

# Judges Meeting Kids in Family Cases: A Good Addition to the Toolbox!

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# Outline

- Why and How to Listen to Children?
- Legal Contexts for Judicial interviews
- Research on Judicial Interviews
  - Perspectives of Judges, Lawyers, Parents & Children
- Suggestions for Judicial Meetings with Kids
- Questions & Comments

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# #1 Experience with Judicial Interviews of Children: How often do you meet with children in family cases?

I have never done this  
as a judge

Occasionally (1-5 times)

I do this fairly regularly  
(6 times or more)

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# Why few or no interviews? If you have had little or no experience with judicial interviews of children, what factors account for this? (indicate all that are significant)

Children might be emotionally traumatized by this experience

Judicial interviews create an incentive for parents to “coach” or pressure their children

I might not do what the child wants

I would not gain useful information

I don't have the skills or training

This is not an appropriate role for a judge

I am not asked by counsel or parents to do this.

# Themes

- Children, parents and the justice process benefit if children have an opportunity to have input into plans that profoundly affect them, but often reluctant to express preference for one parent
- No single “best” engage children in the family court process, and in some cases may use more than one method & may include judicial interview
- If judicial interview, need to consider
  - Does child want to meet the judge
  - Preparation of child
  - Purpose & structure
  - Record, confidentiality & disclosure
  - Ultimate weight
- “A voice but not a choice.”

# Views & Experiences

***Evidence of Views:*** children's perceptions of relationships and their expressed preferences, - i.e. the child's statements about subjective feelings

-> **family context** where concern about welfare of child and limited concern about due process or reliability

***Evidence of Experiences:*** children's statements about what happened to them or what they observed about factual issues in dispute (especially relating to allegations of child abuse or spousal violence) - i.e. the child's statements about objective issues

->**criminal context:** Charter and due process rights of accused are very significant -  
> restricted scope for hearsay, and children often have to testify and be cross-examined.

# Value of Child Meeting the Judge

- Most children want a “say” in family arrangements & understand the difference between providing input into decision-making and making the final decision
  - Relieved to meet the judge & hear “not your decision”
- Focus the parents on needs and wishes of kids, which can reduce the intensity & duration of conflict
- Judge will have more information & understanding of context from meeting the child

# Concerns About Child Meeting the Judge

- Emotional trauma to the child
  - Research does **not** reveal trauma from meeting judge
    - Continuing high conflict parental separation traumatizes children
    - Meeting social worker, lawyer or judge may result in pressure
- Due process & fairness to parents – not the traditional judicial role
  - Fairness to child is more important than fairness to parents
- How reliable is the information?
  - How reliable is any information that the court receives?



# Child's evidence in the family courts

- Hearsay – child's statements to parent
  - Reliability? Depends who statement made to
- Statement to independent adult
  - teacher
- Social worker or psychologist assessment (court-ordered)
- Focused "Voice of the Child" Report
- Lawyer for child tells court about child's views
  - Limits to lawyer "giving evidence" *R.M. v. J.S.*, 2013 ABCA 441
- **Child meeting with judge (judicial interview)**

*Puszczak v Puscczak*, 2005 ABCA 426

*SK v. DG*, 2022 ABQB 425

*Chalmers v. Lannan*, 2015 ABPC 262, per Cook-Stanhope J.

- Child testifies in open court



# UN Convention on Rights of Child

## Art. 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.

(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.

# Judicial Meetings - International

- Germany, Israel & N.Z.
  - Very common
- England & Wales
  - becoming more common
- USA – variation by state
  - Ohio : Presumptive statutory right of parent to request
  - NY: Judicial discretion (*Lincoln* 1969)
- Quebec: Presumptive Right of Child - common

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.
- Rest of Canada
  - Rare until recently, but growing judicial use



# Canadian judicial support for interviews

“The Court raised the issue of whether the Court should hear from K.... Many children want to be heard and they understand the difference between having a say and making the decision. Hearing from them can lead to better decisions that have a greater chance of success. Not hearing from them can have short and long term adverse consequences for them. ..**Children have legal rights to be heard during all parts of the judicial process....**”

*B.J.G. v. D.L.G.*, 2010 YKSC 44, per Martinson J.

