

# CHILDREN'S EXPERIENCES WITH FAMILY JUSTICE PROFESSIONALS IN ONTARIO AND OHIO

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## ABSTRACT

There is increasing recognition in law and social science research of the importance of having children participate in post-separation decision making, though there is not a clear consensus on how this should be done. This article reviews the social science literature about children's participation in the family justice process and presents results of a study in Ohio and Ontario with 32 children between 7–17 years of age, who either met with a judge, had a children's lawyer represent them, or spoke to a mental health professional in a custody evaluation. Themes focus on (i) what they remembered about their parents' separation and how they felt about it; (ii) how they found out about the plans that were made for their care; (iii) their level of involvement in decisions about their parents' post-separation arrangements; (iv) the plans for their care; (v) what they remembered about their participation in the family justice process; (vi) what they found helpful about the process, and what was not helpful; and (vii) what advice they would give to lawyers/social workers/judges who work with children and young adults to help others in similar circumstances. The authors conclude by challenging some of the myths that professionals have about the possible harms or problems with involving children in decision-making post-separation. Children should never be forced to participate or feel that they are making a choice between parents, but it is valuable for children to be given the opportunity to participate, including meeting with the judge, if that is what they want.

## PART I: INTRODUCTION

### 1. INVOLVING CHILDREN IN POST-SEPARATION DECISION MAKING

Much has been written about the importance of consulting children and youths about issues that affect them. Internationally, there is a

movement to engage children and youth in the political process (Quinn, 1999) and to hear their views on issues regarding their sexuality, gender, and health-related matters (McCabe, 1996; Mitchell et al, 2003). Despite the advances in thinking about actively involving children in decision making and the 1989 Convention on the Rights of the Child,<sup>1</sup> which guarantees children the right to express views on matters that affect them, in North America children are generally not involved in the making of decisions and plans following parental separation. In part, this absence is the result of the perceptions and assumptions of professionals and parents about childhood and the effect of parental separation on children, which has led to a presumption that children will be harmed if they are involved in any way in the decision-making process following parental separation.<sup>2</sup>

Until relatively recently, the prevailing view was that because of their vulnerabilities, children should be 'protected' from being involved in decision making about post-separation parenting plans (Kelly, 2003; Smart, 2003). A related assumption was that parents understand their children (O'Quigley, 2000; Timms, 2003), and hence, that children's views and perceptions are adequately represented by their parents. However, Smith et al (2003) assert that children are more competent than was previously assumed. They argue that children's resilience following separation will be increased if they are treated as competent actors who can be permitted to share their experiences and perceptions with adults involved in making decisions about their lives. Butler et al (2002) argue that:

Children do not experience their parents' divorce passively. Their involvement is an active, creative and resourceful one. Recognizing children as competent (as well as relevant) witnesses to the process of family dissolution may further assist the process whereby their accounts are attended to and valued (p. 99).

Cashmore (2003), Kelly (2003), McIntosh (2009) and Wade and Smart (2002) have suggested that children want and will benefit from being part of the decision-making process, and are able to not only talk about their experiences but also to learn from others. Smart et al (1999) argue that children can provide a unique perspective to the discussion about divorce and family changes; they suggest that rather than excluding children:

We may have a lot to learn about divorce from children if we suspend the presumption that they are damaged goods in need of protection (p. 366).

The distinction between participation and choice is important. Children generally want to engage collaboratively with supportive adults during family transitions, but relatively few of them want or expect to make the decisions about post-separation living arrangements by themselves (Achim, Cyr and Filion, 1997; Bretherton, 2002; Cashmore, 2003; Neale, 2002).

There is a growing body of literature on involving children in post-separation decision making,<sup>3</sup> though there is still a lack of consensus about *whether* and *how* to do this (Bagshaw, 2007; Bretherton, 2002; Cashmore, 2003; Dunn and Deeter-Deckard, 2001; Pike and Murphy, 2006; Smart, 2002, 2004; Smart and Neale, 2000; Smith et al, 2000). Further, there is very little research comparing children's experiences with different methods of being involved in the process of post-separation decision making.

## 2. OBJECTIVES OF THIS RESEARCH

This article is part of a broader research agenda exploring children's participation in the family justice system during parental separation and divorce (Birnbaum and Bala, 2009, 2010). The focus of this article is on how children felt about their involvement with different professionals in the family justice system, and what can be learnt from their experiences in the family justice process. Specifically, we report on a study of children in Ontario and Ohio who were interviewed by a judge, represented by a lawyer, or assessed by a mental health professional preparing a report for court.

Part II reviews the growing body of social science and research literature on children's participation in family justice decision making. Part III describes the methodology, design, and the participants of this qualitative study.<sup>4</sup> Part IV describes the thematic results focusing on (i) how the children found out about the plans for their care, (ii) the level of their involvement in developing these plans, (iii) whether they felt 'heard' by different family justice professionals who spoke to them, and (iv) what did they find helpful or not about their involvement with those professionals and providing advice to these professionals about listening to children. Part V concludes with recommendations about children's participation in decision making during family breakdown.

The central theme of this article is that many children want to be involved in decision making about their future, though relatively few want to make the decisions. Too often children feel that their voices are not being adequately heard. The authors argue that children have a right to be heard and should be involved in the decision making that so profoundly impacts their lives during parental breakdown. The decisions being made by adults (ie judges, lawyers, mental health professionals, and their parents) have both short- and long-term social and psychological impact on children. To treat children as only passive subjects who should be protected from the decision-making process is not in their best interests, as has been increasingly recognised internationally, and now is being expressed by children themselves.

