

## Children’s Voices in Family Court: Guidelines for Judges Meeting Children

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### I. Introduction: The Controversy Over Judges Meeting Children

There is continuing controversy concerning children’s participation in post-separation decision-making,<sup>1</sup> in particular over the issue of whether and how judges should meet children.<sup>2</sup> While the practice is now an accepted part of the family justice process in some jurisdictions, it occurs rarely, or not at all, in others. This article explores this controversy, advocates use of judicial meetings with children, and proposes Guidelines for the conduct of such meetings. While the authors believe that these meetings can be valuable for children, judges, and the dispute resolution process, meetings need to be conducted in an appropriate fashion, and not if the child does not want to meet with the judge.

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1. The focus of this article is on children meeting judges in the context of parental disputes over custody and visitation (or access), though many of the issues are also relevant to child welfare proceedings and cases under the *Hague Convention on Child Abduction*; see Linda D. Elrod, “Please Let Me Stay:” *Hearing the Voice of the Child in Hague Abduction Cases*, 63 OKLA. L. REV. 663 (2011).

2. In this article, we use the terms judicial “meeting” and “interview” with children inter-

Part II explores some of the main arguments for and against judges meeting with children who are the subject of parental disputes. It summarizes the social science research on the effects of children being interviewed by judges. The research reveals that litigation between parents about parenting arrangements can be traumatic to their children. Allowing children to participate in the process, however, may improve decision-making and make the outcome less harmful. There is no evidence that meeting a judge will traumatize a child. In Part III, we survey the legal approaches to judicial interviewing of children. In many jurisdictions there is considerable judicial discretion and a lack of clear guidance about whether judges may meet with a child. Some jurisdictions recognize that children have the *right* to decide whether to meet the judge or there is a presumption that judges should meet the children if requested by a parent. In Part IV, we provide the background for the development of our Guidelines for Judges Meeting Children. We also discuss some of the most significant issues that are addressed in the Guidelines, in particular the contentious issues of the duties on lawyers for children and custody evaluators in regard to such interviews, and how judges should disclose information about the meeting to parents.

In Part V, we set out our Guidelines. They are in part based on guidelines in use in such jurisdictions as California, England and Wales, and New Zealand. We have developed them to assist judges, lawyers, mental health professionals, and parents in jurisdictions without guidelines, and to stimulate discussion about guidelines generally. In Part VI, we offer practical suggestions about the structure of interviews and age-appropriate questions that judges may want to ask. We conclude by discussing issues related to the implementation of Guidelines, including the need for education for judges, lawyers, and other professionals about this process, and suggestions for research.

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changeably, with the word “meeting” having a more informal sound and being more appropriate for use in conversation with children, while the term “interview” is more commonly used in legislation, jurisprudence, and legal literature. A few authors distinguish between a judicial “interview,” which may result in a judge acquiring information or insights that can be used in making a decision, in particular about a child’s views and preferences, and a judge having a “meeting” with a child for some other purpose, such as to answer questions that a child may have or to tell the child about the court’s decision. *See, e.g.,* Dan L. Goldberg, *Judicial Interviews of Children in Custody and Access Cases: Time to Pause and Reflect*, Law Society of Upper Canada, Voice of the Child Education Program, Apr. 8, 2011, Toronto.

While judges meet with children at different stages of proceedings and with different intended purposes, in our view it is artificial and potentially confusing to distinguish between “meetings” and “interviews.” Meetings with a child may have more than one purpose before they begin, or their nature may change once the meeting occurs; the same *Guidelines* should apply to all meetings, though the timing and purpose of the meeting will affect how they are applied.

## II. The Context for the Controversy

The controversy over children's involvement in the family dispute resolution process arises, at least in part, as a result of the divergent perspectives, values, and assumptions of the professionals involved in the family justice process. The disagreements are more *within* professional groups, including judges, lawyers, and psychologists, rather than *between* professional groups, with members of each profession being advocates for and against judicial interviewing. Some take the view that children have rights and should be allowed to express their views about their future, even in the context of parental disputes. Others, however, believe that children need to be protected from family conflict and not directly involved in the process.<sup>3</sup>

Arguments against children becoming involved in the process in any way include concerns that children lack the ability to assimilate relevant information about the family justice process and may not understand what they are being asked. There are other particular concerns about judicial interviews. For example, children may be manipulated by parents into providing inaccurate information. Another concern is that children may experience guilt, pressure, or retribution from parents, either before or after a meeting with a judge. If judges are not adequately trained in interviewing children, they may not reliably explore children's views or feelings. Some suggest that as a result of pressure from parents or poor judicial interview techniques, children may be "traumatized" by the experience. These concerns may be heightened to the extent that judges hearing family law cases are not always specialist family law judges.

Lawyers and judges also express concern that allowing a judge to interview a child, especially in the absence of parents or their counsel, derogates from the traditional judicial role and may violate the rights of parents. Some children are ambivalent or change their views depending on how and when they are interviewed. So there are also concerns about a process in which any professional, including a judge, may try to determine a child's views and preferences based on a single meeting.

While many professionals have concerns about children meeting judges, ironically, opposition seems most pronounced in jurisdictions where it occurs rarely or not at all. There seems to be support for the practice in jurisdictions where it is common. Despite the opposition to and concerns about judicial interviewing, research on the practice of children meeting with judges suggests that:

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3. Robert E. Emery, *Children's Voices: Listening—and Deciding—Is an Adult Responsibility*, 45 ARIZ. L. REV. 621 (2003); Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373 (2003).

- children generally have better outcomes if they feel that they have a “voice” in the family dispute resolution process, but they often report feeling ignored;<sup>4</sup>
- even if children have had a lawyer or a custody evaluation, if they are properly asked, a significant portion of children would also like to meet with the judge;
- children are often traumatized by being involved in high-conflict separations, but meeting the judge places the child in the same position as regards their parents in meeting a lawyer or a custody evaluator;
- though children often report feeling anxious before they meet the judge, they usually feel positively after the meeting, and there is no evidence that children are traumatized as a result of meeting a judge;
- judges report that often they find it helpful to meet children; and
- while research about the experience of parents with judicial interviews is limited, an Israeli study found that a substantial majority supported their children meeting the judge, and German research suggests that most parents reported relief that their children had met the judge.<sup>5</sup>

Judicial meetings with children may allow them to feel more connected with proceedings, and give children an opportunity to satisfy themselves that the judge has understood their views. These meetings help children to better understand the nature of the judge’s task and the court process.