# Ontario Law – CLRA s. 64 (most provinces do not have legislation)

## Child entitled to be heard

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

## Interview by court

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

## Recording

(3) The interview shall be recorded.

## Counsel

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

# *Puszczak v. Puszczak*, 2005 ABCA 426

- “A court has ...discretion ...While it may be desirable to ascertain a child's wishes in a contested custody dispute, the manner in which this ought to happen requires careful consideration. The three most common methods are judicial interview, the appointment of an independent expert able to ascertain those views, and the appointment of independent legal counsel.”
- inherent jurisdiction for Prov. Ct.
  - *Chalmers v. Lannan*, 2015 ABPC 262, per Cook-Stanhope J.

# Research on Children Meeting Judge (Ohio, Ont, QC, Alta)

(Bala, Birnbaum & Cyr, 2015)



# Views of Judges (Ohio vs Ont) (2014)

- **Ohio: Legislation requires judge meet child in many cases**
  - “it’s a great law”
  - “it is a valuable tool and in the right circumstances cuts through all the litigation...you get to visually see the child”
  - Ohio judges saw meeting with a child as an opportunity to get to know them and for them to be “child focused.”
- **Ontario: Legislation gives judges discretion**
  - Ontario judges tended to regard interviewing children as “gathering evidence” and had concerns about how it fit with judicial role.



# How Often & How Long

## Ohio

- All judges interview children
- ages of 3-17 years
- 2-3 times per month
- Interview for approx. 50 minutes and usually once only (though some have interviewed child several times)

## Ontario

- 12 out of 30 judges have interviewed a child while a judge
- ages 5 - 15 years
- 22/30 would consider, but 8 would “never” do it

# Culture & Philosophy

## **OHIO**

- “it is normal in Ohio to interview children.”
- “you get to see the case through child’s eyes.”

## **ONTARIO**

- “I am a decision-maker and not an evidence gatherer...what is my role [if I interview children.]”
- “the prevailing judicial philosophy is that it is really dangerous to interview children”

# Lawyers' concerns about judicial interviews

- “I do not agree with ‘judicial interviews.’ The court process should be open and appropriate experts should advise the court. I do not support any process where a judge gathers information in a closed meeting.”
- Lawyers who are familiar with the process are generally more supportive than those without experience

# Summary of research on kids meeting judges

(see Paetsch, et al. , Newell et al, 2009, Parkinson et al 2007, Bala, Birnbaum & Cyr, 2015)

- While children suffer from high conflict separations & litigation, research generally shows no harm from meeting with a judge
  - Rare anecdotal reports of harm from post-meeting retribution from parent, especially if child promised confidentiality
- Though often anxious before they meet a judge, children usually report positively on the experience and there is no evidence that children are traumatized by meeting a judge.
- Issues of stress and parental pressure similar with meetings with assessor, child's lawyer or judge

# Summary of Research (2)

- Research indicates better outcomes for kids if they know that they have been heard & understand what is happening
  - especially if older
  - applies throughout the process including mediation – not just court
  - relief for children to hear from judge that they will NOT decide
- Even if they had a lawyer or assessment, many children would also like to meet with the judge, if they are asked.
- Judges often find it helpful to meet children.
- Judicial experience indicates that judicial meetings at conference stage can significantly facilitate settlement

# Suggestions For Judges Meeting Children in Family Proceedings

Bala, Birnbaum, Cyr & McColley

(2013, FLQ)



# When Judges Should Meet Children?

- Child's right to meet judge before important decision
  - assessor & lawyer for child should to ask child about interest in meeting judge
- One or both parents may suggest, but consent not required
- Judge may also raise
- Submissions from parties about whether & how to meet
- Some judges meet children as young as 4 years, but most start at 7-8 years
- **Pre-hearing, case conference, trial or post-decision?**
  - Cases where there is urgency to make a decision (e.g., interim decision about school or residence with no time for report).
  - If trial, usually at the end of other evidence, but with opportunity for “rebuttal” from parents
  - After decision? – better to have lawyer communicate judge's decision, or perhaps write to child
  - In any event, take care not to threaten child into compliance