## PART II: SOCIAL SCIENCE RESEARCH ON CHILDREN'S PARTICIPATION

## 1. WHAT DOES CHILDREN'S PARTICIPATION MEAN?

At the broadest level, children's participation in decision making relating to parental separation can be as varied as having an opportunity to be involved directly or indirectly when parents are making arrangements without any professional assistance, having input into services that are being provided to them upon separation, having a role in mediation or court-based dispute resolution, or participating in discussions about broader policy and law reform issues relating to parental separation (Birnbaum, 2009; Lansdown, 2001).

There are different levels of participation. Hart's (1992) 'ladder of participation' in decision making has eight rungs. As one moves up the ladder, children become more involved. At the lower level of the ladder, children do what adults say. At increasingly higher levels, children can take part in planning a family or community activity or to provide their thoughts and feelings – but without being given the responsibility for making decisions. At the highest level of the ladder, children are able to set the agenda themselves and invite adults to participate in an advisory capacity.

Shier (2001) suggests there are pathways to participation associated with children's involvement that have a range of openings, opportunities, and obligations. Similar to Hart's ladder, there are succeeding levels of participation from just listening to children to providing children with opportunities to share power and responsibility for decision making with adults.

Sinclair (2004) describes children's participation as having four dimensions: (i) the level of active engagement in participation (eg degree of power sharing between adults and children); (ii) the focus of the decision making that involves children (eg decision making within the family versus in the context of publicly provided services); (iii) the nature of the participation activity (eg consultation exercises, youth forums, or advisory groups or ongoing involvement in the governance of institutions); and (iv) the children involved. Sinclair's (2004) model begins with the premise that, given the diversity among children, it is important to start with the fourth factor – the children or youth involved – and to consider, for example, their age, gender, culture, economic, and social circumstances, as well as individual ability or disability. The latter dimension must then be matched with all other dimensions relating to the nature of the activity, purpose, and the decision-making context, if children are to meaningfully participate in decisions that affect their lives.

Spicer and Evans (2006) suggest that a hierarchical structure or ladder of participation as outlined above may not best describe the

complex interplay of different factors that can enhance or impede children's involvement. Rather, it is more useful to describe different levels of participation such as (i) informing children about their rights, (ii) consulting with them about their views and opinions, (iii) forming a partnership characterised by information sharing and valuing the opinions of children as well as adults, and (iv) delegating control by devolving the responsibility and power of exclusive decision making by adults. These types of participation are not mutually exclusive; they interrelate and are often overlapping.

With respect to children's level of participation in the making of post-separation plans for their care, studies from a number of countries demonstrate a low level of consultation with children in relation to custody and access cases (Achim et al, 1997; Birnbaum and Bala, 2010; Butler et al, 2002; Parkinson and Cashmore, 2008; Smart et al, 2001; Smith et al, 2003). Further, children generally report that neither are they well prepared for their parents' separation nor are they informed about the process (Butler et al, 2002; Dunn et al, 2001; Taylor, 2006). Graham and Fitzgerald (2010) interviewed 12 children in Australia to understand their level of participation in decision making during family breakdown. They found that all children expressed the view that they should have a say in decision-making processes. For children, having a say meant being listened to by adults and having their views taken into account – having a chance to influence the decisions being made on their behalf. The children believed that the benefits of participating would lead to better decision making and reported that being excluded from participation made them angry and resentful. This is a recurring theme that is being heard across the globe (Butler et al, 2002; Dunn-Deeter-Deckard, 2001; McIntosh, 2009; O'Quigley, 2000; Smith et al, 2003).

Birnbaum (2009) suggests that in the context of mediation or other alternative dispute resolution processes specifically, children's involvement is highly varied; mediators have not adopted any one model of participation. In considering how children are currently being included from the perspective of where their participation fits along the various participation models identified above, children are usually involved at the lower end of the spectrum. That is, children, even older children, are not automatically given 'voice' in the decision-making process but, rather continue to rely on adults asking them first. In turn, this leaves children feeling less empowered in the decision-making process.

## 2. THE DIFFERENT WAYS CHILDREN ARE HEARD

In the context of family justice decision making, children's involvement is highly varied, both within and between jurisdictions (Birnbaum,

2009). In contested custody and access disputes, children's voices are ascertained by (i) direct evidence from the child either as a witness in court or an interview in the judge's chambers, (ii) indirect evidence related by a parent or other witness through hearsay (including a videotape or audiotape), (iii) the evidence of a mental health professional who has conducted a custody and access assessment for the court, (iv) written statements from a child in the form of a letter or affidavit, and (v) child legal representation.

### 3. SUMMARY OF RESEARCH ON CHILDREN'S INVOLVEMENT WITH DIFFERENT PROFESSIONALS

#### A. *Mediation*

In a review of a number of studies from the United States,<sup>5</sup> the UK and Australia on private and public sector mediation, [Saposnek \(2004\)](#) reported that mediators sought children's direct input between 4–47 per cent of all completed mediations, with most studies reporting participation by children in less than 10 per cent of cases.<sup>6</sup>

In Australia, [McIntosh \(2007\)](#) compared child-inclusive (CI) mediation (child specialist meets the child and provides parents with feedback on the needs of their particular child) versus child-focused (CF) mediation (where parents are educated about the needs of children in general) in terms of effects on resolution of parental conflict, enhancing parent–child relationships, and reducing distress on children. Of the 150 families who participated, the researchers reported that both interventions lowered inter-parental conflict and child distress 1 year later ([McIntosh et al, 2008](#)). However, the CI group demonstrated better outcomes with increased father satisfaction with parenting arrangements, more father involvement in their children's lives, and less court litigation compared to the CF group,<sup>7</sup> suggesting that there is real value in providing children with a voice in the mediation process.

