JUDICIAL INTERVIEWS OF CHILDREN IN CUSTODY AND ACCESS CASES: TIME TO PAUSE AND REFLECT

Dan L. Goldberg*

Introduction

In 1991 Canada ratified the United Nations Convention on the Rights of the Child.¹ This agreement enshrined into international law the inalienable rights of children. Pursuant to Article 12 of the Convention, a child who can form views in a matter affecting him or her can, either directly or through a representative or an appropriate body, have those views placed before any judicial or administrative proceeding. This provision theoretically allows a child to communicate his or her views directly with a judge or other judicial officers. In Canada, children who are involved in custody/access proceedings and whose views and preferences are ascertainable are also, at least symbolically, entitled under international law to have their own counsel to serve as their representative.

* Senior Counsel, Office of the Children’s Lawyer, Ministry of the Attorney General, Toronto, Ontario.

The views expressed in this article are those of the author and do not necessarily represent the views of the Office of the Children’s Lawyer.

The author gratefully acknowledges the research assistance of Philippa Geddie, 2009-2010 Student-at-Law, Office of the Children’s Lawyer.

The author gratefully acknowledges, with fondness and admiration, the enormous contribution to family law in Canada and internationally by Queen’s University Professor of Law, Nicholas Bala.

Under Article 12 the opportunity of a child to be heard in any judicial and administrative hearing, is to be provided in a manner consistent with the procedural rules of Convention signatory countries. In regard to the methods of ascertaining children’s views, the statutory provisions and regulations of the Canadian provinces and territories vary, both as to whether or not judicial officers have the discretion to interview children, as well as to the systematic provision of children’s counsel.

In the past several years the issue of judges conducting forensic interviews with children for the purpose of eliciting their custodial and visitation preferences has resurfaced and generated a debate in many western jurisdictions regarding the appropriateness of this practice. This paper will discuss this issue and describe the many significant concerns about judicial preference interviews. At the same time, the paper will also describe some circumstances in which it may be appropriate for a judge to meet and have a conversation with a child without discussing that child’s preferences regarding his/her custody and visitation.

There are several ways to place a child’s views and preferences in evidence before the Court without directly involving him or her as a witness or the subject of a judicial interview. An assessor’s report, a therapist’s evidence, a parent or another’s statement, and, in Ontario, evidence of a clinical investigator/social worker assisting the child’s counsel, can all be used as vehicles for ensuring that a child’s wishes are placed before the court.

**Exception to the Rule against Hearsay Evidence**
The traditional rule about hearsay statements is that they are not admissible in evidence. However, an exception to this rule in both criminal and family law proceedings is that children’s statements to third parties are admissible.

The decision in R. v. Khan established the hearsay exception for children’s statements to third parties on the basis of the dual test of necessity and reliability.\(^2\) The Supreme Court of Canada applied its decision in Ares v. Venner\(^3\) and held that “necessity” should be interpreted as “reasonably necessary.” If a child’s *viva voce* evidence would be inadmissible, then hearsay evidence is necessary. A psychological assessment that the child’s testimony in Court might be traumatic or harm the child may also establish necessity.\(^4\)

In *R. v. Khan*, the Supreme Court of Canada held that “reliability” may be determined by evidencing the:

…timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement…The matters relevant to reliability will vary with the child and with the circumstances and are best left to the trial judge.\(^5\)

The Supreme Court also held that courts must be more flexible in accepting children’s hearsay evidence, especially in cases where the children may have been victims of sexual abuse.

In *Khan v. College of Physicians and Surgeons (Ont.)*, the Ontario Court of Appeal held that the test of necessity and reliability set out by the Supreme Court of Canada in the *R. v. Khan* criminal proceedings also applied in civil proceedings.\(^6\) The Court held:

\(^4\) *Supra* note 2 at 546.
\(^5\) *Ibid.* at 547.
The reliance in *Khan on Ares v. Venner*, …a civil case, indicates that the necessity and reliability criteria identified in *Khan* have equal applicability whether the child’s out-of-Court statement is tendered in a civil or criminal proceeding. That is not to say that the determination of whether those criteria have been met will be the same regardless of the nature of the proceedings, but only that both factors will have to be addressed in both types of cases.\(^7\)