# Purpose of Meeting With Child

- Allow child to ask questions & understand process
- Allow judge to put other evidence in context. It is also “evidence” and may be relied upon by judge, to help contextualize other evidence
  - Unique judicial role & unique type of evidence
  - Child-related cases have other unique features
    - Court-appointed experts, lawyers for non-party (child)
- Judges should be cautious about placing too much weight on child’s expression of preferences and should not rely on interview for disputed facts.
- If dispute, more reliable information likely from interviews by evaluator or child’s lawyer after multiple meetings



# Preparation

- Schedule at appropriate time of day and with sufficient time to conduct the interview
  - 20 min – 60 min
  - perhaps 9am or 3:30pm if school age
- Counsel for parents should be asked to suggest questions
- Consider how child will be notified & brought to court – ideally counsel for child or independent mental health professional will prepare and accompany child.
- In some cases, especially at conference stage, judge may request or suggest meeting without any prior notice;
  - child may be more relaxed without prior notice.

# Setting & Persons Present

- **Most common, in chambers, without parents or their counsel present, but with another adult present (reporter, counsel for child, therapist.)**
- Right of children to have their lawyer or social worker present.
- Most judges in common law countries are not alone with child
  - Some judges meet alone in park, school or McDonald's
  - Meetings alone common in Europe

# Conducting the Meeting

- Establish rapport and try to put the child at ease.  
e.g., discuss school, sports, pets or leisure activities
- “Tell me what you know about being here today”  
is a good open-ended question. Helps frame child’s expectations and whether there was pressure.
- Set out judge’s expectations
  - Tell the child you are interested in what they have to say.
  - But emphasize that the judge is making the decision.
- Use open-ended questions and avoid suggesting answers to questions.  
For example, it is good to ask questions such as:  
“What would you like to tell me?” or  
“If there is one thing you could change in your life, what would it be?”

# Confidentiality: Factors for Judges



- Judge should make decision about degree of confidentiality **before** interview & explain to all, including child
- Factors
  - Harm to child: undermining relationship to parent
  - Encouraging child to be candid
    - Due process for parents
  - Allow testing of accuracy & completeness
- We suggest “no secrets” but only give parents a summary and try to respect child’s desire for confidence
  - *SK v. DG*, 2022 ABQB 425
  - Some judges provide parents with full transcript; need to warn child
    - *Eustace v. Eustace*, 2016 ONSC 5004
- Need for flexibility if child discloses abuse, but very rare in judicial interview

# Recording the Interview



- If judge will record, inform child
  - What will happen with record?
- Most judges who record make an order sealing the transcript of the interview. If the decision is appealed, appellate court could make order unsealing the transcript
- No appellate jurisprudence in Canada about confidentiality, recording etc.

# Important For The Judge

- Do NOT ask the child which parent they prefer to live with or otherwise ask them to “make a decision.”
- Do ask them about their time with each parent
- Ask children if they have any questions.
- Most importantly, tell the child you might not do what the child wants. They have “a voice but not a choice.”
- Never suggest to the child as to what you might do.
- Maintain a neutral position at all times, and avoid criticism of either parent. If appropriate, say that you know that they love both parents, and both parents love them.
- Use open-ended questions and avoid suggesting answers.

# Assessing Independence of Child's Views

- Judge may try to determine if the child has been pressured by either or both parents to say certain things.
- For example, it is reassuring if a child says something like:  
“I love both of my parents, but I am tired of their arguing over where I will live.”  
This suggests that, like most kids, the child loves both parents.
- Usually if there has been rehearsal, pressure or alienation, it is apparent
- Possibility/certainty of alienation is NOT a reason to reject meeting with child
  - See *Haberman*, 2011 SJ 688 (QB): where expert reports 12 year old boy at risk of alienation from mother and Sandomirsky J. goes to his school with reporter to “meet” the boy .