[Goldson \(2006\)](#) in New Zealand explored a programme of child-inclusive mediation with 17 families and 26 children between the ages of 6–18 years. In this programme, the mediator met alone with the child, and reported a summary of the child views to their parents. The children were told that what they said would generally be discussed with their parents, but were provided with an opportunity to identify information that they did not want shared with their parents. After the parents, taking account of the child's views, developed a tentative plan with the mediator, the parents and children were then brought together in a joint session to discuss the proposed parenting plan. A subsequent session with parents, child, and mediator was held a few weeks later to discuss how the implementation of the parenting plan was working, as well as to examine any outstanding concerns. [Goldson \(2006\)](#) found

that children uniformly reported that they liked having their voice heard and were more satisfied with the final parenting plan as they had an opportunity to voice their feelings. Of significant note, as a result of hearing their children's views, parental conflict was reduced and there was an increased likelihood of a mediated agreement rather than a judicial resolution. Goldson (2006) further observed that there was an increase in the parents' awareness of the impact of the conflict and the significance of working together on behalf of their children. As a result of the parents hearing their children's views, the children reported feeling more relaxed and better able to adapt to their parents' separation.

### *B. Child Legal Representation and Social Work Investigations*

Taylor et al (1999) interviewed 20 children in New Zealand between the ages of 8 and 15 years of age about their experiences having a lawyer represent them in parental disputes. The children had varying experiences: 20 per cent disliked their lawyers, 25 per cent liked them, while the remaining children expressed ambivalence. When asked about what advice they would give to lawyers who represent children, the children suggested that lawyers need to listen more carefully to children, talk on their level, and take the time to get to know them, be friendly, and respect children's confidentiality.

Masson and Oakley (1999) conducted interviews and observations of 20 children between 9 and 15 years of age in the care of the state in England to study their experiences with their *guardian ad litem* (or 'GAL') (an independent social work investigator) and their lawyers. The researchers found that most of the children had a good understanding of the role of their GAL and trusted them. The children had less of an understanding about the role of their lawyers, and many seemed confused about the lawyer's role. Most children did not see the full reports filed in court by their GAL's and did not have an opportunity to discuss the report with their lawyer. In addition, most of the children were not kept informed by their GAL or lawyer about the outcome of their case.

Similar findings were reported by Birnbaum and Bala (2009) in their study of 11 young adults (19–21 years of age) who reflected on their experiences as children with their lawyer from the Ontario Office of the Children's Lawyer (OCL) during their parents' custody dispute. For example, they reported that while they were glad to have been able to speak to someone who was independent, most felt that their lawyer really did not explain the process enough to them, and more importantly, paid little attention to their wishes.

Douglas et al (2006) surveyed 15 children (8 boys and 7 girls) in England between 7 and 17 years of age to explore their experiences

with their social worker and lawyer, and with the legal process. They found that in general children believed that if their parents could not resolve their difficulties, a neutral judicial authority was necessary. The children appreciated having someone neutral to talk to about the court process. Younger children appreciated having a social worker while older children wanted to speak to a lawyer. The children wanted the social worker to accurately report to the judge on what the children said, but were upset if they discovered that their confidence was breached when information was provided to their parents and the court. They wanted to be kept updated about developments in the case by their social worker and lawyer, as they believed that information received from these professionals would be more reliable than that provided by their parents. The majority of the children reported that they felt secure and trusting of their social workers or lawyers. They also reported feeling more confidence in having their views made known to the court and more importantly appreciated the experience of being treated with respect – a theme echoed in studies from other countries.

Tisdall et al (2004) conducted a study in Scotland to examine how best to take children's views into account during family court proceedings. Four focus groups involving 26 children were conducted, and 17 children were interviewed individually; the children were between 8 and 18 years of age. The different groups were (i) children who were represented by a lawyer or had a *guardian ad litem* (social worker) in child welfare proceedings in court, (ii) children whose cases were dealt with in family court but who were not represented, (iii) children who had experienced parental separation but were not involved in court proceedings, and (iv) children who had not experienced parental separation or divorce. The children who were represented by lawyers generally spoke positively about their experiences. They stated that their lawyers provided them with an opportunity to be able to express them, were friendly in their approach, and provided a relaxed atmosphere to share their views. The children also felt that their lawyers explained things clearly to them. Some of the children expressed relief in having a lawyer so that they that they did not have to talk in front of a group of strangers (in a court room), or having to be present and speak in front of their parents. One child spoke of the negative impact of the long delays in court resulting in stress on the family as well as negative effects on schoolwork. The researchers concluded that children – both those who had legal representation as well as those that did not – wanted to have their views considered in making post-separation plans.

Stotzel and Fegert (2006) surveyed 52 children and youths in Germany concerning the role of the guardian<sup>8</sup> appointed to represent their interests in family proceedings. They found that most children understood the role and duty of the children's guardian. Of the

children who expressed views, 30 children reported positive experiences with their guardian, 2 were critical, and 12 children reported both positive and negative views. The majority of the children were satisfied with the process to the extent that they felt supported, and believed that their feelings were being accurately reported back to decision makers.

### *C. Judicial Interviews*

Atwood (2003), Parkinson and Cashmore (2007), Raitt (2007) and Williams (2006) have surveyed judges in Canada, the United States, Scotland, and in Australia. They found responses amongst the judges varied from those who would interview children to learn more about them and get to know them to other judges who reported that they did not feel qualified or that there was not any need to bring children into the parental dispute.<sup>9</sup>

Morag et al (2009) undertook research in Israel regarding a governmental pilot project on the participation of children 6–18 years of age in family court proceedings. According to the model applied in the project, a child participation unit has been established within the family courts. The unit is staffed by social workers and psychologists (hereafter referred to as Participation Workers). The child is invited to the participation unit and offered the possibility of meeting directly with the judge who is hearing the case, or of transmitting his/her thoughts, feelings, and opinions about their parents' dispute to the court through a participation worker. Of the 448 children in the study, about half (48 per cent) invited to participation unit came to the unit and exercised their right to participate, 26 per cent of these children met with the judge and 74 per cent decided to convey their views through the participation worker. A vast majority of the children in the study stated that it was a good idea to ask children to participate (93 per cent) and they [children] would advise a friend to speak to either a judge or a participation worker (92 per cent); a significant majority indicated that participating in the process helped them (62 per cent). The researchers found that the lawyers for parents were more supportive of the project as it went on, resulting in more parental support for their children's participation.<sup>10</sup>

## 4. SUMMARY OF RESEARCH ON CHILDREN'S VOICES IN THE FAMILY JUSTICE PROCESS

There is great diversity in different jurisdictions in how children are involved in the family justice process. While there are no definitive conclusions about whether one professional group or the other is better suited to interviewing children, one common theme is that, regardless of which professional is involved with the child, children

want to be consulted when decisions are being made about their future and want to be part of the decision-making process.