Beyond the questions of whether a judicial meeting with a child is potentially beneficial to the child and useful to the court is the issue of the *right* of the child to meet the person who will be making a very important decision about the child’s life. The United Nations Convention on the Rights of the Child provides:

Article 12

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

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4. For discussions of the social science literature on judicial meetings with children, and more on involving children in the family dispute resolution process, see Rachel Birnbaum, Nicholas Bala, & Francine Cyr, *Children’s Experiences with Family Justice Professionals in Ontario and Ohio*, 25 INT’L J.L. POL’Y & FAM. 398 (2011); Rachel Birnbaum & Nicholas Bala, *Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio*, 24 INT’L J.L. POL’Y & FAM. 300 (2010); Rachel Birnbaum & Michael Saini, *A Scoping Review of Qualitative Studies on the Voice of the Child in Child Custody Disputes*, 20 CHILDHOOD 260 (2013); Joan B. Kelly & Mary Kay Kisthardt, *Helping Parents Tell Their Children about Separation and Divorce: Social Science Frameworks and the Lawyer’s Counseling Responsibility*, 22 J. AM. ACAD. MATRIMONIAL L. 1401 (2009).

5. M. Karle, S. Gathmann, & G. Klosinski, *Investigation into the Practical Implications of Child Hearings Conducted Pursuant to Section 50b of The German Act Governing Non-Contentious Proceedings* (2010)

- (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.

While the Convention does not specifically establish a child's right to meet with a judge and is not of direct legal force in the United States, which is not a signatory, the Convention reflects and reinforces an international trend toward recognition of rights of children. These are usually qualified rights, and their application depends on the capacities of the individual child and the laws and resources of the particular jurisdiction where the child resides. The Convention, however, has been cited to assert that children have the *right* to meet the judge making a critical decision about their future (and, of course, the right *not* to meet the judge if they do not want this).

Despite our support for increased use of judicial interviewing of children, there are limitations and cautions about this practice. While the process can be useful for the court and children, generally an experienced mental health professional, guardian *ad litem*, or lawyer for the child who conducts a series of interviews with a child over a period of time will be able to establish a better understanding of the child and obtain more reliable information. In particular, having a series of meetings will help address situations where a child may be ambivalent or the child's views vary depending on recent activities with each parent.

We argue that it should be the practice of lawyers appointed to represent children, guardians *ad litem*, and mental health professionals undertaking evaluations to discuss with children, in a manner appropriate to their developmental understanding, whether they want to meet the judge. This professional should communicate with the court (with notice to the parties) if the child wants to meet the judge, a request that should normally be granted by the court. A child should be able to meet the judge, in addition to having a lawyer, guardian, or evaluation. A primary purpose of such meetings is to let children know that their views and feelings were taken into account, even if not reflected in the final decision. Such meetings may also benefit the judge and other family members, and facilitate dispute resolution.

Further, in some cases, the stage of the proceedings, urgency of the matter, or the limited means of the parents and resources of the particular jurisdiction may not allow for involvement of a lawyer or guardian *ad litem* for the child or an evaluator to interview the child. In such cases, a judicial interview may be the best, or only, way for a judge to learn of the child's perceptions, feelings, and views.

### III. Legal Context for Judicial Meetings with Children

Although there is great variation among jurisdictions, even in the same country, in the extent to which legislation provides for and regulates judicial meetings with children, there is always a degree of judicial discretion. In some jurisdictions a statute creates a presumption that a child will meet the judge, whereas in others legislation allows for judicial interviews without structuring judicial discretion. In most common law jurisdictions, there is no applicable legislation, but jurisprudence recognizes the inherent authority of a judge dealing with a family case to meet with the child.

#### A. Legislative Presumption of Judicial Interviews

There are a few jurisdictions with legislation that creates a statutory presumption that judges will meet with children. There are two models of this type of legislation: one gives parents the presumptive right to request that the judge meet with their child, while the other presumptively gives a child the opportunity to meet with the judge.

Ohio has one of the most detailed and direct statutory schemes regarding judicial interviews with children, presumptively requiring an interview if requested by either parent. Ohio Revised Code § 3109.04 states:

- (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. . .
- (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 also provides that the court "shall" not "consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters."<sup>6</sup> This effectively requires parents to ask the judge to meet their children to ascertain their wishes in the absence of evidence from a custody evaluator, guardian *ad litem*, or child's lawyer.

Because of the directory nature of the Ohio statute, failing to conduct an interview when requested by a parent may be the basis for vacating a trial decision and ordering a new hearing.<sup>7</sup> In one unpublished case, the Ohio Court of Appeals stated, "The plain language of [the] statute

6. OHIO REV. CODE ANN. § 3109.04 (West 2011).

7. *Badgett v. Badgett*, 698 N.E.2d 84 (Ohio Ct. App. 1997).

absolutely mandates the trial court judge to interview a child if either party requests the interview.”<sup>8</sup> Even if no party requests a judicial interview, the judge may use his or her discretion in deciding whether or not to interview any or all children involved. Even if a parent requests an interview, however, a judge may decline to meet with the child if the judge believes that it would be contrary to the child’s interests to be interviewed.<sup>9</sup> In another case, the appellate court 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 trial judge was justified in refusing this request based on the opinion of a psychologist, who expressed the view that the children, in kindergarten and first grade, were not mature enough to be interviewed.<sup>10</sup>

While age is a factor considered when deciding whether to interview a child, based on the reported case law, judges in Ohio seem more willing to interview and consider the preferences of younger children than judges in many other jurisdictions.<sup>11</sup> Thus, in *Badgett*, the appellate court held that the trial judge erred in not interviewing a six-year-old child who was the subject of a dispute between divorced parents over which school the child would attend, and remanded the case for a further hearing.<sup>12</sup>

When deciding whether to interview a child, in addition to the age of children involved, judges in Ohio also take into consideration whether there has been a custody evaluation report prepared. For example, in *Braden v. Braden*, the appellate court upheld the custody decision of a trial judge who rejected a father’s request to interview the boys, aged four and nine 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 . . . as well as an investigation by two guardian[s] *ad litem*, we cannot conclude that the trial court abused its discretion by failing to interview the children regarding their wishes.<sup>13</sup>

While Ohio Statute § 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

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8. *Hill v. Hill*, 2006 WL 3175138 at \*2 (Ohio Ct. App. Nov. 6, 2006) (unpublished). *See also Mangan v. Mangan*, 2008 WL 2809225 (Ohio Ct. App. July 18, 2008) (slip only).

9. OHIO REV. CODE ANN. § 3109.04(B)(2)(b) (West 2011).

10. *Henderson v. Henderson*, 2008 WL 4599607 at \*2 (Ohio Ct. App. Oct. 10, 2008) (unpublished). *See also In re Mack*, 2008 WL 4384185 (Ohio Ct. App. Sept. 28, 2008) (unpublished).

11. Ohio judges are elected to a specialized Domestic Relations and/or Juvenile Court Bench. Appointed magistrates may also be involved in cases where they interview children.

12. *See Badgett v. Badgett*, 698 N.E. 2d 84 (Ohio Ct. App. 1997).