In *R. v. Khelawon*, the Supreme Court of Canada widened the scope for admitting children’s hearsay evidence. Trial judges may now properly consider, at the threshold reliability stage, evidence of the circumstances under which the statement was made, which includes the presence or absence of any corroborating evidence.\(^8\)

In custody and access proceedings, courts tend to admit into evidence statements made by children to third parties. *J.K.F. v. J.D.F.*\(^9\) concerned a five-year old child who had told a daycare worker, a social worker, and a psychologist that her father had poked her in the genital and rectal areas. The mother applied to suspend the father’s access on the basis that he had sexually abused the child and, at trial, sought to introduce the child’s hearsay statements into evidence. The Court commented that the rules of evidence must be more flexible in both child protection and custody cases. The Court applied the *Ares v. Venner* decision and held that the reception of hearsay evidence is justified on the grounds of necessity and reliability. The Court stated that reliability depended upon whether the statements were spontaneous, whether the child was coached, whether the questions suggested an answer and if the child’s disclosures were consistent over time.

In *Gillies v. Gillies*, counsel for the father sought to introduce into evidence statements made by the children to various third parties, including the father’s current wife.\(^10\) The children were not called to testify directly because they were only 6 and 7 years old and because the atmosphere

---

*\(^7\) Ibid. at 204.*  
*\(^8\) [2006] 2 S.C.R. 787 at paras. 92-100.*  
*\(^9\) [1988] B.C.J. No. 278 (B.C. C.A.).*  
*\(^10\) (20 May 1993), Owen Sound 1105/89 (Ont. Ct. J.).*
in the court was too intimidating. The court held that the statements were admissible and would
determine after hearing the evidence whether it was reliable and what weight it would be given.

Fortier J. stated:

In normal situations, hearsay is prohibited unless it is hearsay that fits into one of
the numerous categories considered to be exceptions to the hearsay rule.
Utterances of children to third parties have not, until recently, been considered to
be an exception to the hearsay rule.

It is my experience that a practice has evolved that children’s utterances to the
third parties be admitted in evidence in custody and access cases because it is
useful to assist the judge at least in determining issues of credibility.¹¹

In *P.V. v. D.B.*¹², the mother, in the context of a custody and access case, alleged that her 10-
year-old daughter (M.) was at risk of violence when she was with her father. The British
Columbia Supreme Court addressed the issue of the admissibility and weight of a child’s hearsay
statements in a custody case. Justice Russell stated:

Much of the evidence relied on by the defendant in this case consists of statements
made by M. to other persons, particularly the defendant and professionals engaged
by the defendant to counsel M. Both parties agree that a child’s hearsay evidence
may be admissible in a child custody case, provided that it is both necessary and
reliable. However, P.V. asserts that M.’s statements should be viewed as unreliable
and given limited weight by the Court, because the statements to her mother are the
product of improper influence. Further, he submits that statements to other this
parties may be influenced by M.’s need to please her mother, her anxiety about her
mother’s safety and her mother’s continued hostility to the father that has been
communicated to M.

In this case, the child did not testify and, therefore, the admission of her hearsay
evidence is necessary in order to fully consider the question of her best interests.
The bigger issue is the reliability of these statements. A list of the indicia of
reliability of a child’s hearsay statements was given by Dillon J. in *S.F.R. v. E.C.R.*
[(1997), 41 B.C.L.R. (3rd) 239] at [paragraph] 43:

The indicia of reliability have been established in *R. v. Khan*, supra, and in the
cases that have applied *R. v. Khan*. They include: timing of the statement;
demeanour of the child; personality of the child; intelligence and understanding
of the child; absence of motive of child to fabricate; absence of motive or bias
of the person who reports the child’s statement; spontaneity; statement in
response to non-leading questions; absence of suggestion; manipulation;
coaching; undue influence or improper influence; corroboration by real
evidence; consistency over time; and statement not equally consistent with
another hypothesis or alternative explanation…¹³

¹¹ *Ibid.* at para. 3.
In *Neuberger v. Connors*, a professional’s testimony about a child’s disclosure of sexual abuse was held to be admissible to prove the truth of the statement.\(^\text{14}\) The court held that custody and access litigation is not the same as ordinary litigation, because the only issue is the best interests of the child. The court stated that the rules of evidence should therefore be more flexible where the court’s only mandate is to act in the child’s best interests and thus admitted the professional’s testimony based on the criteria of necessity and reliability.