# Listening to Children & Judicial Interview:

- No single “best way” to how to engage child
  - nature & stage of case
  - matters at issue
  - child’s age, capacity & desire
  - resources of family & community
  - professional preferences & competencies
- May use more than one method
- Judicial interviews especially useful if
  - child is older and wants to meet the judge
  - need for urgent decision and no other way to get views



# Thank you for listening



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# References on Judicial Interviews

American Academy of Matrimonial Lawyers,(2009) *What Should We Tell the Children? A Parents' Guide for Talking About Separation and Divorce*

Bala & Birnbaum, Hearing the Voices of Children in Family Disputes, in Pierre Noreau et al eds, *Youth at the Crossroads of Family, Community, Law and Society*, (Éditions Thémis, Montreal, 2021), 21-42.

Bala, N., Birnbaum, R. & Bertrand, L. (2013). The role of the children's lawyers: Instructional advocate or best interests guardian? Comparing legal practice in Alberta & Ontario—Two provinces with different policies. *Family Court Review*, 51(4), 681-697.

Bala, Birnbaum, Cyr & McColley, "Children's Voices in Family Court: Guidelines for Judges Meeting Children" (2013), *Family Law Quarterly*, 47,3, 381-410.

Bala, N., Birnbaum, R., & Cyr, F. (2015). Judicial Interviews of Children in Canada's Family Courts: Growing Acceptance But Still Controversial. In T. Gal & B. F. Duramy, *Promoting the Participation of Children across the Globe: From Social Exclusion to Child-Inclusive Policies*. Oxford University Press.

## References (2)

- Birnbaum, Bala & Cyr (2011), "Children's Experiences with Family Justice Professionals in Ontario and Ohio" 25 *Inter J Law, Po. & Family* 398-422.
- Birnbaum, R. & Bala, N. (2014). A survey of Canadian judges about their meetings with children: Becoming more common but still contentious. *Canadian Bar Review*, 91, 1-17.
- Birnbaum, R., Bala, N., & Bertrand, L. (2013). Judicial interviews with children: Attitudes and practices of Canadian lawyers for children. *New Zealand Law Review*, 3, 465-482.
- Birnbaum, R., & Saini, M. (2012). A scoping review of qualitative studies on the voice of the child in child custody disputes. *Childhood*, 20(2), 260-282.
- Birnbaum, R., & Saini, M. (2012). A qualitative synthesis of children's participation in custody disputes. *Journal of Social Work Research Practice*, 22(4), 400-409.
- Byrnes (2011) "Voices of Children in the Legal Process" 17 *J Fam Studies* 44
- Caldwell (2011), "Common Law Judges and Judicial Interviewing" 23 *Child & Family L Q* 41

## References (3)

Fernando (2009) “Conversations between judges and children” 23 Aust J Fam L 48.

Kelly & Kisthardt (2009) “Helping Parents Tell Their Children About Separation and Divorce” 22 Journal of American Academy of Matrimonial Lawyers 325

Martinson & Tempesta (2018) “Young People as Humans in Family Court Processes : A Child Rights Approach to Legal Representation

McIntosh, Wells, Smyth & Long (2008) “Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of postseparation adjustment. *Family Court Review*, 46(1), 105-124.

Morag et al, (2012) Child’ s Participation in the Family Courts- Lessons from the Israeli Pilot Project, 26 *International Journal Law, Policy and the Family*

Ontario Committee (McCarthy-Goldberg) (2014) “Guidelines for Judicial Interviews and Meetings with Children in Custody & Access Cases in Ontario” 36 R.F.L. (7<sup>th</sup>) 489

Parkinson & Cashmore J. (2007), “Judicial Conversations With Children in Parenting Disputes: The Views of Australian Judges” , *International Journal of Law, Policy and the Family*, 21(2), 160-189.