admissible evidence, and they would need to share all relevant the information told by a child with the parents and their counsel.

5. WHETHER JUDGES FIND INTERVIEWS HELPFUL

While the Ohio judges were unanimous in their support for judicial interviewing of children, the Ontario judges expressed a broader range of views about whether they believed interviewing children has value.

In Ohio, six judges said that they would prefer the guardian *ad litem* or another professional report the views of the child. Yet, these same

judges, as well as their 10 colleagues who were more supportive of judicial interviewing, all believed that there was added value to hearing directly from the child about their views and preferences. The Ohio judges recognised both the potential helpfulness and the challenges with judicial interviewing, as reflected in the following quotes:

> It's important to give a child the opportunity to meet the judge and allow the judge to hear it . . . [even though I personally] would prefer to rely on GAL and lawyer, it's easier.

> Yes, it's helpful, get insight into what's going on in the house, [and with the child's] schedule.

> Parents want me to make life changing decisions and I want to hear from children, different perspective of case and independent truthful perspective, kids tell what is really happening.

In contrast, in Ontario, the majority of the judges suggested that judicial interviewing is generally not be helpful; their concerns outweighed the potential usefulness to them. Seven of the 12 Ontario judges with experience doing judicial interviews shared both positive and negative experiences regarding judicial interviews of children.

Some of the Ontario judges had negative experiences while in practice and representing children for the OCL, which made them reluctant to conduct interviews with children now that they were on the bench. One judge reported on a previous child client who was fearful of the judicial process and acknowledged, 'It colored my experience of the process [and as a result that judge did not conduct any interviews]'. In addition, several judges described how their own upbringing experiences as children or parents influenced them in not wanting to have children directly involved in the litigation process.

Of the Ontario judges who reported that they had positive experiences with judicial interviewing, a number remarked that they initially struggled with the decision to interview a child:

> I struggled with doing it . . . thought long and hard. . . felt inadequate and ill equipped.

> I was initially worried because it was so out of bounds [judicial interview] . . . but lawyers and parents said child was bright and articulate and wanted to speak to me . . . what she [child] said she could have written the decision [ie it had confirmed the judge's decision].

6. OHIO AND ONTARIO: CONCLUDING COMMENTS ON DIFFERENCES AND SIMILARITIES

One of the questions explored in this study was whether the availability of professional mental health assessors and/or child legal representation would be a reason for judges *not* to interview children. Interestingly,

there were few differences reported by the judges in obtaining access to mental health or child legal services in Ontario and Ohio. Judges in both jurisdictions reported that professional mental health and child representation were generally available to the courts, whether they were in major urban areas or more rural settings. While in both jurisdictions, there were some concerns about lack of access to these services, especially in cases where parents lacked resources, their lack of availability generally seemed to have little effect on whether judges would or would not interview children. However, in one county in Ohio, the judges reported that they interviewed children less often than their colleagues elsewhere in the state as there were more mental health professionals accessible to the court.

There were no significant differences based on the gender of the judges in either Ohio or Ontario in attitudes or experiences towards judicial interviewing. However, there was one major difference that was noted within Ontario related to the professional background of judges. Ontario judges who had experience as mediators before they became judges were more inclined to view interviewing children as potentially being helpful, compared to those who exclusively practiced litigation when they were lawyers. In addition, *a few* of the judges in Ontario who used to represent children when they were lawyers were *less inclined* to interview children now that they were in the role of a judge; while they had had skills and experience in interviewing children, they were able to reflect on the challenges of them in their capacity as judges. Three of them specifically stated they had more time with children as child lawyers and were aware of the challenges related to talking to children about family issues and hence were unwilling to interview them as judges. However, several Ontario judges stated that as former child lawyers, their skills helped them to conduct judicial interviews with children.

In sum, Ontario and Ohio judges generally had fundamental different perspectives regarding their role in child-related proceedings. In Ohio, the judges viewed interviewing children as part of their role and normal routine, while in Ontario, judges made comments such as:

> I am a decision-maker and not evidence gatherer . . . what is my role then [if I interview children?].

The Ohio judges often described their meetings with children in informal terms, referring to them as a 'conversation' or a 'chance to get to know the child', and demonstrated little apparent concern with how these meetings 'fit' with notions of due process. In contrast, the Ontario judges, who had little or no experience, tended to use the more formal term 'judicial interview' and expressed real concerns about how this process might affect their role as judges.

LESSONS LEARNED AND RECOMMENDATIONS

1. THE SIGNIFICANCE OF THE 'CULTURE OF THE COURT'

A unifying theme in both of these jurisdictions is that the 'culture of the court' influences the extent to which judges engage in judicial interviewing of children.