### PART III: METHODOLOGY OF THIS STUDY

#### 1. CHILDREN'S PERSPECTIVES ABOUT FAMILY JUSTICE PROFESSIONALS

In 2010, children were recruited from closed family court files, where trials or hearings occurred between 2000 and early 2010<sup>11</sup> in three Ontario court jurisdictions (different court levels) and four Ohio court jurisdictions.<sup>12</sup> The study was guided by an inductive qualitative design using grounded theory strategies. Grounded theory is an approach that develops knowledge in an area that has been the subject of relatively little inquiry – children's views of their involvement with family justice professionals (Creswell, 1998; Cutcliffe, 2005). Themes emerged from the semi-structured audiotaped telephone interviews with the children. The information provided was systematically gathered and analysed throughout the research process, allowing thematic themes and patterns to emerge (Fossey et al, 2002). Journaling included observations and reflections of the interviews as suggested by an audit trail (Charmez, 2006; Fossey et al, 2002; Lincoln and Guba, 1985).

A semi-structured interview guide was used and each child was asked several open-ended questions. Examples of the questions were:

- what do you remember about your parents' separation and how you felt?
- how did you find out about the plans that were made for your care?
- how were you involved in decisions your parents made about living apart?
- did plans for your care change over time?
- what can you remember about your participation in the process?
- what did you find helpful in the process, and what was not helpful? and
- what advice would you give to lawyers/social workers/judges who work with children and young adults to help others in similar circumstances?

Each parent<sup>13</sup> and child between the ages 7 and 17 years old<sup>14</sup> was contacted by letter advising them about the study with a consent form requesting their child's involvement in an interview about children's experiences with various family justice professionals. Both parents and the children were advised of the confidential, voluntary nature of the study. Each child who participated received a \$25.00 honorarium for their time.

## 2. PARTICIPANTS

There were 32 children who participated in the study: 16 females and 16 males.<sup>15</sup> The majority of the children, 22 out of 32, were in the sole custody of their mother, 3 children were in a shared custody and decision-making arrangement, and 7 children were in the sole custody of their father. The age of the child at the time of the custody dispute before the court ranged from 4 to 12 years of age. The length of time that the children's parents had separated was between 3 and 5 years. The length of time since the closing of the court file and the interview ranged from 1 month to 5 years. The historical element of the study allowed for a retrospective view of children's feelings and perceptions of their level of participation, as well as providing further information about follow-up on children post decision making. There is little, if any, follow-up or on outcomes in family law decision making by judges, mental health professionals, or children's lawyers. Therefore, obtaining this information provides an important contribution to knowledge translation for family justice professionals and policy makers.

There were 10 children who were residing in a different city at the time of the interview.<sup>16</sup> Of the 32 children interviewed, 16 had been interviewed by a judge, 9 children had a lawyer represent them, and 7 children were interviewed by a mental health professional (usually a social worker) about their views and preferences.

The parents of these children were all disputing custody or access, each of the cases involved substantial allegations against one or both parents (ie domestic violence, poor child care supervision, and mental health concerns). In half of the cases, a trial had taken place. In the majority of cases where a judicial interview took place, it was at the trial stage, and the child/children had previously been interviewed by a lawyer, a *guardian-ad litem*, or a mental health professional.<sup>17</sup>

## PART IV: THEMATIC RESULTS

### 1. WHAT DO YOU REMEMBER ABOUT YOUR PARENTS' SEPARATION?

Virtually, all the children expressed feelings of sadness and angst over their parents' separation, regardless of their age or length of time since their parents' separation, and had vivid recollections of their parents' separation.<sup>18</sup> In contrast, while each child correctly remembered which type of professional they met (as verified by the researcher's search of court files), few could recall the names of the family justice professional with whom they were involved. None of the children reported feeling any negative effects as a result of their interviews with any of the professionals. Five children initially did not want to discuss their

parents' break-up with the researcher, but then acknowledged that the separation was probably best in the end:

I knew she [mother] could not look after us and as much as I wanted to stay with her, it is better with my father. (age 10)<sup>19</sup>

I really wish they could have worked it out, even though they were always fighting. (age 12).

They fought [verbally and physically] all the time . . . my brother and I were scared a lot. (age 10)

Mother was on pills and tried to kill herself, now not so depressed [mother]. (age 15)

I got into trouble . . . blew up a car . . . got into criminal stuff. (age 16)

A majority of the children reported feeling very confused and experiencing school difficulties after their parents' separation, as reflected in the comment of a child whose court file had very recently been in the sample closed:

I am having a hard time coping with the break-up and my grades dropped. (age 12)

## 2. HOW DID YOU FIND OUT ABOUT THE PLANS THAT WERE MADE FOR YOUR CARE?

A majority of the children (19/32; nearly two-thirds) stated that they were not consulted about their living arrangements by anyone. The majority of the children also reported that they were told by one or both of their parents of the separation – some as a result of a domestic violence incident between their parents. All of the children who were 10 years of age and over at the time of separation reported that they expressed their views about their living arrangements to their parents, but most indicated that their parents did not listen to their views. Five children stated that their parents asked them where they wanted to live. Comments ranged from:

I didn't have any say . . . they [parents and professionals] need to listen to children, they [children] are humans no matter how old they are, they need to have say. (age 15)

I would have liked to be at court, after all it is my life. (age 11)

No one told me and one night a big fight between mom and dad. Dad was drinking . . . he got charged and we left. (age 13)

I was told it [arrangements] was none of my business. (age 9)

I remember seeing a social worker and not knowing why until it was too late [that this meeting could have a significant effect on my future]. (age 13)

My parents went to court and then OCL showed up. (age 13)

Similar findings have been reported by Butler et al (2002), Cashmore and Parkinson (2008), Dunn and Deeter-Deckard (2001), Hawthorne et al (2003), and McIntosh (2009) where children reported neither being consulted about their living arrangements nor told of what was happening in their family, despite the research on children's coping capacity being enhanced when their views are respected and their autonomy is supported (Smart et al, 1999, 2001).

### 3. WHAT DID YOU FIND HELPFUL OR NOT ABOUT TALKING TO A FAMILY JUSTICE PROFESSIONAL?

Interestingly, the children who met a judge remember being asked whether they wanted to do this. However, children who had a lawyer or met with a mental health professional could not recall being asked whether they wanted to do this. Regardless of whether they met with a judge, lawyer, or mental health professional, the children unanimously stated both that it was important for them to be heard, and that they did not want to make the final decisions. As one child stated:

So instead of saying what they [children] want . . . [just] good to have a say. (age 12).

### 4. JUDICIAL INTERVIEWS

All 16 children<sup>20</sup> who spoke to a judge reported that they were initially anxious about meeting with the judge, but they wanted to speak to the judge to let the judge know how they were feeling. All the children reported that the judge made it clear to them at the beginning of the interview that the meeting would be private; the judge would not tell the parents exactly what they said, and would only tell their parents what the judge thought about the situation. Only 4 of these 16 children reported that the judge taped the child's interviews; 2 judges did not allow the parents' lawyers in the room and in 8 cases the child's lawyer or *guardian-ad-litem* was present.<sup>21</sup> The children made the following statements about meeting the judge:

I saw the judge, twice I think. I wanted to and felt good about it. (age 12)

Not great about seeing judge, but [the judge] made me feel comfortable. (age 10)

Judge told me the decision and I was not happy about the decision, but felt it was good for the judge to see who I was . . . I knew the judge was struggling with the decision. (age 14)

I wanted to be heard as it was about me . . . judge never heard about lot of stuff. (age 10)

Yes, it was good to see the judge, even though I did not get what I wanted. (age 10)

Nice to talk to someone who had direct input and decision-making . . . told judge what I wanted and would have been upset had it not worked out. (age 12)

Didn't get what I wanted, not worth it [judicial interview], but did get my point across. (age 14)

At first nervous, but judge really nice and I felt that judge listened. (age 9)

##### 5. IF YOU HAD A CHOICE, WOULD YOU ALSO HAVE LIKED TO MEET THE JUDGE?

Children who were represented by a lawyer or who met with a mental health professional in the course of an assessment were asked if they would also have liked to have met with the judge.<sup>22</sup> Six out of the 16 children responded that they would have liked to meet with a judge if they had known it was an option.<sup>23</sup> The following comments were made by those who would have wanted to speak to the judge:

That would be a good to speak to a judge, but I did not get that chance . . . mother did and my lawyer did. (had child lawyer, age 17)

Want a say and not a report on me . . . [would like to have met the] judge for sure. (had both a child lawyer and mental health professional, age 14)

I didn't know I could talk to a judge . . . yea something like that is good. (had child lawyer, age 12)

I went to court but did not get a chance to talk to the judge . . . my mother did. (had child lawyer, age 12)

I would have asked to see a judge [if I had known.]. (had mental health professional, age 12)

In contrast, a number of children indicated that they did not have an interest in meeting the judge, making comments such as:

Would prefer a lawyer. (had a child lawyer, age 12)

I would probably want talk to my parents first. (had a mental health professional, age 9)

I would say a lawyer because if you actually have a lawyer, they kind of help with some kind of problems with court and stuff, so I choose a lawyer. (had a child lawyer, age 10)

I really liked what [social worker] did, so I was ok. (had a mental health professional, age 11)

##### 6. LAWYERS

Of the nine children who were represented by a lawyer, several of the children also had previously met with a mental health professional and

spoke to a judge as well. The children reported the following about their views of their lawyers:

I did talk to a social worker and a lawyer, but not sure how helpful it was though. (age 17)

It is helpful that the court knows what the child wants and what the child is going through . . . the lawyer was ok. (age 13)

OCL was helpful . . . looking for someone with skills on making better parenting but did not see it too much. (age 12)

It was helpful to me, but wanted more time with the lawyer. (age 12)

I had two lawyers . . . lots of fighting by the lawyers. (age 10)

Many of the children who had lawyers did not know that there were other ways of being heard. However, they all expressed that wanting to be heard was important to them.

## 7. MENTAL HEALTH PROFESSIONALS

Seven of the children were interviewed by a mental health professional as part of a court-ordered assessment. Comments from these children included:

She was really good and listened to me . . . I got what I wanted. (age 9)

Not sure how much help the worker was in the end. (age 10)

OCL [social worker] . . . was not really helpful and her choice [was] not good about how often I have to see my other parent. (age 16)

It was ok I guess, but really can't remember as it was a long time ago. (age 17)

## 8. WHAT ADVICE WOULD YOU GIVE TO PROFESSIONALS ABOUT HEARING CHILDREN'S VIEWS?

The 32 children interviewed had many suggestions for professionals involved in the family justice system, including judges, lawyers, and mental health professionals, about the importance of listening to children, as well as some advice for children experiencing separation. The themes presented in this study have resonated in previous studies from several countries. The children's comments included:

### **Advice to Lawyers**

Be patient and just listen. It is hard for kids.