Allowing expert testimony of a child’s views and preferences by an individual such as an assessor or therapist permits the child’s wishes to be heard, while protecting the child from being directly involved in the dispute. This approach ensures that the best interests of the child remain the focal point of the proceeding in terms of the desired outcome and in terms of the procedure that is followed.

**Why Children Should Not be Called to Give Direct Evidence**

Despite the provisions of the Ontario *Evidence Act*\(^\text{15}\), which allow the testimony of children in custody/access proceedings, there is a general reluctance on the part of the judiciary to have children called as witnesses, believing that it is undesirable to have children openly and publicly declare a parental preference in a courtroom.

Regrettably, in a custody/access case when it is suggested by a parent or their counsel that a child testify or “speak” to a judge, it is often as a result of the child being aligned with their parent due to inappropriate influence and/or pressure by that parent. This circumstance alone should

---


\(^{15}\) R.S.O. 1990, Chapter E.23.
give pause to judges in determining whether to allow a child to testify or whether they should conduct an interview with the child.

It is important to note that in criminal cases a child’s testimony may be necessary. There, an accused whose liberty may be at stake, is entitled to have the child’s evidence tested on the “beyond a reasonable doubt” standard of proof. This is to be contrasted with a custody/access case where the issue to be decided is to be made in the best interests of the child based on the “balance of probabilities” standard of proof. In this latter instance, the direct testimony of a child is not only unnecessary, but the very process of involving a child in these court proceedings, usually between his/her parents, may well be harmful to the child.

Even in a resource strapped environment, it is not the responsibility of children to solve the adult disagreement over their custody. Children should not be made to feel burdened by the weight of a perception that where they live is a decision they get to make. Nor should children be made to feel omnipotent – that their view will be determinative. Both of these perceptions have much greater traction with children when a judge, as opposed to child’s counsel or a mental health professional, conducts an interview for the purpose of obtaining that child’s preferences. For a child, the judge’s position of authority alone significantly magnifies the importance of the circumstances to make that child’s perceptions feel even more real.

There are two major categories of professionals who think that judges should interview children. First, there are those who operate in a resource-strapped environment where lawyers for children are not involved in every custody/access case, and who feel they have no credible, independent third party who can provide information to the court regarding a child’s views and preferences. This would also include not having a mental health professional, an amicus curiae or
guardian *ad litem*, who can, at least, advise the court as to the child’s wishes. The second category are those who, even if the wishes of a child are before the court through a recent assessment or child’s counsel, are ideologically committed to the notion that they are well-suited to elicit that child’s views and preferences. While the former instance may be more justifiable than the latter, judges are not in a good position to conduct interviews of children for the purpose of eliciting their views and preferences.

It is important to establish the purpose of the judicial interaction with a child. Is the purpose to have a get-acquainted “*meeting*” with a child or is it a forensic “*interview*” designed primarily or exclusively to elicit the child’s custodial or visitation preferences? The debate in this controversial area largely revolves around the latter.

In Canadian case law, most judges express a great reluctance to interview a child because of their lack of training in both child development and in conducting child interviews, a judge’s chambers being an inappropriate interview setting, as well as their concern for the potential parental loyalty bind in which they believe a child may be placed.

In Ontario, child’s counsel, through the Office of the Children’s Lawyer, receives training on child development and interviewing skills. Significantly, unlike a judge, child’s counsel conducts multiple interviews, over a period of time, in a neutral setting such as a school, which is a familiar and comfortable place for most children. As a result, counsel has the opportunity to establish a rapport and trust with the child that will, in time, and in most cases, yield accurate and reliable information regarding the strength, consistency and independence of a child’s views and preferences. By also interviewing the child’s parents (or other litigants) and collateral sources
such as teachers, therapists and important extended family members, child’s counsel can also gain a crucial understanding of the context or circumstances surrounding those views and preferences.