In Ohio, judges interview children as a routine matter; while a few of them expressed some concerns with this practice, the vast majority of them believe that it is a child's right to be heard by them. These judges also believe that meeting a child helps them to better understand the child and the case, and thus to make better decisions.

The Ontario judges expressed a wider range of views about interviewing children, but a majority expressed significant reluctance to undertake this. A number of the Ontario judges noted that their traditional role as judges is to make decisions based on the evidence presented by the parties, and the interviewing of children is not consistent with this role. While the majority of the judges in Ontario remain cautious about the value of interviewing children, they also expressed a genuine desire for wanting more direction or education in whether and how to interview children.

The majority of the judges in Ohio described the purpose of judicial interviews as providing a forum for children to express their thoughts and feelings, and to allow judges to get to know the children.[83] They generally wanted to meet the children and learn what they liked and disliked about their family, friends, school, and hobbies, rather than interviewing them to hear where they wanted to live or what they expected in terms of an access schedule. Similarly, in Ontario, the judges with judicial experience in interviewing children indicated that the purpose of an interview with a child was generally more about 'having a conversation' with a child rather than using the interview 'to gather evidence'. For these judges, both in Ohio and Ontario, the objective of the judicial interview is relational. That is, they view the purpose of the interview as a way of 'getting to know' the children, rather than fact-finding. Judges in Ohio, however, are much more likely to also refer to it as a child's 'right' to meet with the decision maker.

In each jurisdiction, the judges have different levels of comfort and experience with interviewing children. A significant number of judges in Ontario spoke about their professional boundaries as a judge. In Ontario, the majority of judges spoke about different judges having various approaches, experiences, skills, and personality characteristics that may lead some to interview more than others. Interestingly in Ohio, while judges recognised that there are differing styles, temperaments, and experiences among those on the bench, there was less emphasis on this being a significant factor in whether or not interviewing of children is done, and more emphasis on this influencing how it is done.

The majority of the judges in Ohio and Ontario shared similar concerns regarding the challenges of judicial interviews. Judges are concerned about their abilities to interview children, the impact on a child who may feel that they have to choose one parent over another, their role and purpose for an interview, and issues of confidentiality. However, a major difference was that the Ohio judges believed that many, if not all, of these issues can be overcome if interviewing is done sensitively and thoughtfully. These beliefs also related to their view that children should be allowed to participate directly and speak to a judge about their (child's) issues and concerns, if any. Judges in other jurisdictions share these concerns, but like the judges in Ohio, they are not deterred by these challenges from interviewing children on a regular basis (Atwood, 2003; Crichton, 2006; Fernando, 2009; Hunter, 2006; Liu, 2004; Lombard, 1983; O'Connor, 2004; Parkes, 2009; Parkinson and Cashmore, 2007; Raitt, 2007; Scott and Reppucci, 1988; Tapp, 2006; Williams, 2006).

The legislation in Ohio has resulted in a judicial culture of interviewing children as a norm rather than an exception. The discretionary Ontario legislation is generally given a narrow interpretation by judges. Ontario judges were more likely to frame their comments in terms of the adult participants. This also ties into the issue of judicial culture and philosophy.

In Ohio, judges took on a less formal approach to 'meeting the child', with only limited concerns about the significance of such a meeting in terms of the adversarial trial process. In Ontario, the judges expressed more concern about the possible effects of judicial interviews on the adversarial process and the adjudicative role. The views of the Ontario judges, however, were diverse, and a few of the Ontario judges had views very similar to those of the Ohio judges regarding the process and purpose of the judicial interview with children.

2. SUGGESTIONS FOR JUDGES

There is a small amount of literature offering lawyers[84] and judges (Atwood, 2003; Fernando, 2009; Jones, 1985; Parkinson and Cashmore, 2007; Raitt, 2007; Tapp, 2006) advice on interviewing children: it is recognised that the purpose and timing of the interview – the why and when of the meeting – will influence how it is done. Furthermore, the interviewer must always take into account the child's age and stage of development, any special needs of the child related to physical or cognitive disabilities, learning disabilities, mental health issues, and issues related to culture, ethnicity, or religion. Children present with varying abilities to communicate about what their lives are like. Some are more introspective and articulate, while others are cognitively constrained by intellectual and emotional difficulties.