13. *Braden v. Braden*, 2006 WL 3772285 at \*6 (Ohio Ct. App. Dec. 22, 2006) (unpublished).

age of the children, their capacity, and whether there is reliable evidence from other sources (i.e., evaluator reports). Ohio decisions do not express a concern about the due process rights of the parents or the judge's lack of qualifications to interview children. Judges in Ohio are more concerned with *how* to interview than *whether* to interview children.

In the province of Quebec, the *Civil Code* also creates a presumption that children will be directly "heard" by the judge, but this provision is based on the protection of the rights of the child, not the rights of a parent:

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 six years old who express a wish to communicate directly with the judge do meet with the judge in family law cases in Quebec. The normal court process is generally modified for these witnesses, in particular excluding parents from the courtroom.<sup>14</sup> 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.)*,<sup>15</sup> which held that lawyers who represent children should adopt an advocate role. Provided that the child gives clear directions, the lawyer should advocate based on those directions, even if the lawyer believes that the child has been unduly influenced (or alienated) by a parent or wants an outcome that will be contrary to the child's best interests. This decision has also influenced attitudes toward judicial interviewing of children in Quebec, making the practice more common.<sup>16</sup>

### *B. Permissive Legislation for Judicial Interviews*

In a number of jurisdictions, legislation permits a judge to interview a child to ascertain a child's views and preferences, without creating a presumption for (or against) such a procedure. Ontario, Canada, is one such jurisdiction. Until recently, judges in this province have generally taken a narrow approach to this permissive legislation, though judicial attitudes are starting to change.

Ontario's Children's Law Reform Act specifies that a judge "shall" take into account a child's views and preferences "to the extent that the

14. Anne-Marie Trahan, *The Judge and the Child*, LA REPRÉSENTATION DE L'ENFANT DEVANT LES TRIBUNAUX (B. Moore, C. Bideau-Cayre & V. Lemay eds., 2008).

15. (2002) 211 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.

16. Rachel Birnbaum & Nicholas Bala, *A Survey of Canadian Judges about Their Meetings with Children: Becoming More Common but Still Contentious* (under review).



child is able to express them,"<sup>17</sup> in determining the child's best interests. This is only one of a number of factors considered, however, and the judge is to determine what weight, if any, to give to the child's views. Further, the legislation provides a permissive provision that a judge "may interview the child to determine the views and preferences of the child." Judges in Ontario have traditionally been reluctant to interview children. In a frequently cited 2004 decision, *Stefureak v. Chambers*, Justice Quinn reviewed the various methods of bringing a child's views and preferences before the court. After analyzing the problems associated with judges interviewing children, he stated this should be "only as a last resort."<sup>18</sup> Justice Quinn suggested that it was normally preferable that a mental health professional interview the child and testify about the child's preferences. In *Stefureak*, the parents were disputing the custody arrangement previously agreed to concerning their seven-year-old child. In making their arguments, both parents also wanted to adduce evidence of the child's preferences, based on comments supposedly made to them by the child. In refusing to interview the child, Justice Quinn explicitly stated that "a chambers interview is not feasible . . . as I have no training or known skill in interviewing children."<sup>19</sup>

Judges in Ontario have also expressed concern about the potential trauma to children from a meeting with a judge. 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 domestic abuse by the father, Justice Perkins 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.<sup>20</sup>

Another reason that Ontario judges offered for refusing to use their discretion to interview children is that such action would undermine "the appearance of justice" and the traditional due process rights of parents. Thus, in *Ali v. Williams*, where both parties were seeking sole custody of their two children, age twelve and fourteen, Justice Van Rensburg ruled that she would not interview the children in her chambers because neither of the parties was represented by a lawyer. 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

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17. Children's Law Reform Act, R.S.O 1990 c. 12, s. 24(2)(b) & s. 64(1).

18. *Stefureak v. Chambers*, 2004 CarswellOnt 4244, 6 R.F.L. (6th) 212 (Ont. S.C.J.).

19. *Id.* para. 70.

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

the appearance of justice.”<sup>21</sup>

More recent decisions<sup>22</sup> and empirical research<sup>23</sup> about judicial attitudes, however, suggest that judicial attitudes and practices in Ontario are changing, though judicial interviewing remains a contentious issue in the province.

### *C. Permissive Jurisprudence*

While it is very common for jurisdictions with statutory definitions of the “best interests” of the child to include the wishes of the child as a factor to be considered, in many jurisdictions there is no explicit legislative provision for judicial interviews with children. It is, however, widely accepted that judges dealing with custody and visitation disputes have the inherent judicial authority to meet with children in the absence of their parents. In *Lincoln v Lincoln*, the New York Court of Appeals stated:

[T]he first concern of the court is and must be the welfare and the interests of the children. . . . Their interests are paramount. The rights of their parents must, in the case of conflict, yield to that superior demand.

. . . [A] child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them. The trial court, however, if it is to obtain a full understanding of the effect of parental differences on the child, as well as an honest expression of the child’s desires and attitudes, will in many cases need to interview the child. There can be no question that an interview in private will limit the psychological danger to the child and will also be far more informative and worthwhile than the traditional procedures of the adversary system—an examination of the child under oath in open court.

. . . The procedures of the custody proceeding must . . . be molded to serve its primary purpose [the promotion of the welfare of children], and limited modifications of the traditional requirements of the adversary system must be made.

This approach has been followed and expanded on in other jurisdictions. Recently, in Canada’s Yukon Territory, which also has no statutory provision allowing for judicial interviews, Justice Martinson in *B.J.G. v D.L.G.* considered whether a twelve-year-old boy should be allowed to express his views to the court in an application to vary an existing custody order. She concluded that, pursuant to both the Convention on the Rights of the Child and Canada’s own domestic laws, “all children in Canada have legal rights to be heard in all matters affecting them.” Citing some of the relevant social science research, the justice observed that obtaining

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21. *Ali v. Williams*, 2008 CarswellOnt 1757 (Ont. S.C.J.) at para. 51.

22. *See, e.g., McAlister v. Jenkins*, 2008 CarswellOnt 4266 (Ont. S.C.J.).

23. *See Birnbaum & Bala, A Survey of Canadian Judges, supra* note 16.

information from children regarding their preferences and views “can lead to better decisions . . . that have a greater chance of working successfully.” While she found that in this specific case the boy did not want to meet with her, and accordingly she did not interview him, she concluded:

Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and, if so, whether the child wishes to participate. If the child does wish to participate, then there must be a determination of the method by which the child will participate.

This approach not only accepts that judges have the discretion to interview children, but also actually have the *duty* to ensure that children are asked whether they would like to meet the judge. If children want to meet the judge, the judge should meet with them, even if the case involves allegations of alienation or domestic violence.

## **IV. The Guidelines**

### *A. Purpose of the Guidelines*

While a few jurisdictions have developed guidelines or protocols for judges meeting children, none that we are aware of provide a contextual framework and detailed discussion about conducting these important but potentially challenging interviews.<sup>24</sup> The Guidelines are written to assist those who may be in jurisdictions without guidelines and to provide some contextual information for understanding the guidelines existing in some jurisdictions.

