

Including Children in Decision Making about Custodial Placement

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The authors of child custody evaluation texts have provided little information about how to interview children and how to place the child's experience of living with each parent at the center of the advisory report. Some literature has addressed psychological assessment of children relying on traditional clinical assessment tools such as projective techniques.

We take the position that evaluators, attorneys, and judges need to consider providing age appropriate opportunities to children for participation in the legal disputes that affect their residential placement. In this article, we discuss the long held myth that harm will come to those children who participate in the legal system by sharing their thoughts and feelings about custodial placement. We will then review research about children's participation in decision making about custodial issues that directly affect them and conclude the article with a framework of how to talk to children about their experiences living in each parent's home.

Among the reasons that we who are involved in resolution of child custody disputes have been reluctant to include children's participation in decision making regarding their custodial placement and parenting access schedules is out of fear of harming children. However, there are many ways in which children may participate in the decision making process of residential placement and parenting schedules. Participation is a process, not a dichotomous variable

Patrick Parkinson and Judy Cashmore point out that "[a]t the simplest level, it may just mean informing children about what is happening about the separation rather than leaving them

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to imagine what it means.”¹ They argue that there are benefits to explaining to children what is happening to the family in a manner that is developmentally appropriate to their understanding. Without such age appropriate explanations, children “can feel apprehensive and uncertain, and what they imagine may well be worse than the reality.”²

Often, parents who are in the process of ending their marriage will take their children to a mental health professional for the purpose of providing the children with an outlet for their emotional expressions. Parkinson and Cashmore suggest that providing opportunities for children to share their feelings and be heard and understood is another form of participation.³ With whom children may talk, however, is another important parental choice. Several studies have revealed that children prefer to talk with someone they know and trust. They also are more likely to share their feelings when the person with whom they are talking is a family member or a member of their social circle rather than a stranger, such as a mental health professional.⁴

There is a myth about children’s reluctance to participate in the legal proceedings about their custodial placement. Several studies have shown that children want their voices to be heard and taken seriously.⁵ Children also do not want to be the decision makers.⁶ “Being heard and having one’s views taken into account . . . is one of the main determinants of the perception that the decision making process is fair, even if the outcome is not the one that is wanted.”⁷

¹ PATRICK PARKINSON & JUDY CASHMORE, *THE VOICE OF A CHILD IN FAMILY LAW DISPUTES* 19 (Oxford University Press 2009).

² *Id.* at 19.

³ *Id.* at 19.

⁴ *Id.* at 19; Carol Smart & Bren Neale, *It’s My Life, Too: Children’s Perspectives on Post-Divorce Parenting*, 30 *FAM. L.* 163 (2000).

⁵ Ian Butler, Lesley Scanlan, Margaret Robinson, Gillian Douglas, & Mervyn Murch, *Children’s Involvement in Their Parents’ Divorce: Implications for Practice*, 16 *CHILD & SOC’Y* 89 (2002); Megan Gollop, Anne B. Smith, & Nicola J. Taylor, *Children’s Involvement in Custody and Access Arrangements After Parental Separation*, 12 *CHILD & FAM. L.Q.* 383 (2000); Smart & Neale, *supra* note 4.

⁶ Gollop, Smith, & Taylor, *supra* note 5; Smart & Neale, *supra* note 4.

⁷ PARKINSON & CASHMORE, *supra* note 1, at 20.

Parkinson and Cashmore suggest three questions that need to be considered when children participate in decision making about custodial placement issues. First, what is the degree of influence that children actually have over the decisions that affect them? Second, what is the extent to which children believe that they have any influence in the decision making process? Third, do the children want to have any influence in the ways that decisions are made concerning their custodial placement?⁸

I. The Myth of Detriment

Mental health professionals become involved in child custody litigation to assist the court with information about the children, their relationships with each parent, and their relationships within the family. Historically, judges, attorneys, and mental health professionals assumed that children's participation in their parents' custody dispute would be detrimental to their well-being and contrary to their best interests.

Over the course of the past decade, both mental health professionals and judges have developed an increasing interest in providing opportunities for children to participate in decision making about their custodial placement and the parenting time arrangements imposed on them. This growing interest in examining how to increase children's participation in decision making about their custody and parenting time arrangements is found in legal opinions and in the peer reviewed literature.⁹

While this apparent paradigm shift toward increasing children's participation in decision making about their custodial placement is occurring in many countries around the world, there appears little awareness of this trend in current child custody literature published in the United States.