In its Working Paper 13 – Divorce\textsuperscript{16}, the Law Reform Commission of Canada commented on the practice of having children testify or be judicially interviewed. The Commission stated:

\begin{quote}
Where a custody dispute goes to trial, some judges attach significance to opinions and preferences expressed by the children but others do not. We think the children should have their opinions taken into account. We recommend that, where custody is being contested in divorce proceedings, the court should be statutorily required to ascertain the views of the children. We do not propose that the children be called as witnesses and asked direct questions respecting their preferences. Nor do we propose that the judge should speak to the children informally in his chambers.\textsuperscript{17}
\end{quote}

Most of the literature regarding child witnesses involves children who have been victims of sexual abuse and the re-victimization the child may experience were s/he to testify about the event. Many children, however, find the experience of testifying to be traumatic in itself. This point is made by lawyer Bryan Finlay and Supreme Court of Canada Justice Thomas Cromwell (then of the Nova Scotia Court of Appeal):

\begin{quote}
[T]here is a good deal of expert evidence reported in the cases supporting the view that testifying in the particular circumstances of those cases will or is likely to be damaging to the child. Moreover, counsel knows that many adults find testifying a difficult experience and it seems unlikely that children would find it less so…[C]ounsel should therefore consider very carefully whether it is essential for the child to testify.\textsuperscript{18}
\end{quote}

As the author of one American study observed:

\begin{quote}
It seems clear that putting a child on the witness stand in a custody case, and expecting him to express a preference or reveal damaging facts about one or both of his parents, is almost certain to make a bad situation worse. As observed by the New York Court of Appeal in Lincoln v. Lincoln:
\end{quote}

\begin{flushend}
\textsuperscript{16} (Ottawa: Information Canada, 1975).
\textsuperscript{17} \textit{Ibid.} at 50.
\end{flushend}
It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them.  

Professor Heino Lilles has commented on the difficulty for children of being a witness and how, consequently, the information they provide may not be very accurate or helpful:

…[T]he court appearance, can also be the most confusing, strange and traumatic for the child witness. The memory of the child may already be partially disabled due to the passage of time and exposure to extraneous facts; his memory organization techniques are underdeveloped; he may not fully understand the language of the court and certainly its purpose must be a mystery to him; often he is asked to recall traumatic events or to accuse a parent, relative or friend; and then he must cope with cross-examination of defence counsel, and exercise which is highly verbal and demanding of developed cognitive skills. In these areas, young children are clearly at a disadvantage. Furthermore, [c]hildren are less likely than adults to have the cognitive skills necessary to organize the experience for recall purposes.

The authors of a Canadian study commented on the differences in the cognitive abilities between children and adults in the context of the legal system, and how this impacts on a child’s testimony:

Children are not just short adults; they have different reasoning and communication skills. For them, words and ideas often have different meanings. Children also have more limited life experience than adults and often do not understand the reasoning or motives of adults. Additionally, they do not understand the legal system. For example, some children believe that they can go to jail if they give the wrong answer or do not answer a question. Further, children do not have the same language skills as adults. As a result, complex questions are often beyond children’s ability to comprehend. These factors affect how they understand the questions they are asked as witnesses.

---

As young children grow older, their capacity to reason increases. Nevertheless, the stress and possible trauma of testifying in a courtroom may have a bearing on the ability of a child to do so. Another Canadian study commented on this point:

When these abilities are beginning to emerge, they may not always be correct and may regress under conditions of physical or emotional stress. Under such conditions more immature ways of thinking and reasoning may re-emerge and persistent questioning may not be fruitful.\(^{22}\)

If counsel or a party seeks to compel a child to testify by issuing a subpoena, then the court must deal with the matter as part of its duty to control its own process. Professor D.A. Rollie Thompson has addressed this very issue:

The court is able to enforce its own views of the propriety of children being called as witnesses through its control over the court’s process, including subpoenas. While counsel and not the court have the right to determine who they wish to call a witness, this right is not unfettered. The trial judge retains a discretion to vacate or set aside a subpoena directed to a child, as part of any court’s ability to control its own process and also as part of its legislated mandate to act in the best interests of the child.