These Guidelines are a response to several important and related concerns identified in case law, empirical research and commentary. One significant concern is a lack of consistency among judges, even within jurisdictions, in what criteria they use in deciding whether and how to meet with children. A related concern is the practice of some professionals, including judges, that may not be consistent with existing knowledge about child development and experience in places where judicial interviewing is common. We developed these Guidelines<sup>25</sup> as part of a broader research

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24. For example, in California, in 2012 the state adopted the California Rules of Court 5.250, which addresses when and how judges should meet with children; but, in most states there is no guidance for the courts about judicial interviewing of children. England, New Zealand, and Germany also all have guidelines. In Canada, the Ontario Court of Justice prepared a document for judges of that court considering interviewing a child (August 2012); it is widely available to lawyers in the province (*see, e.g.*, Law Society of Upper Canada, Family Law Summit, May 6, 2013, Toronto), but is not published or easily accessible to the public.

25. A version of the Guidelines was initially drafted by Bala, Birnbaum & Cyr in April,

agenda on children's participation in family disputes, addressing how their "voices" and their needs should be heard during parental disputes.

As recognized in the Preamble, the premise of these Guidelines is *not* that a meeting with a judge will be the best source of information for courts or parents about the views, feelings, and preferences of children. Rather, our premise is that, where available, evidence about a child's needs, wishes, and feelings are usually best ascertained and presented to the court by means of an evaluation report prepared by a mental health professional appointed by the court or by representations from a guardian *ad litem* or counsel appointed for the child. Such information can be gained through a series of meetings with the child that can occur as part of broader inquiry into the circumstances of the child. Further, some children are ambivalent or change their minds, perhaps heavily influenced by their most recent experiences or even by which parent brought them to an interview, and having a number of meetings may help to reveal this. Despite the involvement of an evaluator, guardian *ad litem*, or lawyer for the child, there is a complementary role for a judicial interview with a child. There may be value for the child, judge, and parents in such a meeting, even if it only confirms information already provided. There may also be cases where a child will reveal additional information to a judge. Further, in cases where assistance of a lawyer for the child, evaluator, or guardian *ad litem* is not available, the interview may be the most reliable or the only way for the judge to hear the views of the child.

A primary purpose of these interviews is to help children feel more involved in the process in which important decisions are made in their lives. The interviews also give them the opportunity to meet the judge and to understand the nature of the judge's task. A judge who meets a child should emphasize to the child that while the child has a right to be heard, in the absence of parental agreement, it is the judge, not the child, who has the responsibility for making the decision about the child's future: "Children have a Voice, but not a Choice."<sup>26</sup>

### *B. Right of the Child and Duty of Professionals*

Lawyers or guardians *ad litem* appointed to represent children and mental health professionals undertaking evaluations, should discuss with children, in a manner appropriate to their developmental understanding, whether their participation in the process includes a wish to meet the

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2012, and then extensively revised with the assistance of Judge McColley and comments from many individuals as a result of circulation of drafts and conference presentations.

26. This recognition of the right of children to participate in legal processes where decisions affecting them are being made is required by the U.N. Convention on the Rights of the Child, Art. 12 (Nov. 20, 1989).

judge. If the child does not wish to meet the judge, discussions with the child should address other ways of enabling the child to feel a part of the process. The parents should be told not to try to persuade the child to change his or her mind about how to be involved. If children tell an independent professional that they wish to meet the judge, that wish should be conveyed to the judge, and should normally result in a meeting with the judge.

A primary purpose of the meeting is to benefit the child. However, a meeting between the child and judge may also provide important insights to the court and promote sound decision-making. Parents may also learn more about their children as a result of learning the results of such a meeting. Depending on the stage of the process, this may facilitate settlement by the parents or result in greater acceptance of the judge's decision by them.

### *C. Confidentiality and Due Process*

After the question of whether there should be an interview with the child, the most contentious issues relate to disclosure of the interview. Are parents entitled to a transcript of an interview with their child? Does a judge have the authority to afford the child a degree of protection by keeping some, or all, of the interview confidential?

The argument in favor of providing parents with a transcript is based on concerns about both due process and allowing a full testing of the accuracy of any statements made by the child. An example of a decision taking this approach is the 2008 Ontario decision in *McAlister v. Jenkins*, where at a pretrial case conference, the therapist for the twelve-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."<sup>27</sup> 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 interview was in his office, but he wore his judicial robes. The judge remarked:

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.

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27. *McAlister v. Jenkins*, 2008 CarswellOnt 4266 (Ont. S.C.J.) at para. 133.

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

Some judges have taken a very different position, ruling that the interview with a child should be “confidential.” In his 1987 Ontario decision in *Montgomery v. Rendell*, Justice Vogelsang 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.<sup>28</sup>

A common judicial approach is to record the interview in the event of an appeal, but only provide parents and their lawyers with a summary of what the child said in a way that will avoid embarrassing the child or potentially poisoning the child’s relationship with a parent, and generally without any quotes. In our view, this approach reasonably balances concerns about protection of the child and encouraging the child to be candid with concerns about ensuring that the parents are aware of the substance of what the child has said and able to respond appropriately in the context of litigation.

An example of a court taking this approach is the 1969 New York decision in *Lincoln v Lincoln* where the court of appeals wrote:

The dangers [to the child]. . . can be minimized. We are confident that the Trial Judges recognize the difficulties and will not use any information, which has not been previously mentioned and is adverse to either parent, without in some way checking on its accuracy during the course of the open hearing. . .

The trial court here concluded that the only method by which it might avoid placing an unjustifiable emotional burden on the three children and, at the same time, enable them to speak freely and candidly concerning their preferences was to assure them that their confidences would be respected. This could only be done in the absence of counsel, and we see no error or abuse of discretion in the procedure followed by the trial court.

A similar approach was taken in the 1996 Ontario decision, *Demeter v. Demeter*, where at the request of counsel for the father and with the consent of counsel for the mother, the judge conducted separate interviews for the two children, aged eight and thirteen, 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:

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28. *Montgomery v. Rendell*, 1987 CarswellOnt 1554 (Ont. Prov. Ct).

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.

Even in jurisdictions where legislation creates a presumption that judges will interview children, like Ohio, there may be a lack of statutory guidance for how these meetings will be conducted, leaving it to judges to determine critical issues, such as whether to record such interviews and provide parents with a transcript. Some Ohio judges hold that interviews must be recorded, and others conclude that recording is dependent on the request of the parties involved.<sup>29</sup> Recent case law appears to show greater support for the latter position. In *Wilson v. Wilson*, the court 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."<sup>30</sup>

The Ohio legislation also leaves it to the judge's discretion to decide 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's counsel. In *In re White*, the appellate court rejected the argument of the mother that the trial court erred by not allowing her counsel to be present for her child's interview. The court noted:

[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

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29. See *Patton v. Patton* 623 N.E.2d 235 (Ohio Ct. App. 1993); *Donovan v. Donovan*, 674 N.E.2d 1252 (Ohio Ct. App. 1996).