I want lots of details about what is going on.

Be really gentle with kids. We need to know that we are important.

**Advice to Mental Health Professionals**

Listen and not keep changing the subject.

Want follow-up and check in every six months to see how we are doing.

**Advice to Judges**

Be straight up with how you feel and what you want.

Try to get to understand what the child is going through and believe the child.

It is not child's decision, but the child should have a say and judge should hear it.

Don't be biased and be open-minded to what a child says.

Give children an opportunity to see and talk to a judge before judge makes a decision.

Two young adults who did not get what they wanted from speaking with the judges in their case nevertheless clearly stated that it was important for them to meet the judge:

In every case, a judge should give a kid a chance to talk to them.

Yes, it was good to see the judge even though I did not get what I wanted.

**PART V: CONCLUSIONS – MYTH BUSTING**

Much of the small body of research on children's participation in the family justice process is based on interviews with professionals or parents. The purpose of our study was to hear directly from children about their involvement with different family justice professionals, without having their experiences filtered through the lens of the adults. This study reports on some important findings in two very different jurisdictions: Ohio, where children are often interviewed by a judge and Ontario where the practice is rare.

While children can be interviewed by a lawyer, a mental health professional, or a judge, at present in most jurisdictions it is generally the adults who make the decisions about *who*, *when*, and *how* they will be interviewed if at all. This study revealed a similar pattern: children were told they had to meet 'with their lawyer' or 'the court's mental health professional'. The children who met with a judge, however, all reported that they were given a choice of whether to meet the judge. Of the children who reported that they 'did not get what they wanted' (4 of the 16) after meeting with a judge, nevertheless all stated that it was still important to have the judge hear from them, and that they would do it

again. That is, they all thought that it was important for them to speak directly to the decision maker.

Not all children in Ontario or Ohio have an opportunity to speak to a family justice professional, and the reality is that not all children need to speak to a professional in the process of having plans made for post-separation parenting. However, *choice, opportunity, and availability for children* should be part of all family justice processes that address children's future well-being and post-separation decision making.

What is clear and consistent from all the interviews with the children was that they want to be asked *whether* they will participate in decision making, and many want to be heard and listened to and be part of the decision making that affects their lives. Children need to know that what they feel and think is important and worthy/or useful to be listened to.

At the start of the separation process, children will have no experience with it and likely very little knowledge about how they can be involved, but as the process continues, children will start to gain an appreciation of how they might be involved. Inevitably, at the start it is the parents who will be the first to tell their children about their separation, and who will start to provide them with some information about the separation process. In many cases, the parents make their own arrangements without involving professionals. In attempting to do so, the parents are usually the first to solicit their children's views. While it is very important for professionals to caution parents against drawing their children into taking sides, it is also important for professionals to recognise that the parents are likely to have communicated with the children before the dispute resolution process commenced, and that they will be communicating with them after it is over (Kelly and Kisthardt, 2009).

For those cases that will be resolved with the assistance of family justice professionals, whether mediators, lawyers, judges, or mental health professionals, those professionals can be of great assistance and support to children by explaining the legal process and answering their questions about what is happening in their family situation in appropriate child focused language. Irrespective of the level and type of conflict, all children should be heard to affirm that their views and feelings are important and valued, be it by their parents in mediation, their lawyer, or a judge. Education on interviewing children can be of benefit to all professionals in the family justice system. Even a single meeting of a child with a judge, mediator, mental health professional, or child lawyer can be valuable for giving the professional some insights about the child and more importantly, can be empowering for the child. However, children's expressed views and preferences may change and be affected by such factors as who brought the child to the meeting, cultural nuances, and so on. Therefore, no professional whether it is a judge, mediator, lawyer, or assessor should *ever* rely on just one interview to establish a child's views and preferences.

It has often been said that children should be protected from the negative effects of their parents' separation, and it is widely recognised that parental conflict that involves the children is harmful to them and therefore children should not be put in the middle of their parent's dispute. We agree, but with one important cautionary note. If parents are unable to agree on a parenting plan without involving professionals or the court process, it is very likely that children are already caught up in the conflict between their parents. We argue that *allowing* children to express their views in a safe, neutral, non-judgmental way to a family justice professional, and even a judge, can go a long way in assisting children's positive post-separation adjustment. While children should never be pressured to express their views or preferences, they should always be afforded the opportunity to share their perspectives.

The concern expressed by some judges, lawyers, and mental health professionals that judges may harm children with even a short interview has not had any support in this study (Birnbaum and Bala, 2010; Kelly, 2003). The event that the children remembered most vividly and traumatically was the day their parents separated – not their interviews with a judge, lawyer, or a mental health professional. Perhaps, professionals overemphasise the importance of their direct involvement in the lives of children.

We found that many children, including those that had an interview with a mental health professional or a lawyer, wanted to speak to the judge, because they wanted to speak to the final decision-maker, a similar theme echoed by Cashmore and Parkinson (2008) in their study. We are not suggesting that one type of professional is 'better' at engaging children in post-separation decision making. In fact, children's interests may be served by meeting with different professionals at different points during the separation and court process. It is often said that divorce [for adults] is a 'process' (emotionally and financially), so too, is it for children.

To build an ethic for children's participation in post-separation decision making requires that the various family justice professionals listen respectfully and engage with children in a dialogue respecting their strengths and capabilities – not focusing on their limitations. Finally, regardless of which professionals meet a child, the child's voice must be heard and considered in the decision-making process. It is no longer *when, or if*, but *now* that they be heard.