A. Why and When Judges Should Meet Children

There are a range of different reasons for a judge to meet the child who is the subject of a parental dispute; in some cases, this could be at an interim or pre-hearing stage, or as part of a trial. Some suggestions for deciding whether to meet with a child include the following:

- Recognising that a child has the *right* to meet with the judge before any important decisions are made; the child should be told, preferably by a neutral professional, such as a child's lawyer or social worker, about the opportunity for meeting with the judge. If possible, that professional should help the child prepare for the meeting and bring the child to it.
- Cases where there is some urgency to making a decision (eg relocation before the start of the school year) and the views of the child are not available from an assessor or lawyer for the child.
- At pre-hearing stage, a meeting with the child may help the court to make a decision about whether there needs to be a full assessment by a mental health professional or appointment of a child's lawyer. The meeting may provide the judge with information that may not be apparent from the materials that the parents provide.
- At a case conference or settlement conference stage, where there has not been an assessment or child representation, the child may have views that one or both parents are not aware of; a judge may be able to share these views to help facilitate a settlement.
- Following decision making, a judge may decide to meet with the child to help 'bring the child on board' if the decision seems contrary to the wishes of a child, as conveyed at a prior meeting or through other evidence. These meetings should be approached with caution, as a child might be angry or sad if the decision is contrary to the child's wishes. In severe alienation cases, some children will 'turn' within a matter of hours or days of a custody change, but their initial reaction to hearing the news about a custody change from the judge may be very negative. It will usually be preferable for a judge to ensure that a lawyer for the child or neutral mental health professional tell a child about a decision that is likely to upset a child, including providing the child with an explanation of why the decision is in the child's best interests. While judges can and should make it clear to parents the consequences of the failure to obey court orders, a judicial meeting with a child to explain the consequences for the child of disrespecting an order (eg running away) may have deleterious consequences.

- If a judge is clear on the purpose of the interview, the judge can then plan where and how to interview the child. It is suggested that the judge not have the child brought on the same day as the trial hearing.
- The judge should generally meet with the child relatively late in the process, so that the judge can learn as much about the child as possible before the meeting, though there should always be an opportunity after the meeting for the parents to present further evidence and make further submissions. In addition, the judge should know with whom the child is going home after the interview to prepare the child for that parent.
- In some cases, it will be appropriate for the child to meet the judge (or judges) on more than one occasion, but there should not be multiple interviews on the same day with the child.

B. Where to Interview the Child

Older children (9 years of age and older) can be interviewed in the judge's chambers. Younger children (8 years of age and younger) may require more time to become comfortable and will benefit from a child-friendly atmosphere, preferably with some snacks and drinks available. Having access to a 'child-friendly room', in terms of decor and furniture, for meetings with children may significantly increase their comfort and facilitate communication, especially with younger children.

C. Who Should Be Present

A judge should avoid being alone with a child who is the subject of a court proceeding, but limiting the number of people present is desirable to avoid having the child feel intimidated.

Having a neutral professional present who is familiar with the child can help the child to feel more comfortable. Indeed, it may be appropriate for the judge to ask that professional to take the lead in asking the child questions, allowing the judge to ask further questions if necessary. If the child has a lawyer, that person should be present. If a mental health professional has undertaken an assessment or is providing counselling to the child, that person may be asked to be present, especially if there is no lawyer for the child.

In Ontario, there is also a statutory requirement for a record to be kept of the interview, which may require a court clerk to be present.

It is suggested that lawyers for parents (let alone the parents) should rarely be in attendance as their presence may inhibit or influence the child, though some judges prefer to have them in attendance but sitting out of the child's line of sight. While the meeting is a part of the court process, the child is not technically a witness, and should not be subject to any type of cross-examination. The purpose of the meeting is not to

ascertain 'facts' but for the judge to gain a better understanding of the child, as well as giving the child an opportunity to meet the person making key decisions about the child's life. The parties (or their lawyers) should, however, be canvassed before the meeting for any issues that they think should be explored with the child.

If the child is very young or expresses a strong preference for having the parents present, it may be appropriate to have both parents present, but it should be made clear to them that they are there only to listen.

D. How Judges Should Meet Children

Prior to meeting a child, the judge should have considered a number of issues and planned for the meeting. Some of the most important issues to consider include the following:

- Explanation at start of meeting: The child should be told the purpose of the meeting by the judge and that the child can also ask questions of the judge regarding the court process. It should be made clear that the judge is deciding the case, based on an assessment of the child's best interests, and that the child's wishes will be considered but are not determinative of the outcome. Children who are being pressured by parents to 'take sides', and hence feel a sense of guilt or disloyalty for expressing their views, may feel relieved to learn that their views are not determinative. The judge should be satisfied that the child understands that participation is voluntary.
- Confidentiality: The judge should make a decision about the extent to which the parents will be informed about the interview before the interview is held, and this should be communicated to the parents before the judge meets the child, and to the child at the start of the interview. It is suggested that a complete assurance of confidentiality is never appropriate, as the judge will always be obliged to report any child welfare concerns, and, at least in Ontario, if the parents appeal, they may well obtain an order from the appellate court for preparation of a transcript of the interview. Furthermore, concerns about fairness to the parents and ensuring that any information provided by a child is reliable would require that a judge inform the parents of the substance of the interview. Accordingly, children should never be told that what they tell the judge is 'a secret'. It is, however, submitted that a trial judge is not obliged to give the parents access to a transcript of the interview; if the judge is of this view, it is appropriate to tell the child that the parents will be given a summary of the interview, but the judge will try to communicate this to them in a way that will not anger, embarrass, or offend them. Furthermore, the child should be

asked to identify any issues that are especially sensitive, so that the judge will not needlessly embarrass the child.