30. *Wilson v. Wilson*, 2009 WL 3043967 at \*2 (Ohio Ct. App. Sept. 11, 2009) (unpublished). See also *Patton v. Patton*, 623 N.E.2d 235 (Ohio Ct. App. 1993) (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").

of chambers, exclusive of courtroom formalities and the unpleasantness of cross-examination.<sup>31</sup>

The contentious issue of whether a judge may decide to have the transcript of the interview with a child sealed has been resolved by an appellate court in Ohio in a manner similar to the New York court in *Lincoln*. In *Myers v. Myers*, the Ohio appellate court 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.<sup>32</sup>

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 some decisions have been reversed for a failure to have an interview. Further, no trial judgment in the state 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.

## **V. Guidelines for Judges Meeting Children in Family Cases**

All references to “child” or “children” refer to those under the age of 18 years and being dealt with in proceedings involving custody, visitation, or private guardianship.

### *A. Purpose of Guidelines & Meetings*

The primary purposes of these Guidelines are (i) to encourage judges to enable children to feel more involved and connected with proceedings in which important decisions are made in their lives; (ii) to give children an opportunity to satisfy themselves that the judge has understood their wishes, perceptions and feelings; and (iii) to help children to understand the nature of the judge's task and the court process. A judge who meets a child should emphasize to the child that while the child has a right to be heard, in the absence of parental agreement about child care plans, it is the judge, not the child, who has the responsibility for making the decision about the child's future: “Children have a voice, but not a choice.”<sup>33</sup>

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31. Wilson, *supra* note 30, at \*4.

32. *Myers v. Myers*, 867 N.E.2d 848 (Ohio Ct. App. 2007); *see also In Re White*, 2009 WL 1175149 (Ohio Ct. App. Apr. 30, 2009).

33. This recognition of the right of children to participate in legal processes where decisions



These meetings can also provide insights and contextual information that may allow judges to make more fully informed decisions, though judges should be very cautious about placing too much weight on information obtained from a single meeting with a child.

### *B. Preamble*

In most cases, evidence about a child's needs, wishes, and feelings is best presented to the court by means of an evaluation prepared by a mental health professional appointed by the court, a guardian *ad litem*, or by representations from counsel appointed for the child. Nothing in these Guidelines should be taken as detracting from this principle. A single meeting by a judge with a child will generally not provide as much reliable information as can a child's lawyer, a guardian *ad litem* or a mental health professional, who has had the opportunity to meet with a child a number of times and develop a relationship with the child.

It should be the practice of lawyers appointed to represent children, guardians *ad litem*, and mental health professionals undertaking evaluations to discuss with children, in a manner appropriate to their developmental understanding, whether they want to meet the judge. If the child does not wish to meet the judge, discussions should address other ways of enabling the child to feel a part of the process. Parents should be advised not to further discuss the possibility of meeting the judge with the child, and to avoid pressuring their children about an interview. If children tell an independent professional that they wish to meet the judge, that wish should be conveyed to the judge and should normally result in a meeting with the judge.

A primary purpose of the meeting is to benefit the child. However, it may also benefit the judge and other family members and facilitate dispute resolution through a trial or by settlement.

### *C. Deciding Whether to Have a Meeting*

1. Children should not be required to meet with a judge if they do not wish to, and the judge should be aware that children may be pressured by parents or others into expressing a desire to meet the judge and stating particular views.
2. A judge has the discretion to decide whether a meeting is held and to determine how the meeting is to be conducted.<sup>34</sup> The decisions

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are being made that affect them is required by the U.N. Convention on the Rights of the Child, Art. 12.

34. In some jurisdictions, the law creates a presumption that a child has the *right* to meet the judge (e.g., Quebec Civil Code Art. 34), or each parent has the right to presumptively require the judge to meet the child (e.g., OHIO REV. CODE ANN. § 3109.04 (West 2011)).

about these matters must be made on an individualized basis and will depend on a number of factors, including:

- the child's age and stage of development;
  - the nature and stage of the proceedings;
  - the matters at issue;
  - the judge's participation in appropriate judicial education programs and experience;
  - the person making the request that the judge meet the child; if that person is the child's lawyer or an independent professional, the judge should normally grant the request.
3. A person making a request for the child to meet the judge should:
    - (i) advise whether the child wishes to meet the judge;
    - (ii) if so, explain from the child's perspective the purpose of the meeting;
    - (iii) advise whether in that person's opinion such a meeting would accord with the interests of the child; and
    - (iv) suggest how, where, and when the meeting should occur.
  4. The parties are entitled to make representations as to any proposed meeting with the judge before the judge decides whether or not it shall take place, and how it should be conducted. The parties should be invited to suggest who should be present and what issues should be discussed with the child during a meeting. The judge may raise the issue of a meeting with the child without a request from any of the parties, and the judge should have the final responsibility for deciding whether a meeting will occur and how it will be conducted.

Once a decision is made that the child will be interviewed, the judge should provide direction for how the child is to be informed and invited to come to meet with the judge.
  5. If the child wishes to meet the judge, but the judge decides that a meeting would be inappropriate, the judge should consider providing a brief explanation in writing for the child, if possible transmitted by counsel for the child or another independent professional.

#### *D. Having a Meeting*

1. If a judge decides to meet a child, it is a matter of judicial discretion to determine:
  - (i) the purpose and proposed content of the meeting;
  - (ii) at what stage during the proceedings the meeting should take place;
  - (iii) where the meeting will take place;
  - (iv) when the meeting will be scheduled; the interview should not be

- held when other witnesses in the case, like relatives or teachers, might be at the courthouse; for children attending school, the start or end of the day is often best;
- (v) how the child will be prepared for the meeting (this should, if possible, be the child's lawyer or an independent professional) and who will bring the child to the meeting;
  - (vi) who will be present during the meeting and where they will sit in the room if done in court; who will be allowed to interview or talk to the child, besides the judge;
  - (vii) how the meeting should be recorded, and if the record is to be shared with the parties or how they are to be otherwise informed of the substance of the meeting.

The parties should be informed by the judge's decisions about these matters prior to the meeting.