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(2009) on hearing children's views about their child legal representation and Birnbaum and Bala (2010) on a comparative analysis about judicial interviews of children's between Ohio and Ontario. All interviews with the children were conducted by the first author in Ontario and Ohio. Dr Francine Cyr is in the process of interviewing children and judges in Quebec, where children are more inclined to speak to a judge than anywhere else in Canada as a result of Article 34 of the Quebec Civil Code that creates a presumption that children will be directly heard by the court. It truly takes a village to conduct research about children's participation in the family justice system and to learn firsthand about their experiences with the different family justice professionals. The authors wish to thank and acknowledge, Ohio Judge Denise Herman McColley, Magistrate Richard Altman, Magistrate Pamela Heringhaus, Dr Kathleen Clark, Programme and Grant Administrator, Marion County Family Court, Ohio, and Anne Marie Predko, Director, Family, Policy and Programmes Branch, Court Services Division, Ministry of Attorney General, Ontario. There are many law and social work students who assisted with the countless administrative and research tasks over the course of this study; we are most grateful to all of them. The authors also wish to acknowledge funding support from the Social Sciences and Humanities Research Council of Canada. Finally, and certainly not least, we thank the children who shared their stories with great humility of their experiences with judges, lawyers, and mental health professionals. They overwhelmingly asked for one thing – to be heard and part of the decision-making process. We hope we have done that – bringing their voices forward so that 'we' adults (judges, mental health professionals, lawyers, and researchers) can hear them and learn from them, and that other children may benefit from being heard in the future.

## NOTES

<sup>1</sup>Canada is a signatory to the United Nations Convention on the Rights of the Child, but the USA is not. Nevertheless, as discussed in this article, children in many American states have a broader right of participation in court proceedings than children in Canada.

<sup>2</sup>*S.R. v. C.S.*, 2006 BCPC 2, [2006] BCJ 8 at para. 18, Skilnick Prov. Ct.J. stated (emphasis added): 'At the conclusion of the evidence, counsel for the Respondent [father] made an application to have the children interviewed by myself as the trial judge, outside of the courtroom and in the absence of the parties or counsel. The application was opposed by counsel for the Applicant [mother]. As a general rule, it is my view that parties should be discouraged from involving children directly in court proceedings. In a case such as this, where there is acrimony between the parents, it is generally unfair and emotionally cruel to do something which might make a child feel responsible for the making of a decision which will so fundamentally affect his or her future relationship with the parents. Whatever decision this court reaches will likely be unsatisfactory to at least one of the parties. Under no circumstances should this child be brought to appear or feel responsible for a decision that may add to discord in the home. Children in this position generally ought to be sheltered and protected from any emotional fallout from the break-up of their parents' relationships and should be free from any subsequent guilt or blame that may be placed upon them, either spoken or otherwise' – ultimately, the judge granted the application only because there was no independent evidence about the children and their views; rather, than the child's right to be heard.

<sup>3</sup>Cyr (2009), Paper presented in Moncton and published in proceedings of the colloquium. *La place de l'enfant au sein de la famille séparée. Entre le droit et l'intérêt de l'enfant: Une question de responsabilité parentale*, November (2008), Moncton, New Brunswick, Canada where she stresses the importance of hearing children without giving them the responsibility or the belief that they can make the decision – rather, to meet them and hear them during the separation/divorce process. Also see

Williams (2007) for a review of relevant provincial statutes referring to the views of the child and the qualifiers to hearing the child's views. There have been two legal conferences sponsored by the Continuing Legal Education Department of the Law Society of Upper Canada, Ontario on the Voice of the Child in 2009 and 2010. In 2009, in conjunction with the University of Toronto, Faculty of Law and UNICEF Canada in celebration of the 20th anniversary of the Convention on the Rights of the Child, *The Best Interests of the Child: Meaning and Application in Canada* was held in Toronto, Ontario. The National Family Law Programme in July 2010 in Victoria, British Columbia, Canada also held panel discussions and debates on children's participation, especially regarding judicial interviews with children. The authors encourage further discussion with all the family justice professionals to unpack the myths from realities as well as the assumptions and barriers that may exist to hear from children directly. Of course, this should include a discussion and debate about the different types of child legal representation in North America.

<sup>4</sup>A qualitative methodology was selected because it captures the breadth and depth of the children's views and experiences with the different family justice professionals. A qualitative approach generates a representation of themes from the children who were interviewed and allows the reader to draw their own conclusions. Qualitative research is not about generalising results; rather it draws out the complexities and tensions that are inherent in the real world – in this case, the varied experiences the children had with the different family justice professionals.

<sup>5</sup>See Birnbaum (2009) and Birnbaum and Bala (2010) on the debates in the social science literature about why children should participate or not in family law decision making as well as a more thorough analysis of each study explored. The purpose of these summaries of the studies is to situate the themes found from this particular study.

<sup>6</sup>Since 2004, children are participating more and more in mediation. However, there remains little consistency in approach across North America. At the Family Mediation and Psycho-Social Expertise Service at the Palais de Justice in Montreal, Quebec, children are included in the mediation process that is similar to the McIntosh et al (2008) child-inclusive approach. More significantly, children are mailed a follow-up survey to comment on whether the mediator heard them, understood their wishes, and also asked about their views on the mediation process. This is the only consistent, structured mental health approach to including children in the mediation process in Canada.

<sup>7</sup>Holtzworth-Munroe et al (2010) are replicating the McIntosh study in the USA but using random assignment of family cases to both types of interventions as well as comparing them to traditional divorce mediation. The study is ongoing and no data are available as of this writing.

<sup>8</sup>The children's guardian can be a mental health professional, a lawyer, or non-professional who represents the interest of the child.

<sup>9</sup>See Birnbaum and Bala (2010) for a more thorough review of judicial interviewing of children.

<sup>10</sup>Further information about this pilot project will be published in the next issue of this journal.