- Communication: The judge should use vocabulary and sentence structure that is appropriate to the child's age and stage of development. Discussion should focus on a child's activities, school, and what they do in each home. Questions should be 'open ended'. It is preferable not to directly ask children about their preferences for custody or visitation, as this question may induce feelings of guilt or disloyalty, and some children will be very reluctant to provide a direct answer. Some children, however, will volunteer this information without prompting, or in response to a very open-ended question like, 'Is there anything you would like to tell me'. If the child does express preferences, either directly or indirectly, it is important to explore the underlying reasons, to allow proper evaluation of those preferences.
- Time for meeting: Enough time should be set aside for the meeting that the child will not feel rushed. The length of the interview will be affected by the child's age and stage of development; older children will generally have more to say, but an interview with a younger child may need to be slower paced, and there is considerable variability in how much children will want to say. The meeting should be at a time of day when the child is likely to be alert, such as the start of the day, and not late in the afternoon (or at nap time for a young child), when the child is likely to be tired or hungry.
- Siblings: It is generally useful to initially meet siblings as a group, and observe their interactions, but each child should be interviewed alone for some period of time, as the presence of siblings influence what some children will say.
- The length of the interview will vary according to the child's age and stage of development.

2. CONCLUDING COMMENTS: PRINCIPLES, POLICIES, AND RESEARCH

While much of the process of family dispute resolution in the courts bears a broad similarity to other types of civil litigation, judicial interviews with children who are the subject of litigation are very different from any other traditional judicial functions. Unlike other aspects of the court process, the judge will have an active role in the discussion; furthermore, the meeting is not traditional 'evidence' but may nevertheless be very important to the outcome. Furthermore, unlike adults, who generally have a deferential attitude to the judge

(and will often hide their true feelings from the court), children may be very candid and are sometimes 'unpredictable'. So it scarcely surprising that judges (and lawyers) without experience with interviews of children should have some hesitation about undertaking them.

The surveyed judges in both Ohio and Ontario all believe that children's voices should be heard during parental separation. The question is *how* their voice should be heard and *what* is the best way to obtain their views and wishes. There are no easy answers to these questions and there is little research to guide judges. Not all children want to be or should be interviewed by a judge. Judges should retain their discretion in deciding when and how to interview children, as there are many circumstances of individual cases that will affect whether and how this is done.

It is, however, our view that all children should be regarded as having the *right* to decide whether they want to meet with the person who may be making very important decisions about their future. Furthermore, judges will often benefit from meeting with children, though this meeting must never be the sole source of the judge's information about the child. Except for urgent cases, judicial interviews should not be viewed as replacements for child legal representation or an assessment by a mental health professional but should be viewed as supplements.

The authors suggest that judicial interviews should occur more often than is currently the case in Ontario, but there should be policies in place to assist judges in carrying out this unique and challenging role. Training and education is an ongoing process for all professionals involved in family law disputes and would greatly assist all judges in any jurisdiction in regard to judicial interviews with children. There must also be government policies to ensure that there are appropriate resources in terms of judicial time and court facilities to allow judges to meet with children in a comfortable and supportive environment.

It must be acknowledged that the study of how to best involve children in the family justice system, and how to make the best decisions for them, is still in its infancy. While this study offers fresh insights into the perceptions of judges about interviews with children, there is clearly much more research that needs to be done. In particular, the authors of this article are interviewing children and young adults in Ohio, Ontario and Quebec who have had experience with the family court process (some having been interviewed by judges and others not) to learn more about their perceptions of what is the fairest and most effective way to involve them in the process. Governments clearly need to partner with social scientists and justice system professionals, including judges, as well as parents and children who have been through the family justice system to learn more about what works and what does not work for children following separation.

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NOTES

[1] See Eekelaar (1992: 221–35) and Cashmore and Parkinson (2009). In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, the Supreme Court of Canada held that courts must consider the opinions of 'mature adolescents' (those younger than 16 years of age) in medical decision making. While legislation, in this case the Manitoba Child and Family Services Act gives a court the authority to authorise medical treatment that it finds to be in the 'best interests of the child', the Supreme Court ruled that the views of a child younger than 16 should be taken into consideration when determining the child's best interests. Justice Abella prescribed 'a sliding scale of scrutiny' that accords increasing respect to the adolescent's decisions depending on his or her degree of maturity, as well as taking into account the independence of those views and the gravity of the medical decision.