2. The purpose of a child's meeting with the judge is *not* to "gather evidence," though judges may make use of insights and information obtained to help inform their decisions. It is the parties, the child's lawyer and any custody evaluator who have the responsibility for gathering evidence and presenting it in court. Meetings are intended to enable the child to gain some understanding of what is going on, and to be reassured that the judge has understood the child's feelings and reality.
3. The purpose of a meeting with a child should *not* be to have the child provide information about a factual matter in dispute between the parties.<sup>35</sup> However, the judge may make use of impressions or information gained to contextualize other evidence presented in court about the child and the family dynamics. The meeting may enable a judge to better understand the child's views, preferences and perspectives, personality, developmental stage, and level of maturity.
4. Children should not testify in open court or be subject to cross-examination in family proceedings.<sup>36</sup> A judge has the responsibility and authority to quash a summons to a child and prevent a child from testifying in a family proceeding if this is required in the interests of the child.<sup>37</sup>
5. Meetings with a child are often held in a judge's chambers (office), where the child is likely to feel less intimidated and more comfortable than in court. Meetings can also be held in a courtroom, typically with the judge sitting close to the child; some children will

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35. Ward v. Swan, [2009] O.J. No. 1834 (Ont. S.C.J.).

36. There may be a limited, but narrow, scope for children testifying in court in child welfare proceedings, but this should only be permitted if consistent with the interests of the child.

37. See, e.g., S.E.C. v. G.P., [2003] O.J. No. 2744 (Ont. S.C.J.) at ¶ 32.

- prefer to meet with the judge in the courtroom, and their preferences should be taken into account.<sup>38</sup> Children will normally be more comfortable and communicative if a judge is at their eye level and not robed, but some children will want to see the judge “in costume.”
6. Judges should avoid being alone with children who are the subject of legal proceedings,<sup>39</sup> though the number of persons present at a meeting should be limited. Usually a court clerk or a court reporter will be present. A lawyer or guardian *ad litem* for the child, if there is one, should be present. If a neutral mental health professional has been involved with the child, it may make the child more comfortable and communicative to have that person present. In some cases, it may be appropriate for a child’s lawyer or a mental health professional to take the lead in the interview, with the judge having a primarily observational role.
  7. It is not appropriate to have the parents or their lawyers attend a judicial meeting with a child that is not held in open court, as their presence may inhibit, unduly pressure, or embarrass the child. Counsel and unrepresented parties should be invited to suggest questions that will be asked at the interview, but it is the judge who decides whether to ask those questions.
  8. If siblings are involved in a case, it is usually helpful for the judge to meet them as a group but it is also important to meet each child individually.
  9. Meetings with children, especially outside of the courtroom, should be informal and conversational. It is appropriate to have snacks available. Younger children may be more communicative if they are able to draw while talking, and having paper and crayons or coloured pencils available may help the child to talk more readily.<sup>40</sup> It is appropriate for the judge to start with a brief explanation of the purpose of the meeting, in age appropriate language, and then ask children about their interests and activities. In cases involving disputes between parents, children can be asked about their routine and activities at school and each home, friends, relatives, siblings and if there are things that they like or dislike in each home. Questions should be open-ended,

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38. Some judges go to a child’s school or meet with children in a park or fast food restaurant; *see, e.g.*, *Haberman v. Haberman*, [2011] S.J. No. 688, 2011 SKQB 415. However, there are issues related to security, recording, and potential allegations against the judge if meetings are held in such settings.

39. In a number of civil law countries in Europe, including Austria, Germany, and Switzerland, with their inquisitorial approach to justice, it has long been common practice for judges to meet alone with children.

40. Some judges ask children to draw a picture of their family; as the child is drawing, the child can be asked to explain who everyone is.

such as: "If there is one thing you could change in your life, what would it be?"

10. Judges should be aware that many children feel loyalty conflicts or a sense of guilt about their parents' separation or about expressing preferences about their parents. Judges should avoid directly asking children to state their preferences about their living arrangements or to "choose" a parent with whom they would like to reside. However, children may be asked open-ended questions like: "Is there anything you would like me to know?" In response to such questions, some children may volunteer their preferences about living arrangements. Such expressions of their views should be acknowledged, but the judge should inform the child that these views may not be determinative. Such an expression of wishes may or may not accord with a child's true preferences, let alone best interests. Some children are ambivalent and express different preferences at different times and in different contexts.
11. In cases where alienation is a factor,<sup>41</sup> a child may express strongly negative views about one parent that are reflective of the alienation; this is not a reason for a judge to not meet the child, but it may be a reason to discount the child's stated views in coming to a decision. Failure to even meet the child in alienation cases can sometimes make it more difficult to achieve compliance with any order that the court may make. In alienation cases, meeting with the child may allow the judge to explain to the child that part of the court's duty is to ensure that each parent is able to play a part in the child's life.
12. Judges may meet children at the conference stage to get a sense of whether they have views about their situation, and whether those views have been properly shared with their parents.<sup>42</sup> It is not uncommon for one or both parents involved in family litigation to have an inaccurate understanding of their child's preferences and feelings, and getting an accurate understanding of the child's views may help to settle the case. Sometimes the judge reporting to parents that their child wishes that they would stop fighting because it is very distressing to him/her can prompt a settlement.

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41. A child's rejection of a parent may also be a result of "justified estrangement;" that is, a response to parental abuse, neglect, or poor care. While it will usually be apparent to an experienced family law judge whether a child's negative attitude toward a parent is a result of alienation or a reflection of the child's own experiences, judges and the parties must appreciate that judges are not conducting a forensic interview and determinations about alienation should be made based on evidence presented in court.

42. Although it is common practice in many jurisdictions not to have a record kept of case conferences, there may be value in having a transcript kept of a judicial meeting with a child at this stage of proceedings: *P.D.B. v. M.R.W.*, 2009 ABQB 532 (Can.).

13. At an interim motion, it may be useful for the judge to meet the child because there may be difficulty in readily obtaining any reliable information about the child from independent sources. Especially at this stage, judges should be cautious about placing too much weight on the statements of a child. However, even at the interim stage, a judge may place more weight on what the views of an older child if they appear reasonable and well-founded.
14. Judges should ensure that a record is kept of the meeting.<sup>43</sup> Judges are, however, entitled to seal the record for use in a possible appeal and may decide to only provide parties with a summary of the meeting, in order to help protect the child's relationships with all concerned.<sup>44</sup> Parties should, however, be informed in general terms of any information obtained, and have an opportunity to adduce further evidence or make submissions after they receive information about the meeting. If a judge relies on information or impressions from a meeting with a child, the parents and any appellate court are entitled to have that explained in the judge's reasons for judgment.
15. If a meeting with the child takes place prior to the conclusion of the proceedings:
  - (i) the judge should explain to the child at an early stage in the meeting that a judge cannot hold secrets and that the substance of what is said by the child will be communicated to the parents and any other parties;
  - (ii) the judge should also explain that the decisions about the case are the responsibility of the judge, who will have to weigh a number of factors, and that the outcome is never the responsibility of the child;
  - (iii) the judge should tell the child (and the parents after the meeting) that the child should not be asked questions by the parents about their meeting and, if this occurs, the child should contact the judge. If parents are also advised of this, they are likely not to ask their child detailed questions about the interview;
  - (iv) the judge should normally also tell the child how the court's

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43. *Lincoln v. Lincoln*, 247 N.E.2d 659 (N.Y. 1969). In some jurisdictions, legislation or appellate jurisprudence govern the keeping of records of interviews. *See, e.g.*, Ontario's Children's Law Reform Act § 64(3) which requires recording of a judicial interview with a child in a custody or access proceeding; in situations not governed by legislation, this is a strongly recommended practice.