…The discretion must be exercised judicially which means, it is submitted, that a judge should have some evidence as to the child’s condition, circumstances and interests before ruling on the propriety of the subpoena. Because of counsel’s general control over the calling of witnesses, the onus of calling such evidence should be upon the party seeking to have the subpoena vacated or refused.\(^{23}\)

In custody/access matters, courts in Canada have generally discouraged parties from calling children as witnesses. In *Taberner v. Taberner* each parent sought to call one child as a witness.\(^{24}\) In deciding not to hear the children’s testimony, Justice Wright held that unless it is necessary for the court to make its decision, children should not be placed in the position of deciding disputes between their parents.

---

\(^{24}\) (1971) 5 R.F.L. 14 (Ont. Sup.Ct.).
In *Wakaluk v. Wakaluk*, the Saskatchewan Court of Appeal affirmed the trial judge’s decision not to allow the two children, aged 12 and almost 11 years, to testify.\(^{25}\) The Court of Appeal held that the trial judge had the discretion to quash a *subpoena* and that the possibility of further destruction to the family unit as a result of the child testifying was an important factor in deciding whether to quash the *subpoena*. Justice Brownridge stated:

> I agree with the view that, in general, children ought not to be encouraged to give evidence for or against either parent.\(^{26}\)

Justice Bayda commented on the issue of whether the trial judge was wrong in refusing to hear the children testify as to their views and preferences and on the topic of judicial interviews of children:

> Whether to allow a child to express his own wishes in a custody proceeding is a matter for the discretion of the trial judge. The age and maturity of the child are two important factors to consider in making that decision. There are, of course, other factors. Each individual case will reveal those other relevant factors…

> To call the child as a witness and ask direct questions to establish his preferences is a procedure that should be discouraged. It is generally, but not always, inappropriate…

> The procedure involving a judge speaking to a child, informally, in his chambers, also is not particularly satisfactory to me. To expect a child in such a short period and abnormal atmosphere (from child’s point of view) to choose between parents, and to expect to obtain from that child an accurate insight into the reasons for the child’s feelings and preferences is ordinarily to expect too much…

> A procedure involving a trained and competent third party independent of the parents, charged with the responsibility of ascertaining the child’s opinions and preferences using such techniques as are most likely to yield genuine feelings and wishes, and be least harmful to the child, over such period of time as may be necessary, and thereafter reporting to the court, by giving testimony or otherwise, is the procedure to be looked upon with most favour.\(^{27}\)


\(^{26}\) *Ibid* at 298.

\(^{27}\) *Ibid.* at 304.
In *Blaschuk v. Blaschuk*, counsel requested that the judge meet with the seven year-old child.\(^{28}\) In rejecting the request, the Court relied upon the decision in *Wakaluk*. In *Schweigert v. Schweigert*, Justice Foran relied upon both *Wakaluk* and *Blaschuk* when he declined to meet an eight year-old girl.\(^{29}\) Similarly, in *Pang v. Pang*, Justice Trainor relied upon *Wakaluk* in refusing to meet with a 10 year-old girl.\(^{30}\) Citing *Wakaluk*, Justice Wittmann of the Alberta Court of Queen’s Bench, in *Howard v. Sandau* stated that there are obvious policy concerns regarding the testimony of children in family law cases and, as such, special regard to the exercise of a court’s discretion must be had concerning minor children.\(^{31}\)

In *Thur v. Thur*, the court found that allowing a six year-old boy to testify directly in court was not the appropriate means of ascertaining his views and preferences.\(^{32}\) The court stated:

> I believe that the child’s wishes can be ascertained in ways other than that provided for in section 65, e.g. through expert witness evidence, the evidence of the parties. It is possibly dangerous to allow a child of age nine to attend in court to express his or her wishes by reason of the fact that if the wishes cannot be followed in light of other evidence to which the child was not privy, it might well be looked upon by the child as yet another in a long string of rejections to which it has been subject.\(^{33}\)

The court went on to say that notwithstanding section 65 of the *Children’s Law Reform Act (C.L.R.A.)* (now section 64(2)) which allows the court to interview the child to determine views and preferences), the comments of the trial judge cited by Justice Brownridge in his decision in *Wakaluk* are still valid:

> What weight can properly be given to statements on the part of the immature children not under oath, who have been caught in a tug-of-war for their entire lives. I think very little, if any, and this is why I refused to see or hear them at trial.\(^{34}\)

---


\(^{33}\) Ibid. at para. 4.