[2] R.T. Can. 1992 No. 3.

[3] For examples of children's meaningful participation reducing the risk of family breakdown, see, Crosbie-Currie (1996: 289), Smart (2002: 307), Kelly (2002: 129), Neale (2002: 455), Pryor and Rodgers (2001); Smith et al (2000: 34), Butler (2002: 89), Cashmore (2003: 158), Pryor and Emery (2004), and Rayner (2003).

[4] A mental health professional interviews the child/ren as well as each parent, and may collect professional reports, if necessary, to provide the court with a report on the child's wishes. They are conducted in British Columbia, Alberta (Practice Note 7), Saskatchewan, Manitoba, and Newfoundland and Labrador with children who are ~8 years of age and older.

[5] These are conducted by mental health professionals in both private and public sectors across the globe. In Canada, New Brunswick is the only province that does not provide public funding for child custody assessments. However, parents who are eligible may receive financial assistance to defray the cost of the child custody assessment through the Court Ordered Evaluations Support Program.

[6] Ontario has the most comprehensive child legal representation program in Canada. Quebec also provides child legal representation, however, the program is more limited in scope. There is also some publicly funded legal representation for children in Alberta and the Yukon, although it is not consistent ('*Family Relations Act Review*', 2007).

[7] Legislation specifically allows judges to interview children who are involved in their parents' disputed custody and access matters in Newfoundland and Labrador, Prince Edward Island, Ontario, the Northwest Territories, and Nunavut ('*Family Relations Act Review*', 2007: chap. 8) and in other provinces case law recognises that this can be done. Also see Elrod and Spector (2002: 618) and Lombard (1983: 807) which discuss judicial interviewing of children in the USA, and Williams (2007: 635) for a review of references to the views of the child and qualifiers in Canadian legislation to hearing from children.

[8] For a discussion of the use of child specialists in collaborative family practice, see Gamache (2005: 1,455; 2006).

[9] Child custody assessment is a term used in Canada and is synonymous with child custody evaluations or forensic child custody evaluations used in the USA. Birnbaum et al (2008).

[10] In Ontario, the OCL provides a clinical investigator to assist a child's counsel in obtaining information about the child and the family to facilitate in the courts' decision making. A 'clinical assist' is not synonymous with an investigation and/or report under s. 112 of the Courts of Justice Act. There is no specific legislation that provides for this unique combination and is only available at the discretion of the OCL.

[11] See Williams (2006) and Reeves (2008) for an analysis of what children think of the different processes and what is and is not helpful to them. Also see Parkinson et al (2007: 84) and Reeves (2008) who describe children's views on different processes and what they find helpful or not. Fernando (2009: 48) outlines the benefits to judges in conducting judicial interviews more often in Australia than presently exists. Also see Eberhard (2005).

[12] The Ontario Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 64, and the Ohio Revised Code, ss. ¶3109.04 and 3109.051, with regard to interviewing children when determining parenting time or visitation. These provisions are more fully discussed below. Also see McColley (2009), Boshier and The Law Society Continuing Legal Education (2008: 5), and Boshier (2006: 145).

[13] Judges rarely have been interviewed about their views and opinions on family law decision making. See the few studies conducted in Canada: Tait, C. (2006) 'Judges' satisfaction with custody and access reports : A Survey of BC Supreme and Proviacial Court Judges'. Produced for the Ministry of the Attorney-General, British Columbia, accessible at: http://www.ag.gov.bc.ca/justice-services/publications/fjsd/survey/JudgeSurvey.pdf; R. Birnbaum and W. McTavish (unpublished manuscript, available with the author), surveying judges in Ontario regarding their level of satisfaction with the OCL; and Kushner (2008).

[14] For examples of research from non-English-speaking jurisdictions, see Liu (2004) and Stötzel and Fegert (2006).

[15] See Rothman (1983: 329) where it is argued that a judicial interview is undesirable because (i) it is an interview conducted in an intimidating environment by a person unskilled in asking questions and interpreting answers of children, (ii) it is difficult to investigate with sufficient depth and subtlety those perceptions of a child, and (iii) the interview may be perceived as a violation of a judges' role as an impartial trier of fact.

[16] A qualitative methodology was selected because it captures the breadth and depth of the views and experiences of highly experienced judges in family law disputes and whether they find judicial interviews of children helpful or not in their decision making. A qualitative approach generates a representation of themes from the judges that were interviewed and allows the reader to draw their own conclusions. Qualitative research is not about generalising results; rather, it draws out the complexities and tensions that are inherent in the real world – in this case, judicial interviews of children. Additionally, using a qualitative methodology to explore the research questions in this study is also supported by Charmaz (2006), Creswell (2007), and Corbin and Strauss (1990).

