

Children in Contested Divorce: Litigation and Mastering Ethics, Hearsay and Other Issues with Children

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Child's Voice

- Growing acceptance that children are capable of expressing their views have the right to have their perspectives considered by a court
- United Nations Convention on the Rights of the Child requires decision makers to receive and consider the views of children
 - 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
 - For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law

Convention on the Rights of the Child: Interpretation

- UN Committee on the Rights of the Child has suggested that this requires that “all children involved in judicial and administrative proceedings must be informed in a child-friendly manner about their right to be heard, modalities of doing so and other aspects of the proceedings”
 - Characterized Article 12 as creating the right for children “To speak, to participate, to have their views taken into account”
 - Opined that the right to be heard in proceedings is a right of children, not an obligation, and children are entitled to choose not to be heard or involved in proceedings

Child Custody Cases

- Legal experts debate whether children should testify in Family Court proceedings involving parental visitation, child custody, or placement issues
- Low-Conflict child custody cases are largely resolved by the parties and attorneys
 - Children's interests & well-being is prioritized
 - Parents move beyond their own emotional reactions to co-parent effectively
 - Little or no need to bring the child into the dispute resolution process
- High-Conflict child custody cases are those that typically raise the issue of “giving the child a voice”
 - Parents have poor communication or refuse to communicate with other parent
 - Often lose sight of the negative impact ongoing dispute has on their children
 - Many high-conflict parents have features of personality disorders

High Conflict Custody Litigants

- What concerns are there with reliance on seeking child's input in disputes involving high conflict litigants?
 - Is the child being manipulated by a parent, potentially compromising the value of the child's input?
 - To what extent is this putting (or keeping) the child in the middle of the dispute?
 - Does this exacerbate an already difficult loyalty bind for the child?
 - What consequences exist for child if he or she provides information in favor of or against another parent?

Not Decision Makers

- Goal is to determine the child's views and preferences in order to assist in determining the child's best interests
 - A decision that will best address the needs of the child must take into account information about the child's:
 - Perceptions of his or her interests
 - Needs
 - Preferences
 - Relationships with parents & other adult caregivers
- It is essential that the child NOT believe that he or she is making the decision
 - Must understand that court makes final determination (or parents if they agree)
 - Misunderstanding: "My child gets to decide who they live with when they turn 14"

Child's Voice in Custody Proceedings

- Child testimony
 - In court
 - Deposition
- *In camera* interview
- Guardian *ad litem* or other professional
- Video or Audio Recordings

Children's Testimony

- Competence of vulnerable witnesses
 - May simply be young or are in some specific way limited in terms of their capacity to understand or communicate effectively
 - Competence should not be confused with reliability or truthfulness
- Suggestibility
 - Children have historically been viewed as particularly vulnerable to suggestion
 - Young children are more susceptible than older individuals to leading questions and pressures to conform to the expectations and desires of others
 - Can greatly compromise reliability of children's testimony
 - How many times have they already been asked these questions? By whom?

Children's Testimony

- A child may be unduly influenced into rejecting one parent due to the conduct of the other parent
- Child may be manipulative or simply want to live with the parent who is most indulgent
- Love the one you're with
 - What child says is strongly influenced by who brought them
 - How was the child prepared?
 - Where did the child sleep the night before?
 - Who drove the child?
 - Where is the child going afterwards?
- Strongly encourage TWO opportunities to question the child – once when brought by Mother and once when brought by Father
 - Not just who transported them, but parent with whom the child has recently had parenting time

Stress of Live Testimony

- Testifying in court or deposition creates anxiety for anyone
- Under conditions of heightened emotional arousal, children's memory performance may be less than complete
- Children may shut down, say as little as possible, or refuse to fully engage
- Child witnesses experiencing stress may be cognitively unable to translate their memories into verbal responses, or unable to generate and employ needed retrieval strategies

In Camera Interviews

- Many child advocates believe that it is in the best interest of the child for a judge to conduct a hearing in chambers with the child when rendering a decision regarding custody of the child and/or parenting time
- Others believe that it is not the role of the court to hear directly from the child and that other professionals should collect and present this information
- Due process requires that *in camera* interviews respect the fundamental rights and other legal protections owed to both the child and the parents
 - Unrecorded testimony may deprive a parent of the ability to preserve certain questions of fact and law for appeal and may prevent meaningful appellate review

Questioning Children: Considerations

- Age & Developmental Level
- Child's understanding of what's going on
 - Child input \neq Child making the decision
- Take multiple samples
 - Meet with them at school, at each parent's home, at a neutral location such as a park
- Be careful not to promise too much
 - Do they think this is confidential?
 - What is their understanding of your role?