\(^{34}\) Ibid.
In *Uldrian v. Uldrian*, the Ontario Court of Appeal held that section 64(2) of the *C.L.R.A.* did not impose a *duty* upon a trial judge to interview the child.\(^{35}\)

In *Hamilton v. Hamilton*, the Saskatchewan Court of Appeal affirmed the position in *Uldrian* and stated:

\[\text{While the advisability of holding…[a judicial] interview is a matter properly left to the discretion of the trial judge, we agree that its use should be limited and not seen as an opportunity to obtain vital information shielded from the knowledge of and challenge by the litigants.}\(^{36}\)

Judicial interviews may be seen by some as a preferable alternative to a child testifying, better shielding a child from the court process. However, conducting such an interview still involves the child in the proceedings and, due to the unnatural circumstances, lack of training of judges in child interviewing skills, and usually just a single child interview, has the concomitant risk of yielding inaccurate information. In *Baxter v. Benoit*, the court commented on the practice of judicial interviews of children:

\[\text{The judicial interview has the advantage of being less intimidating than the courtroom. It has the disadvantage that few judges have the skill to conduct the interview and interpret the evidence.}\(^{37}\)

As some cases have recognized, if a judicial interview is conducted in private outside the presence of the parties and/or their counsel, then the information obtained by the judge may be prejudicial, to varying degrees, to one or both of the parties. This is another example of why the evidence of a child is best introduced by way of a third party.

In the child protection case of *C.A.S. for the County of Prince Edward v. S.H. and B.H. and E.F.* Justice Kirkland ruled, in opposition to counsel’s request, that he would not conduct an interview of the child in chambers for a number of reasons. First, he did not have the training to determine the wishes of the children or to determine if they were actually putting forth their own views. Second, evidence had come before the court that it would be very stressful for the child to come to court and participate. Third, Kirkland J. did not know what criteria to use to determine what questions should be asked. Finally, he determined that interviewing the child privately and off the record would be unfair to the parties and their counsel.

Similarly, in *Jandrisch v. Jandrisch* the Manitoba Court of Appeal commented negatively on the trial judge’s interview of four children in chambers with no one else present. Justice Monin stated:

> I am not prepared to condemn all interviews in camera by a trial judge. I honestly do not think that it is a wise or sound practice and this case seems to prove it. Such a conduct leaves the trier of fact with information, evidence or call it what you wish that the parties, counsel and members of the appellate tribunal have no knowledge of and absolutely no possibility of finding out what happened. It may be of use in exceptional circumstances but not in a hotly contested matter such as this one. In this bitter dispute where the views of the children have taken such exaggerated prominence, it was, in my view, unwise to question them in camera and then to use this information to question fairly severely one of the spouses only.

In declining to both allow the testimony of, and to interview, 12 and 13-year-old children, Justice Van Rensburg expressed concerns about the desirability and appropriateness of judicial interviews for the purpose of ascertaining the children’s custodial preferences:

> This process with Wesley and Shawn confronting their parents in open court and being examined and cross-examined by them, might well be upsetting and even traumatise and wouldn’t necessarily elicit their real views. A private interview of each child…was also not an option…A ‘behind closed doors’ consultation with the judge alone, about such an important matter, is inconsistent with the appearance of justice.

---

38 (23 March 1993), Picton (Ont. Prov. Ct. – Fam. Div.).
40 *Ibid.* at 244.
...It was inadvisable for the reasons I have noted to obtain such evidence directly from the children. In the circumstances, I would also be concerned that the stressful environment of the trial, together with the necessity of confronting both parents about the sensitive matter of which parent a child would prefer to live with might inhibit Wesley and Shawn from accurately expressing their views in court. Communication of each child’s views in a comfortable environment to an impartial third party with appropriate professional skills, in my view, provides some assurance that his true preferences will be before the court.\footnote{Ali v. Williams, [2008] O.J. No. 1207 (S.C.J.) at paras. 52 and 54.}