[17] See Williams (2006) and Williams and Heykoop (2008), which provide suggestions on how and when to include children during family law disputes.

[18] L.Q. 1991, c. 64.

[19] (2002) D.L.R. (4th) 350, [2002] J.Q. No. 480 (C.A.). See also *L. (S.P.)* c. *L. (L).* 2006 QCCA 1053, 152 A.C.W.S. (3d) 244, [2006] J.Q. no. 8690.

[20] Sixty judges responded to the survey, 12 reported that they did not hear child custody disputes. Of the 48 who responded, 43 were state court judges and 5 tribal court judges.

[21] Care of Children Act 2004, s. 2004, s.(1)(b) in New Zealand recognises that children have certain rights. See also Tapp (2006), who suggests that the emphasis on rights and an increased demand that the courts be more accountable may be an explanation for an increase in judicial interviews of children.

[22] See Parkinson and Cashmore (2007). In July 2006, a Practice Direction: No. 2 of 2006 was given to judges involving child-related proceedings as a result of the Children's Cases Pilot Project using the Less Adversarial Trials in Australia. The practice direction can be accessed online at http://www.barweb.com.au/Upload/FCK/SCAN1672_000.pdf

[23] Family Law Act, s.68 LA (2)(5)(7) & (8).

[24] Children's Law Reform Act, R.S.O. 1990, c. C-12, s. 64(1-4).

[25] McLeod (1992: 4(11)). See also *Hamilton v. Hamilton* (1989), 20 R.F.L. (3d) 152 (Sk. C.A.); *LaChapelle v. LaChapelle*, 2000 CarswellOnt 4108 (Ont. C.A.) at para. 7.

[26] *L.E.G. v. A.G.*, [2002] BCSC 1455 at para. 15.

[27] *Hamilton v. Hamilton* (1989), 20 R.F.L. (3d) 152 (Sk. C.A.).

[28] *L.E.G. v. A.G.*, [2002] BCSC 1455 at para. 2.

[29] Ibid., para. 4.

[30] Ibid., para. 5.

[31] See *Hamilton v. Hamilton* (1989), 20 R.F.L. (3d) 152 (Sk. C.A.) and *Jandrisch v. Jandrisch*, 1980 CarswellMan 30 (Man. C.A.).

[32] *Stefureak v. Chambers*, 2004 CarswellOnt 4244, 6 R.F.L. (6th) 212 (Ont. S.C.J.). For a similar approach in an Alberta case, see *S. (M.E.) v. S. (D.A.)*, 2001 CarswellAlta 1542 (Alta. Q.B.).

[33] *Stefureak v. Chambers*, 2004 CarswellOnt 4244 (Ont. S.C.J.).

[34] Ibid., paras. 2–4.

[35] Ibid., para. 70. See also *Mannila v. Mannila*, 1992 CarswellOnt 1587 (Ont. Gen. Div.); *More v. Primeau*, 1977 CarswellOnt 141 (Ont. C.A.); *Toiber v. Toiber*, 2005 CarswellOnt 8366 (Ont. S.C.J.); aff'd 2006 CarswellOnt 1833; *Palumbo v. Palumbo*, 1982 CarswellOnt 1716 (Ont. H.C.J); and *Boland v. Boland*, 1996 CarswellOnt 3545 (Ont. Gen. Div.).

[36] See *Polsfut v. Polsfut*, 2008 SKQB 63; and *Gibb v. Gibb*, 2008 BCSC 966.

[37] *A.A. v. S.N.A.*, 2009 BCSC 387.

[38] *Ward v. Swan*, [2009] O.J. No. 1834 (Ont. S.C.J.). See also *Sefergic v. Selmanovic*, 2009 CarswellOnt 4111 (Ont. S.C.J.); *Ward v. Swan* [2009], O.J. No. 2107 (Ont. S.C.J.); *LaChapelle v. LaChapelle*, 2000 CarswellOnt 4108 (Ont. C.A.); *McGinn v. McGinn*, 2006 SKQB 105; *Jandrisch v. Jandrisch* (1980), 16 R.F.L. (2d) 239 (Mb. C.A.); *H. (M.A.) v. H. (C.M.)*, 2008 BCPC 14; *Stevenson v. DeRose*, 2001 CarswellOnt 1724 (Ont. S.C.J.); *C. (A.G.) v. C. (R.)*, 2006 BCSC 1336.

[39] *S.E.C. v. G.P.*, [2003] O.J. No. 2744 (Ont. S.C.J.) at para. 32.