44. *Id.* Some judges, however, take the position that parents should be provided with a transcript of any conversation in order to make submissions and adduce evidence in response; *see* *McAlister v. Jenkins*, (2008) O.J. no. 2833 (Ont. Sup. Ct.). If this is the judge's approach, it should be made clear to the child at the start of the interview that his or her parents will receive a transcript.

decision will be communicated to the child.

16. Judges should never express an opinion to the child about what will happen before a decision is rendered in court and should maintain a neutral position at all times. Judges should never criticize either parent in front of a child. It is, however, often appropriate for the judge to reassure the child that both parents love the child.
17. If a child makes a disclosure of abuse or neglect that has not previously been reported, the judge must ensure that a report is made to the child protection authorities as required by child welfare legislation. Experience in jurisdictions where judicial meetings with children are common suggests that such disclosures at judicial meeting only occur rarely; if others are present during the interview, it is very unlikely that there are circumstances in which a judge would be called as a witness about the disclosure.
18. A judge may decide that it is appropriate to have a meeting with a child in order to explain the court's decision and encourage the child to comply with the court's order.<sup>45</sup> While this process can be valuable for children, the judge should avoid trying to intimidate children to ensure that they comply with an order that they disagree with. If the judge is not following the wishes of the child, such meetings may be less valuable for the child if the judge did not also meet the child before a decision was made. Judges should not be alone with children at these meetings; any lawyer for the child should be present, and in some cases it may be appropriate to have a mental health professional present. In some cases, it may be appropriate for parents and their counsel to be present to hear the judge's remarks to the child.
19. Judges and other professionals involved should have appropriate education about the issues that arise when judges meet with children.

## VI. Suggested Interview Structure and Questions<sup>46</sup>

Here are suggestions for the structure of the meeting and possible questions, though the nature of the interview and questions will of course be affected by the circumstances of the case, the matters at issue, the child's age and ability and willingness to communicate.<sup>47</sup> It is always important

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45. Alternatively, a judge may decide that it is appropriate to write to the child about the decision, of course, copying the parents and counsel: *see* *Haberman v. Haberman* 2011 SKQB 415.

46. Some questions have been adapted from RACHEL BIRNBAUM, BARBARA JO FIDLER & K. KAVASSALIS, *CHILD CUSTODY ASSESSMENTS: A RESOURCE GUIDE FOR LEGAL AND MENTAL HEALTH PROFESSIONALS* (2008). We have also adapted some material generously provided by Judge Ebhardt Carl.

47. For an excellent text written for judges and lawyers about communication with children

to remain flexible and sensitive to the child's reluctance to answer certain types of questions. Children should not feel obliged to answer specific questions, and they should be told this.

### *A. Communication with the Child*

Questions should be open-ended, and judges should avoid asking purely dichotomous questions or questions that seem to require children to "choose" a parent. For example, avoid asking: "Do you like to visit your father?" It might be better to ask: "What do you do when you visit your father? How do you feel about doing those things?"

With children who seem shy or withdrawn, it can be helpful to use a circular or narrative method of questioning, starting with a topic and returning to it for further expansion later in the meeting. It is, however, also important to respect children's unwillingness or inability to answer certain questions. It is also preferable to avoid "cross-examination." If answers seem inconsistent, especially about feelings or perceptions, the inconsistency may reflect genuine ambivalence.

Judges should consider having some kind of drawing material available for younger children. Although it may seem distracting to an adult, allowing a younger child to play or draw during an interview can actually facilitate communication.

### *B. Introductory Stage: Purpose of the Meeting*

A judge should begin by briefly explaining in age-appropriate language the purpose of the meeting, and tell the child what the parents will be told about the meeting. The judge should emphasize to the child that while the judge wants to hear from the child, as the parents have been unable to reach an agreement about the child's care, it is the judge, *not* the child, who has the responsibility for making the decision about the child's future. The interview might start with questions such as:

- Do you know why you are here? What did your mom/dad tell you about coming here to meet me?
- Do you know who I am? Do you know what I do? If the answer is no, ask if the child wants to know. A possible explanation: "I am the judge who decides when parents don't agree or are having difficulty deciding about how things are going to be."
- How do you feel about being here?

Children will often initially be nervous, and it may be appropriate to reassure the child about the meeting. It will often be appropriate for the



judge to provide some reassurance to children that they are not responsible for the situation by saying something like:

Over the past few years I've got to know lots of children your age whose parents have separated. They have often thought that they themselves have been partly to blame. But that is never the case. It's just that their parents didn't get on anymore and couldn't carry on living together. And so, of course, the parents are responsible for what happened, not the children! But it was always a really difficult time for the children. Thankfully after a while parents usually start being sensible again and talk normally to each other. . . .

*C. Rapport Building: Getting the Child Comfortable  
with Background Questions*

It is good to begin the questioning of the child by asking for basic information about the child, even if the judge is already aware of this. This introductory phase of questioning will help establish a rapport with the child and allow the child to feel more comfortable in talking to the judge. It will also give the judge a sense of the child's comprehension of questions and should facilitate communication. The interview should gradually move toward more difficult questions about the child's views about the parents and possible living arrangements.

- Tell me a little about yourself?
- Do you have any pets?
- Do you have hobbies outside of school? Games played, favorite television shows, Internet activity?
- Are you in any sports, lessons or activities, and is either parent involved in the activities?
- Questions about friends: how many, names, what you like to do with friends?
- Do you have a best friend? What do you do with your best friend?
- Do your friends come over to play? Do you go to their homes?
- Where do you go to school? What grade are you in? What are the names of your teachers?
- Likes and dislikes regarding subjects in school?
- What are you really good at in school and not so good at?
- Do you know what you would like to do when you grow up?

*D. Determining How the Child Was Prepared for the Meeting*

These questions should normally be asked close to the beginning of the interview, but could be asked later.

- Who brought you here today?
- Did your mom/dad ask you to tell me anything today? What did your mom/dad want you to tell me today?
- What did your mom/dad say to remember to tell me?

Even if a child appears to have been coached, lying, or deliberately evasive, it is preferable not to criticize or probe the child's statements. A judge should avoid "cross-examination" of a child.