<sup>11</sup>Similar to the methodological challenges of the Birnbaum and Bala (2009) study of attitudes towards children's lawyers, the addresses of parents in court files were dated and many letters were 'returned to sender'. Twenty parents (15 fathers and 5 mothers) inquired as to whether the researcher [Birnbaum] would provide their child's whereabouts if the other parent responded to the interview. The parents were reminded of the confidential nature of the study and that no identifying information would be released to any parent, even if both parents agreed to their child being interviewed. Ten parents consented to the interview but their child did not, hence, no interview took place.

<sup>12</sup>In Ohio, the highest level of trial court is the Court of Common Pleas, of which there are four divisions – general, juvenile, domestic relations, and probate. Each county has its own Court of Common Pleas, but the divisions are arranged differently. Closed files were reviewed in domestic relations courts (parents are married) and juvenile division courts (unmarried parents). These two courts deal with the majority of family law disputes and both courts interview children in custody and access disputes as well as child welfare matters.

<sup>13</sup>If the parents had joint decision-making authority, each parent signed a separate consent form to have their child/children interviewed as well as all the children.

<sup>14</sup>It was important that all children sign consent for their individual participation. Both written and oral consent are reflected in the *CFSA* where children aged 7+ years need to provide written consent to be adopted and children aged 10+ years must provide written consent to release their medical records. More importantly, having children sign consent to participate validated them and made the process transparent to their participation in the study.

<sup>15</sup>There were five subsets of siblings that were part of this sample.

<sup>16</sup>The study was initially designed to have in-person interviews with each child. However, it soon became clear that many children and their parents had moved to different cities,

provinces, and states. As a result, changes had to be made to the methodology with ethics approval along the way. While the affects of relocation was not part of the study, it does raise another research question about the impact, if any, a move had on the child and the reason for the custodial dispute. See Parkinson et al (2010) and Taylor et al (2010) about interviewing children who have relocated. There is little, if any empirical research on children's views about the affects of relocation on their lives and the qualitative work of these scholars is both timely and necessary.

<sup>17</sup> While some children had experiences with more than one professional, children were only interviewed about their experiences with the last professional to interview them.

<sup>18</sup> Before and after each interview with a child, each parent was thanked for providing their consent for their child's participation. The brief conversations also allowed the researcher several opportunities to hear how the child was feeling about the interview both pre- and post-interview. In addition, each child was given time after the interview to talk about whatever they wished that allowed for another opportunity to assess their reactions and feelings. No child had to be reported to a child welfare agency due to concerns expressed during the interview or provided with names of a counsellor.

<sup>19</sup> All ages reported are at the time of the interview of the study.

<sup>20</sup> Some of these children also had siblings who were interviewed by the same judge. According to the children, the judicial interviews ranged from 10 to 50 minutes. The children's ages at the time of the study ranged from 7 to 16 years of age. While the majority of the judicial interviews with children took place in Ohio, some took place in Ontario: for reasons of children's confidentiality, the judge's location, level of court, and the child's gender are not being disclosed in this paper. Family law disputes about children take many pathways over the course of a child's life and some of these cases could be back before a court for variations about custody or access.

<sup>21</sup> In Ontario, the Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 64 provides for a judicial interview. Judges have wide latitude to decide whether to interview children. The legislation establishes some minimal procedural rules that are to be followed when judges choose to interview a child:

*Child entitled to be heard*

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

*Interview by court*

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

*Recording*

(3) The interview shall be recorded.

*Counsel*

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

The Ohio Revised Code, ss. ¶3109.04 and 3109.051, which governs judicial interviews in domestic proceedings is considerably more detailed and directory than the Ontario provision, requiring an interview if requested by any party, and restricting who may attend. Para. 3109.04 of the Domestic Relations Code provides:

(B) (1) . . . In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities . . . the court, in its discretion, may and, upon the request of either party, *shall* interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation.

(2) If the court interviews any child pursuant to division (B)(1) of this section, all of the following apply:

(c) The interview shall be conducted in chambers, and no person other than the child, the child's attorney, the judge, any necessary court personnel, and, in the judge's discretion, the attorney of each parent shall be permitted to be present in the chambers during the interview. The Ohio legislation further indicates some preference for judicial interviews, as a means of ascertaining the child's views, with s. 3109(B)(3) providing 'shall' not 'consider a written or recorded statement or affidavit that purports to set forth the child's wishes and concerns regarding those matters'.

Unlike in Ontario, Ohio judges are obliged to interview a child upon the request of either party to the proceeding, though s.3109.04 (B)(2)(b) gives a judge conducting an interview the authority to decline to ascertain the child's 'wishes and concerns' at an interview if the child lacks the capacity to do this. Further, the judge may decide that there are 'special circumstances' such that it would be in the child's 'best interests' not to interview the child to determine the child's views. Unlike Ontario, in Ohio, the majority of the judges receive training in interviewing children.

In Ohio, some courts have court-connected mental health professionals who also conduct child interviews and report their findings to the judge. In this study, seven of the children had also been interviewed by a mental health professional prior to a judicial interview in an attempt to resolve the custody dispute.

<sup>22</sup> Cashmore and Parkinson (2008) found similar results in their study of 47 children. In their study, children stated that the best person to speak about their wishes was their parents first ( $n = 12$ ) and then a judge ( $n = 8$ ).

<sup>23</sup> In March 2009 and 2010, the Law Society of Ontario held educational programmes on children's participation in family proceedings; at both of the programmes, lawyers from the OCL indicated that in their experience with representation in this type of cases, very few children had ever requested an interview with a judge. They reported that they had canvassed colleagues at the OCL whose experiences were similar. They also stated that these requests were generally in the context of alienation cases.

A Committee has been established in Ontario to address the question of judicial meetings with children in family cases. We support the development of policies for both the courts and the OCL that will ensure that children are afforded the opportunity to meet with the judge, and that their lawyers will support them in making this decision, and exercising this right.

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