[40] A court may refuse to appoint counsel for a child if it is determined that there is a better way to establish the child's wishes and protect the child's interests. In Ontario, in particular, courts rely heavily on expert custody and access assessments; see McLeod (1992: 4(11)).

[41] *Ali v. Williams*, 2008 CarswellOnt 1757 (Ont. S.C.J.).

[42] Ibid., para. 51.

[43] See, eg *Stefureak v. Chambers*, 2004 CarswellOnt 4244 (Ont. S.C.J.) at para. 70.

[44] *England v. England*, [2005] O.J. No. 1100 (Ont. Ct J).

[45] Hague Convention On International Child Abduction, 25 October 1980, Hague XXVIII at 13.

[46] See *England v. England*, [2005] O.J. No. 1100 (Ont. Ct. J.) at para. 7. This determination was also made in the cases of *French v. Onderik*, 1995 CarswellOnt 2239 (Ont. Prov. Div.); aff'd at 1996 CarswellOnt 1874 (Ont. Gen. Div.); and *Cozby v. Cohoon*, [1991] O.J. No. 2687 (Ont. S.C.J.).

[47] *England v. England*, [2005] O.J. No. 1100 (Ont. Ct, J,) at para. 9.

[48] Ibid., paras. 10 & 14.

[49] *DaSilva v. Pitts*, 2008 CarswellOnt 41, 47 R.F.L. (6th) 43 (Ont. C.A.) at para. 1.

[50] Ibid., at para. 30.

[51] Ibid., at para. 21.

[52] See *Johnston v. Johnston*, 1995 CarswellOnt 2028 (Ont. Gen. Div.); *Stokes v. Stokes*, 1999 CarswellOnt 4564 (Ont. S.C.J.); and *Ellis v. Ismond*, 2000 CarswellOnt 170 (Ont. S.C.J.).

[53] [2009] O.J. No. 2107, 71 R.F.L. (6th) 384, at para. 25 (Ont. Sup. Ct.).

[54] Children's Law Reform Act, R.S.O. 1990, c. C-12, s. 64(3) & (4).

[55] See, eg *Coda v. Coda*, 1997 CarswellOnt 3953 (Ont. Gen. Div.) at para. 12; *McAlister v. Jenkins*, 2008 CarswellOnt 4266 (Ont. S.C.J.) at para. 134; *Demeter v. Demeter*, 1996 CarswellOnt 1301 (Ont. S.C.J.) at para. 7.

[56] *Coda v. Coda*, 1997 CarswellOnt 3953 (Ont. Gen. Div.) at para. 1.

[57] Ibid., at para. 12.

[58] *McAlister v. Jenkins*, 2008 CarswellOnt 4266, 54 R.F.L. (6th) 126 (Ont. S.C.J.) at para. 133.

[59] Ibid., at para. 135.

[60] *Demeter v. Demeter* (1996), 133 D.L.R. (4th) 746 (Ont. Gen. Div.) at paras. 8, 9, and 13.

[61] *Montgomery v. Rendell*, 1987 CarswellOnt 1554 (Ont. Prov. Ct.). A similar debate exists within other Canadian jurisdictions; see, eg *Jespersen v. Jespersen*, [1985] B.C.J. No. 2440 (B.C. C.A.); and *Andrusiek v. Andrusiek*, 2000 CarswellBC 2353 (B.C. S.C.); aff'd in 2002 CarswellBC 492.

[62] Domestic Relations Code, tit. 31 s. 3109.04 (2007).

[63] *Badgett v. Badgett* (1997), 120 Ohio App. 3d 448, 698 N.E. 2d 84.

[64] *Hill v. Hill*, 2006 WL 3175138 (Ohio App.) at para. 9. See also *Mangan v. Mangan*, 2008 WL 2809225 (Ohio App.); *Pedraza v. Collier*, 2007 WL 2164069 (Ohio App.); *Spine v. Spine*, 2008 WL 94641 (Ohio App.).

[65] *Barry v. Barry* (2006), 169 Ohio App. 3d 129, 862 N.E. 2d 143 at para. 19.

[66] *Henderson v. Henderson*, 2008 WL 4599607 (Ohio App.) at para. 12. See also *In Re Mack*, 2008 WL 4384185 (Ohio App.); *Weisberg v. Sampson*, 2006 WL 1976735 (Ohio App.).

[67] See *Badgett v. Badgett* (1997), 120 Ohio App. 3d 448, 698 N.E. 2d 84; *England v. England*, [2005] O.J. No. 1100 (Ont. S.C.J.).

[68] *Braden v. Braden*, 2006 WL 3772285 (Ohio App.) at para. 51.

[69] See *Patton v. Patton* (1993), 87 Ohio App.3d 844, 846, 623 N.E. 2d 235; *Donovan v. Donovan*, 110 Ohio App. 3d at 620, 674 N.E.2d 1252.