Our writings have often reflected our concern about teaching child custody evaluators how best to employ scientifically-informed procedures to gather reliable data that allows for the formulation of relevant and helpful opinions,¹⁰ we have previ-

⁸ *Id.*

⁹ See PARKINSON & CASHMORE, *supra* note 1 (containing a summary of legal opinions and peer reviewed literature).

¹⁰ JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS (Sage Publications 1998); JONATHAN W. GOULD, CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUA-

ously noted that the field of child custody evaluation has done little in the way of teaching evaluators how to place children's voices at a level at least as prominent as the voices of their parents.¹¹

Our experiences as reviewers of colleagues' child custody advisory reports and as teachers of child custody evaluation methods and procedures are that child custody evaluators pay lip service to the notion of the best interests of the child but continue to write reports that place the parents' conflict at the center of the court's attention. In a typical report, an evaluator will write ten to fifteen pages of text about the parents' history and the development of their adult conflict that lead to the dissolution of their marriage. These evaluators often provide two or three paragraphs about a parent's view of his or her parenting ideas and behaviors and about the same amount of information

TIONS, 2ND EDITION (Professional Resource Press 2006); JONATHAN W. GOULD & DAVID A. MARTINDALE, *THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS* (Guilford 2007); Jonathan W. Gould & Lisa C. Bell, *Forensic Methods and Procedures Applied to Child Custody Evaluations: What Judges Need to Know in Determining a Competent Forensic Work Product*, 51 JUV. & FAM. CT. J. 21 (Summer 2000); Jonathan W. Gould & Debra H. Lehrmann, *Evaluating the Probative Value of Child Custody Evaluations*, 53 JUV. & FAM. CT. J. 17 (Summer 2002); Jonathan W. Gould & Philip M. Stahl, *The Art and Science of Child Custody Evaluations: Integrating Clinical and Mental Health Models*, 38 FAM. & CONCILIATION CTS. REV. 392 (2000); David A. Martindale & Jonathan W. Gould, *The Forensic Model: Ethics and Scientific Methodology Applied to Child Custody Evaluations*, 1 J. CHILD CUSTODY 1 (2004); David A. Martindale & Jonathan W. Gould, *Child Custody*, in *ENCYCLOPEDIA OF APPLIED PSYCHOLOGY* 323 (Charles Spielberger ed. 2004).

¹¹ GOULD & MARTINDALE, *supra*, note 10 at 124. There is an important difference between an irrational decision making process and a decision making process that is (1) unduly influenced by situational factors, (2) unduly influenced by short-term objectives, (3) based upon misinformation that an adult might recognize as misinformation, etc. An immature decision-making process resulting from less than fully developed cognitive processes is not the same as an irrational decision making process. If we presume, and we do, that people's decisions are profoundly influenced by their desires and their fears, a major difference between children and adults is that children's desires and fears are more temporally unstable. There is a belief that children's decision making is more impulsive or incomplete than adults. Our point is that there are developmental limitations to children's decision making that may not exist for adult decision making, but adults may be as impulsive and as inconsistent in their decision making as children. The psychological reasons for the impulsiveness and inconsistency would likely be different, however.

about the other parent's caretaking ideas and behaviors. The result is a report that is adult centered with little relevant information about parenting competencies.

We have also observed a paucity of information in these reports that thoroughly investigates the children's experience through their voices and their eyes. We believe that there are at least two reasons why child custody reports often contain little useful information from the children about their experiences in each parent's home. The first reason is that there is a relative lack of literature about what to investigate when interviewing children and how to engage children in such interviews. The second reason is that we, as a profession, are still gun-shy about involving children in the decision making aspects of their parents' custodial dispute.

A. *Lack of Literature*

One of the first conceptual frameworks about what to investigate when interviewing children was developed by Ben Schutz and his colleagues in their brilliant 1989 book, *Solomon's Sword: A Practical Guide to Conducting Child Custody Evaluations*.¹² No subsequent child custody text¹³ has provided a conceptual framework for interviewing children that is as extensive as Schutz et al. Over the past several years, we have written about the work of Carol Smart¹⁴ who has provided what we believe to be the best empirically-based conceptual framework for interviewing children of divorce about their experiences in each parent's home.¹⁵

¹² BENJAMIN M SCHUTZ, ELLEN B. DIXON, JOANNE C. LINDENBERGER, & NATHANIEL E RUTHER, *SOLOMON'S SWORD: A PRACTICAL GUIDE TO CONDUCTING CHILD CUSTODY EVALUATIONS* (1989).