#### *E. Family Situation: Typical Day with Each Parent*

Before raising sensitive questions related to the separation and possible plans for the future, it is usually preferable to first ask about the child's perception of the family situation and learn about how the child views his or her life by focusing on a "typical day" with each parent

- Who is in your family?
- How do you all get along with your siblings/stepsiblings?
- Who takes care of the baby?
- How much time do you spend with each parent?
- Tell me about an ordinary weekday/weekend day from the time you get up (with each parent) to when you go to sleep. (Begin in an open-ended way, then go on to specifics about waking up, getting ready, having breakfast, getting to school, having lunch, getting picked up from school, homework, dinner, bedtime, reading stories, bathing, etc.).
- What does your mom/dad do to help with homework? Do you like that method/approach/involvement?
- Who takes care of you when you are with your mom/dad, or when they have to go out? Explore feelings about the place/person.
- Who takes you to the doctor, dentist?
- Who comes to your school events?

#### *F. Child's Relationship to Parents & Plans for the Future*

It is often useful to get a sense of the child's views about the separation (especially if relatively recent) and how the current parenting arrangements have been for the child. Usually children will express love for both parents, so it is important to avoid asking the child to "choose" between homes or parents. While negative comments about one or both parents may be expected, children should not be asked questions that require direct criticism of a parent. Children who want to express a preference about parenting arrangements will generally do so in response to indirect questions.

### *G. Parent-Child Relationship*

- Describe your mom/dad.
- What fun things do you do with your mom/dad? Do you like them? Do you wish you could do other things?
- Most kids tell me things they really like about their moms and dads and things that kind of bug them about their moms and dads. What things do you really like about your mom/dad? Are there things that really bug you about your mom/dad?
- What is the best part of your mom/dad?
- If there was one thing you could change about your mom/dad, what would it be?
- When something \_\_\_\_\_ happens to you, who do you tell?
  - Insert each of these into the above question: really good, scary, sad
  - Alternatively, give an example
- When you \_\_\_\_\_, who do you talk to?  
Insert each of these into the above question:
  - have nightmares
  - do something good at school
  - need help with school work
  - fight with a friend
  - have a problem you want to talk about
- What are the rules in your home with your mom/dad?
- What do your parents do when you misbehave or don't follow the rules?
  - what happens if you do the same thing a second and third time?
- What do you do that makes your mom/dad angry?
- What happens when you get mad at your mom/dad?
- Does your mom/dad ask questions about the other parent?
- Does your mom/dad ever say bad things about the other parent?
- How does that make you feel?
- How do your parents treat/feel about each other?

### *H. Time with Parent if Contact Is Limited*

- If not seeing one parent: explore reasons, feelings, fears, etc.
- If supervised time, explore reasons, feelings, fears, etc.
- Who is there during your time?
- Probe how child feels about a change in the plans.
- Probe quality, quantity of time, overindulgence, lack of parental attention.
- Probe satisfaction with time: enough, too little, too much, just right.

- Probe how child feels about the residential parent in terms of missing him/her, wanting to see him/her.
- If child is living in one place primarily: how is it where you are living now?
  - What do you like/dislike about it?

### *I. Separation*

Depending on the time since separation and the matters at issue, it may be appropriate to ask questions about the child's experience of the parental separation:

- How was it when your parents lived together?
- How did they get along?
- How are things different now from before? Is it better or worse, and how?
- How do you feel about the separation/divorce? What are the good parts and not-so-good parts?
- It will often be appropriate to ask about child's perception of each sibling's relationship with each parent.
- If the child reveals that a sibling has a preference for one parent, it will be appropriate to ask the child about his/her view of the sibling's preference.
- It may be appropriate to ask more general questions, such as: "Most kids worry at a time like this. What do you worry about?"

### *J. Preferences*

It generally is preferable to avoid direct questions about custody and visitation, but if the child volunteers a preference, then explore it carefully and in an age-appropriate manner.

- Is the preference related to being indulged, having few limits set, fear of the parent, getting lots of goodies?
- Does it reflect negative feelings for the parent perceived to be at blame for separation, to have abandoned family, kicked the other parent out?
- Is it a caretaking effort vis-à-vis the parent the child perceives as being at a disadvantage, hurt, sad, ill?

If the child persists in expressing a strong preference and giving a litany of complaints against one parent and only positive things about the other, this may be a sign of alienation. Allow this to continue for a while and then say: "I know you feel this way and I understand completely. Now that you have told me and I know what you are saying, let's move on to other things."

*K. Making Things Better: Future-Oriented Questions*

- I'd like to make things easier for you. What can I do to help with that?
- What could your mom/dad do to make things easier for you?
- What needs to happen to make things better or easier for you?
- What would happen if your parents knew you felt this way?

*L. Concluding the Meeting*

- Is there anything you want me to tell your parents?
- Is there anything that you do not want me to tell your parents? Why?
- Is it okay for me to tell your parents what we talked about?
- Are you worried about hurting their feelings, getting into trouble?

At the end of the meeting, it is usually appropriate to give the child a verbal summary of what the judge has understood. Give the child an opportunity to ask questions and get a sense of what will be happening in the future. Avoid making any commitments or comments about the disposition of the case. The judge should tell the child (and the parents after the meeting) that the child should not be questioned by the parents about the meeting, and if this occurs the child should contact the judge. If parents are also advised of this, they are likely not to ask their child detailed questions about the interview.

**VII. Conclusions: Implementation of Guidelines**

In our view, individual professionals can and should be taking steps to make use of judicial meetings with children. In jurisdictions where this is not a common practice, systemic changes can facilitate judicial meetings with children. This will require professional bodies, legislatures, or judicial councils to formulate their own guidelines for judicial interviewing of children. The development of guidelines should be a multidisciplinary, collaborative effort, informed by the research and experience discussed in this article, as well as the jurisdiction's relevant legislation, resources, and culture.

There also is a need for interdisciplinary education and training in issues related to judicial interviewing of children and children's involvement in the family dispute resolution process. Neither judges nor lawyers should be expected to have the knowledge or skill of custody evaluators. Even without training, however, most adults have the capacity to meaningfully communicate with children in a way that does not traumatize a child. Rather, the purpose of such education and training is to prepare judges and lawyers for the particular issues that may arise in the course of a judicial meeting with a child who is the subject of litigation between parents.

While there is some research on children's experiences when being interviewed by judges, it is not a very large body of research. There is a clear need for more research on the experiences of children, parents, judges, lawyers, and other professionals, not only with judicial interviewing but also with all aspects of the separation and dispute resolution process. In what situations are different ways of engaging children most helpful, in the short term and the long term? To the extent that different jurisdictions adopt different practices and processes, there will be real value to comparative research as well. While we are advocates of judicial interviewing of children, when children want this, judicial meetings are only one, relatively small, part of the typical family dispute resolution process and more needs to be known about all aspects of this process and its effects on children.

Although there is a clear need for further research, in our view enough is known about the needs, rights, and interests of children that all of those involved in the implementation of family justice should consider how the types of issues addressed by the *Guidelines* in this article can be implemented in their own jurisdictions and practices.