[70] *Wilson v. Wilson*, 2009 WL 3043967 (Ohio App.) at para. 8. See also *Patton v. Patton* (1993), 87 Ohio App. 3d 844, 846, 623 N.E.2d 235 (stating that 'a trial court errs in refusing a timely request that a record be made of its interview of minor children who are the subject of proceedings involving the award of parental rights and responsibilities'); *Lynch v. Lynch,* Huron App. No. H-02-22, 2003-Ohio-1039 (declining to consider appellant's argument that court failed to record in camera interview when appellant failed to make a timely request).

[71] *Wilson v. Wilson*, 2009 WL 3043967 (Ohio App.) at para. 13.

[72] *Myers v. Myers* (2007), 170 Ohio App. 3d 436, 867 N.E. 2d 848 at para. 12. See also *Chapman v. Chapman*, 2007 WL 1721462 (Ohio App.); *In Re White*, 2009 WL 1175149 (Ohio App.).

[73] See Patton (2002). Purposive sampling is recommended when a specific research question is being asked for a particular purpose and thereby includes specific people of interest and excludes others.

[74] The first author conducted all the interviews in Ontario and Ohio. There were two judges who were interviewed together due to scheduling problems. 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. The judges and/or magistrates that were interviewed were from domestic relations court (parents are married) and juvenile division court (unmarried parents). These two courts deal with the majority of family law disputes. For purposes of this study, while magistrates and judges carry different responsibilities, they both interview children in custody and access disputes as well as child welfare matters.

[75] Some of the questions were different between jurisdictions because in Ontario, judges have less experience than in Ohio with judicial interviewing of children.

[76] One judge reported interviewing an average of one child per week between the ages of 4 and 17 years. There are a few courthouses in Ohio that has a room specifically designed for interviewing children. These rooms have toys and games and are equipped with audiotaped capabilities. Some judges have also brought their dog to the interview to act as an 'ice breaker' for the children. There are court-connected mental health professionals in some courts in Ohio who provide custody and access parenting plans for children. The parents receive a letter from the court and the children are interviewed automatically by a mental health professional.

The law in Ohio stated previously that when the child was age 12, he or she could make an 'election'. In many cases, a child's affidavit was filed with the parent's motion to change custody. A hearing would be set. At the hearing, if the parties had not agreed, the judge would interview the child, and normally, whatever the child said would be what the judge often ordered. If a child made such an election and the other parent wished to contest it, he or she would have to prove it was not in the best interest of the child for the court to accept that election. In an original proceeding, a child at age 11 could state a 'preference' during a judicial interview.

[77] There are some courts in Ohio that have access to court-connected mental health professionals who conduct the child interviews and report their findings to the judge.

[78] In Ontario, s. 39(3)(4)(5)(6) of the Child and Family Services Act, R.S.O. 1990, c. C. 11 allows a child to be served and participate in the hearing if the judge believes it is appropriate. There is no similar legislation in family law disputes.

[79] In Ohio, guardians *ad litem* take a best interest approach. That is, they present the child's wishes in the context of the child's family life situation and are not advocates for the wishes of the child.

[80] In Ohio, the child's wish is one factor in determining his/her best interests.

[81] Despite the fact that some of these judges had never interviewed a child and some had said previously that they would rather not interview a child, they were able to see some merit if some of these conditions existed. In other words, the judges did not rule it out entirely, nor did they take a strong dogmatic view that it would never happen under any circumstances.

[82] In Ohio, the majority of the judges received training in interviewing children or had read about interviewing techniques for children. The majority of the judges referred the interviewer to Walker (1999), which outlines principles in interviewing children, and problems to look for and inconsistencies in children's wishes. Many of the judges added that they are also involved with interdisciplinary programs such as the Association of Family and Conciliation Courts and obtain ongoing training as well.

[83] There are no empirical studies that have been done to evaluate whether judicial interviews lead to better decision making by judges. Moreover, there are few, if any, longitudinal studies that

evaluate whether child custody assessments or child legal representation lead to better outcomes for children. See Birnbaum and Bala (2009: 11). It is interesting to note that these latter processes are adult driven and assume that the child's voice is being heard by the judge.

[84] Williams and Heykoop (2008) have written about some practice tips that can be used by lawyers and judges in interviewing children. In the USA, the American Bar Association has had two major conferences on the role of child legal representation in child custody and child welfare (dependency) cases. A number of standards and guidelines have been produced that can be accessed online at http://www.abanet.org/child/repstandwhole.pdf and http://www.abanet.org/family/reports/standards_childcustody.pdf. See Bellamy et al (2010) for guidelines for judges who wish to interview children in Great Britain.

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