¹³ E.g., MARC J. ACKERMAN, *CLINICIAN'S GUIDE TO CHILD CUSTODY EVALUATIONS* (2nd ed. 2001); ROBERT M. GALATZER-LEVY & LOUIS KRAUS, *THE SCIENTIFIC BASIS OF CHILD CUSTODY DECISIONS* (1999); GOULD, *CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS* (1998), *supra* note 10; PHILIP M. STAHL, *CONDUCTING CHILD CUSTODY EVALUATIONS: A COMPREHENSIVE GUIDE* (1994).

¹⁴ Carol Smart, *From Children's Shoes to Children's Voices*, 40 *FAM. CT. REV.* 307 (2002); Smart & Neale, *supra* note 4.

¹⁵ See GOULD, *CONDUCTING SCIENTIFICALLY CRAFTED CHILD CUSTODY EVALUATIONS*, 2ND EDITION (2006), *supra* note 10; GOULD & MARTINDALE, *supra* note 10.

We have written elsewhere about the growing awareness of the need for evaluators to spend more time interviewing and assessing children's view of their lives with each parent. We have called for evaluators to focus increased attention on exploring children's wishes and feelings about changes in their lives resulting from their parents' divorce. We need to better understand why so many evaluators, attorneys, and courts seem to find it difficult to talk to children in a meaningful manner about relevant experiences describing what it is like to live in each parent's home.¹⁶

Our perspective is shared by Smart who writes about her fear that listening to children will become a token process, one that is perfunctorily addressed rather than systematically examined. Smart talks about how the evaluators, attorneys, and judges appear to have difficulty knowing what to do about the diversity of experiences within a family. One child in a family might express one view of living in the family while another child might express a completely different view of living in the family. Knowing what to do with the diversity of experiences within each family often is a difficult task for judges to tackle.¹⁷

Smart, reporting results from several studies that involved speaking with children of divorce and speaking with their parents, writes:

One of the most significant outcomes for us was the way in which talking to children, and analyzing their stories, had the effect of jolting us into a child's worldview. . . . [W]e were acutely aware of how different the experiences of the 'same' divorce was for parent and child. . . . Even the most caring parent could find it very difficult to see divorce from the standpoint of his or her child.¹⁸

Smart concluded that children's voices often were not heard. Children's accounts of family life frequently were overshadowed by their parents' interpretations of family events. Smart found that children and their parents often offered vastly different accounts of many aspects of family experiences. She wrote: "It is not that children's accounts obliterate or correct the parents' accounts; nor is it the other way around. Rather, it is to acknowledge that people stand in different relationships to one another,

¹⁶ GOULD & MARTINDALE, *supra* note 10, at 124.

¹⁷ Smart, *supra* note 14, at 307.

¹⁸ *Id.* at 308.

have access to different resources, and regard different things as important.”¹⁹ Smart argues that taking children’s stories seriously means giving legitimacy to their experiences on the same level as that given to parents’ experiences. One is not necessarily more important than the other. Each experience needs to be thoroughly understood.

When adults attempt to place themselves into the shoes of their children, they often project onto the children memories of their own childhoods. They hear children’s stories as reconstructions of their own childhoods, recalled through many layers of personal history. Evaluators need to be aware of the need for reflection and sensitivity to children’s stories. “It is not simply a matter of allowing the child to speak; it is also a matter of being attentive to what it is that we hear the child say.”²⁰

B. *Concerns About Children’s Participation in Custodial Decisions*

Critics of children’s participation in custodial decision-making cite concerns about placing the children into the middle of their parents’ conflict. If children become involved in providing information to the court about their experiences at each parent’s home and about their preferences about living at each parent’s home, this becomes an invitation for parents to exert influence on their children. Richard Warshak has written: “The more weight accorded children’s stated preferences, the greater the risk of children being manipulated or pressured by parents.”²¹

Some influence may be direct and obvious, such as engaging in conversations with the children in an attempt to convince them of the need to express a particular preference. Such direct attempts at influencing children place them squarely in the middle of the parents’ conflict and impose upon them the potential to have to choose between two parents. This loyalty bind might serve to distress children, adversely affect the children’s relationship with one or both parents, negatively affect the children’s relationships among the sibling group, and undermine the

¹⁹ *Id.* at 309.

²⁰ *Id.*

²¹ Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. REL. 373, 375 (2003).

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children's ability to form and maintain a close and healthy relationship with both parents.