Guidelines: Children Birth to Age 6

- **Developmental Considerations:**
 - The most important person to a child at this age level is the one who provides physical care on a daily basis as well as love, comfort, stimulation, and nurturing
 - Primary caregiver, whether it is the mother, father, or another caregiver, is most significant
 - This relationship lays the groundwork for relationships in future developmental stages and affects the child's degree of self-esteem, confidence, independence, trust, and self-control
- **Interviewing Guidelines:**
 - Best to meet with child at home or a setting in which they are familiar and comfortable
 - Interview should be brief and non-punitive
 - It is valuable to watch the child interacting with each parent
 - Preschool child is generally considered too young to express a reasonable preference
 - Verbal skills may imply more comprehension than actually exists

Guidelines: Children Birth to Age 6

- How old are you?
- What is your birthday?
- Do you have any brothers or sisters?
How old are they?
- Tell me about who lives with you
- Who takes care of you during the day? At night?
- Who gets you breakfast, lunch, dinner?
- Who helps you get dressed?
- Who gives you a bath, washes your hair, cuts your nails?
- What do you and mommy like to play together? What do you and daddy like to play together?
- Who puts you to bed?
- What is your favorite food, toy, TV program?

Guidelines: Children Age 6 to 13

- **Developmental Considerations:**

- Daily caretaking is still important but less so than at an earlier age. The child grows more independent although the continuity of having a caregiver, routines, and schedules is important. Disruption may cause rebellious behavior, depression, or an “I don’t care” attitude
- There is a growing awareness of blood-tie relationships and what that means (having a father vs. a stepfather)
- Extracurricular involvement with friends and participation in school, church, or sports activities become important. Disruption of these on parenting time weekends may cause behavior problems
- There is an increasing mastery of the language, but most thinking is still concrete rather than abstract

- **Interviewing Guidelines:**

- Child should be interviewed in a private setting such as school or at your office
- Inform the child that the judge makes the decisions about custody and parenting time and that the judge wants to know how the child feels
- Ask the child very specific questions to elicit more detail

Guidelines: Children Age 6 to 13

- What grade are you in? What school? Favorite subject?
- How do you get to and from school? What time? When do you come home?
- How are you doing in school?
- What do you do after school? On weekends? With friends?
- Tell me who lives with you at your house(s) and what you think about those people
- What chores do you have?
- Describe a typical school day. Describe a typical weekend day.
- What do you do for fun?
- What holidays do you celebrate? When do you open your presents? What do you do on Thanksgiving? On other holidays?
- I understand you have been spending the school nights at your mom's house and weekends at your dad's. What is the best thing about your mom's house? What is the best thing about your dad's house?
- If you accidentally broke a window/a flower vase/your brother's toy/etc., what would your mom do? What would your dad do?
- When you are too sick to go to school, who stays home with you? Takes you to doctor/dentist?

Guidelines: Teenagers Age 13 to 18

- Developmental Considerations:
 - The most significant issue is independence—working on being free of parental control. Emotional ties to parents are no longer as important as they were earlier
 - Teenager should have full awareness of blood-tie relationships and what that means (biological parents vs. stepparents and others)
 - This age wants creature comforts – food, clothing, cash, and a car – and admits to needing very little else from parents
 - Peer group is of primary significance and may outweigh parents' or adult authority
 - The preference of some adolescents is paramount. Their reality is what they perceive it to be. For other adolescents, there is great relief upon learning that the decision is not theirs to make

Guidelines: Teenagers Age 13 to 18

- Ask about school & extracurricular activities
- Does either parent participate as a coach or manager of a team? Who attends events?
- When teen breaks a rule, what happens? What's the worst thing they've done? How does your mom react? How does your dad react?
- What is the one thing your mom does that upsets you the most? What is the one thing your dad does that upsets you the most? What would you change about each?
- Are there problems you can talk more easily about with your mom than with your dad? Are there problems you can talk more easily about with your dad than your mom?
- Have you been involved in therapy/counseling? Has it been helpful?
- When you are sick, who takes care of you? Who takes you to doctor/dentist?
- What responsibilities/chores do you have at each home?
- What's your understanding of why I'm here? Who told you & what did they say?
- What's it like when your parents don't agree? What's the worst you've seen?
- If you ruled the world, what would things look like for you?
- Is there anything you would like the judge to know?

What About Secret Recordings?

- 18 U.S.C. § 2520 - Federal anti-eavesdropping prohibition
 - Prohibits private citizens from intercepting or recording private communications
- Case law has interpreted this statute as a “one-party consent” rule that still permits private citizens to record any of their own conversations or interactions with other people
- I.C. § 35-31.5-2-176 - "Interception" means the intentional recording or acquisition of the contents of an electronic communication by a person other than a sender or receiver of that communication, without the consent of the sender or receiver, by means of any instrument, device, or equipment under this article...
- *Dommer v. Dommer*, 829 N.E.2d 125 (2005) – No marital exception in Indiana’s Wiretap Act

Secret Recordings in Family Law

- Practice of making secret or surreptitious recordings is not uncommon among our clients
 - Much cheaper and easier to record conversations than 15 or 20 years ago
- Audio or Video secret recordings of children
 - What do judges think?
 - What do mediators do with these?
 - How do GAL/psychologists handle this information?
- Do secret recordings help or hurt the case?