Another way that children may be caught in the middle of their parents' conflict is through the more subtle methods of influence described in the children's suggestibility literature. Warshak comments, "Through a variety of tactics such as selective attention, repetition, intimidation, overindulgence, and suggestion, a parent can corrupt a child's view of the other parent."²² The result is that the child's voice reflects the words, attitudes, and beliefs of the parent who exercises the most influence over him or her. Ironically, as a result of these manipulations, the child comes to believe that the parent who has engaged in behavior that is most detrimental to his or her best interests is the preferred parent.

A corollary is a parent who manipulates a child to express a preference to live with him or her when that parent may not have presented the child with all the available and necessary information to make a responsible decision. There are two alternative concerns that may come from a parent's manipulation through providing limited and biased information that the child uses as the basis for his or her decision. One outcome is that the child learns later in life that s/he has been manipulated by the parent and focused his/her anger at being manipulated toward that parent. The second outcome is that the child feels a sense of guilt and remorse over rejecting the other parent based upon biased or incomplete information provided by the custodial parent. A third outcome is that the child learns not to trust the previously trusted parent and reaches out to the other parent to find that the other parent is unwilling or unable to repair the damage done by the earlier decision.

Another reason for not including children's participation in the decision making about their custodial placement is that children's decisions are . . . how do we say this delicately . . . often unreliable, spur of the moment, emotion-driven, short sighted, and generally misinformed. That is, children are not often rational or objective in their decision making. Perhaps a fairer way to frame the concern is that on any given day a pre-adolescent or adolescent child may be rational, objective, and consider the long

²² *Id.*

term effects of his or her decision making, and the next day may be impulsive, emotion-driven, and short sighted.

A further concern is that once a child expresses a preference, the decision makers will accept the child's expressed preference as a way for the adult decision makers (i.e., parents, guardians ad litem, or judges) to avoid making the hard calls.²³ When children's expressed preferences are accepted without critical examination by parents, attorneys, and judges, "[c]hildren may be given a level of power and authority that they are not equipped to bear."²⁴

When parents allow decision making power to be invested in children's expressed preferences, the roles that operate in healthy family systems are reversed with a likely outcome being undermining parental authority.²⁵

II. Smart's Interview Framework

Among the most relevant factors to examine when talking with children about their experiences in a divorced family are:

1. *Physical space* refers to the practical issues of getting from one place to another. Physical space includes examining concerns that the child has about organizing clothes, toys, and schoolwork. It entails letting children's friends know where they are and letting children voice concerns that they have about remembering where to be at certain times.
2. *Emotional space* refers to different emotional climates that exist at each parent's home. Children are moving not only from one physical home to another but also from one emotional landscape to another. Children may react to changes in emotional climate between mother's and father's home. Children also may feel differently at different homes. Smart found that the geographic distance between parental homes can create an emotional distance between child and parent.²⁶ Interestingly, Smart noted that even children who are equally happy to be with either parent or equally happy to be in either parent's home experienced transitions between homes as an emotional journey requiring regular emotional adjustment.
3. *Psychological space* refers to differences in household structure, organization, and functions. There may be changes between

²³ PARKINSON & CASHMORE, *supra* note 1.

²⁴ *Id.* at 16.

²⁵ *Id.*

²⁶ Smart, *supra* note 14, at 311.

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homes in routines, codes of behavior, expectations, standards of living, and other functional differences. Children may find it difficult to adjust to a home that does not fit the psychological narrative in their heads about who they are and where they are supposed to live.

4. *Equal time* refers to parents', judges', and attorneys' tendency to think about parenting time in exact amounts of time. Whether children spend one week with one parent and another week with the other parent or whether children are on a "4 day with one parent and 3 day with the other parent" schedule, the inflexibility of time share schedules often affect children's need for elasticity in the scheduling of their transitions between homes. For example, Smart found that if a child was scheduled with her father but needed to spend time with her mother on a particular day, the rigidity of the access schedule became a more important decision-making element than the child's needs. If it was Tuesday, the child had to be at dad's house. Smart reported that children felt frustrated with the rigidity of their access schedules and they were reluctant to talk about these frustrations with their parents.²⁷ Children were aware of their parent's competing needs for the children's time and, as a result, they did not want to disappoint either parent nor did they want to cause tension because of their discontent. The result was that children did not talk about their feelings and often experienced the unbending nature of the parenting schedule as oppressive.
5. *Time apart* refers to children's time away from one parent. Some children did not like time away from a particular parent and, other children did not like feeling that they were forced to spend time with a parent. Still other children liked the time away from the residential parent because it provided them with opportunities to gain some perspective on the non-residential parent. Smart referred to this time away from the residential parent as a "sabbatical."²⁸
Some children worried about one parent when they were with the other parent. Children worried when their parents remained single and had no romantic partner. These children felt that time away from a single parent meant that the parent was lonely. Some children reported that time passed more slowly at one parent's home than at the other's, usually because one parent was less available, less involved, or had a home with fewer creature comforts.
6. *Time to oneself* refers to children's lack of private time. Children of divorce felt that their time was always scheduled. They felt that they had less time for themselves and that they had less time to spend with their friends.

²⁷ *Id.* at 313.

²⁸ *Id.* at 314.

7. *Time and hurting* refers to an experience of a subgroup of children who had to deal with waiting for the nonresidential parent to come to visit them or wait for the nonresidential parent to take them out. These children often felt powerless and they often viewed time spent waiting for the parent to show up as a measure of how much that parent cared.
8. *Time and sharing* refers to those situations where both parents enjoyed plenty of time with their children and where each parent was on good terms with the other parent. Sharing parenting time became a way of continuing family life. Children felt happy with time-sharing arrangements because of the quality of their relationship with each parent. Children felt that the most important issues were sustaining and managing their relationships with parents.

A unique contribution of Smart's research is its focus on aspects of *children's* experiences within the binuclear family. Smart's research may be most useful to evaluators interesting in learning about children's experience of divorce through the eyes of these children. Smart's work may also help evaluators to better recognize how to distinguish when parents' project their interpretations of their children's experiences on to their (parents') narratives resulting in interview data that reflects parents' understanding of the best interests of the children as seen through the eyes of parents. What we need to do is to focus attention on factors associated with children's experiences of divorce through their perspective.

III. A Framework for Children's Involvement

Historically, courts have used age as the threshold factor in determining when children's preferences can be used in judicial decision making. Many states have case law and/or statutes that allow judges to weigh in significant ways the expressed preferences of children 15 years and older. Some states allow judges to weigh the expressed preferences of children 12 years and older, though the weight given to 12 year olds' expressed preferences is often less than that given to older children.²⁹

²⁹ See, e.g., Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 634 (2003) (noting that 80% of judges responding to a survey "reported that they consider the preferences of older teenagers to be very or extremely significant, while about 40% would ascribe that same weight to the views of children aged eleven to thirteen years."). See also Patrick Parkinson, Judy Cashmore & Judi

The idea at the foundation of these age-determined thresholds was that children become competent to provide reliable testimony once they reach certain ages and/or developmental stages. It has been a long held belief that prior to adolescence, children do not have the capacity to make reasoned choices or to provide reliable testimony about important matters. The prevailing view, according to Pryor and Emery, was “that children are not able to say anything sensible until about the age of twelve.”³⁰

Parkinson and Cashmore opine that the law has treated issues related to children’s competence as a binary choice. A child either is competent or is not competent. This binary view of children’s competence “is at odds with the understanding that developmental psychologists have of how children’s capacities develop over time”³¹ and is considered out of date.

It is unquestionable that “[c]hildren’s development is dynamic, interactional, and profoundly affected by their experiences and relationships with those who are significant in their lives, and by their perceptions of and reactions to those experiences and relationships.”³² Too often, adults underestimate children abilities and capacities. Children’s capacities to develop new competencies may be tied to developmental processes but they may also be facilitated by the context, the degree of support they may receive support for developing new capacities, and the degree of participation they are allowed in learning new capacities.³³ That is, when children are provided opportunities within a supportive environment to express their feelings and preferences about life in each parent’s home, it is possible that such circumstances provide children with opportunities to participate meaningfully in decision making about important custody and access issues that affect their everyday lives.

Single, *Adolescent’s Views on the Fairness of Parenting and Financial Arrangements After Separation*, 43 FAM. CT. REV. 429 (2005).

³⁰ Jan Pryor & Robert E. Emery, *Children of Divorce*, in RETHINKING CHILDHOOD 171 (Peter B. Pufall & Richard P. Unsworth eds. 2001).

³¹ PARKINSON & CASHMORE, *supra* note 1, at 4.

³² *Id.*

³³ Jeanette A. Lawrence, *The Developing Child and the Law*, in CHILDREN AND THE LAW IN AUSTRALIA 83-104 (Geoff Monahan & Lisa Young, eds., Lexis-Nexus, 2008).