In \textit{S.J.M. v. D.F.M.}, the Nova Scotia Family Court cited \textit{Jandrisch} and also commented on the ability of judges to conduct interviews of children.\footnote{(1985) 67 N.S.R. (2d) 335 (N.S. Fam. Ct.).} Justice Daley held that:

...the judiciary are, with rare exceptions, not trained in the human behaviour sciences nor have the specialized training or experience with children who are undergoing possibly the most traumatic experience a child can fact in its young life.\footnote{Ibid at 344.}

In \textit{L.E.G. v. A.G.}, the British Columbia Supreme Court cogently addressed the issue of conducting judicial interviews of children.\footnote{[2002] B.C.J. No. 2319 (B.C. S.C.).} Justice Martinson held:

Concerns about the judge interview have been raised that go beyond procedural safeguard questions. Judges usually are not trained to interview children in a way that allows them to accurately assess the real wishes of the child. Judges lack knowledge about developmental differences in cognitive, language and emotional capacities in children. From a clinical perspective, being interviewed in chambers can be far from a relaxing experience for children. Rather, it can be a formidable and inherently stressful experience for most children...

...A judge may not be able to obtain accurate information in one relatively short meeting...There is an added concern that the judge may think that he or she has received accurate information when the information is not, in fact, accurate.\footnote{Ibid. at paras. 25-26.}

In the custody case of \textit{Palumbo v. Palumbo},\footnote{[1982] O.J. No. 1576 (Ont. Sup. Ct.- H.C) } Justice Eberle declined to conduct a preference interview with 12 and 14-year-old children, stating that although he does so on some occasions, he did not find it satisfactory:

I have no magic in dealing with children.
And the situation is worsened by the fact that an interview by a judge, even in chambers, with no one else present, is an interview, by a child, with a complete stranger in strange surroundings. And these children are certainly at an age where I am sure that both of them are aware that the trial is going on today between their parents, and I am sure both children will be fully aware of the great pressures and stresses that are upon everybody who participated at trial.

And so, it seems to me that interviewing a child, or children, in an attempt to determine their real wishes in those circumstances is to do so in entirely false circumstances, unreal circumstances, and circumstances in which, if one were to arrive at the right answer, it would be only by luck and good fortune, and not for any other reason. So I am not inclined to interview the children.47

Wayne D. v Christina D. was an access case where a father issued and served a subpoena to his 10 year-old child to testify as to whether the child wanted to see his father’s common law partner.48 The child was fearful about attending court. The court declined to have the child testify and accepted the submissions of counsel for the child about the child’s wishes. Judge Felstiner felt that bringing the child to court to express an opinion might be traumatic to the child and that any answers given to questions in court would be those that the child felt would please the parent or the court.

In S.E.C. v G.P., the Court refused to allow a 13 year-old girl to testify.49 Justice Perkins stated:

I...find that having to testify would likely be traumatic for her, and while it might not cause long lasting damage, it would nevertheless cause her real harm that could last for some time...It would be ironic in the extreme on a custody and access issue, where the only factor is what is in the best interests of the child, if the litigation process were used so as to cause harm to the child for the ostensible purpose of ascertaining her wishes or even shedding light on her best interests.50

In T.W. (Re), Justice Schmaltz quashed a subpoena for T.W., an 11 year-old boy, to testify at a child protection hearing as oppressive and not in his best interests. The court held:

47 Ibid at paras. 4-6.
48 (11 April 1990), North York D.620/82 (Ont. Prov. Ct. – Fam. Div.).
50 Ibid at 265.
Subjecting a young child to court procedures, examination, cross-examination is not a reasonable way to ascertain a child’s views or preferences. Court procedures and the adversarial system were not designed with children in mind... The legislators have recognized that requiring a child to attend court in what can only be described as a highly emotional situation for adults, is more than likely a confusing, frightening, stressful, and potentially traumatizing situation for a child.51

In *Mamchur v. Mamchur*, notwithstanding the fact that both counsel wanted the judge to interview a 12 year-old boy in chambers regarding his views and preferences in a custody/access proceeding, the court declined to do so.52 The court stated:

Counsel for each of the parties, with somewhat different degrees of enthusiasm, invite me to question Bryce privately to ascertain the sincerity or otherwise of his expressed desire to live with his mother. I have indicated informally to counsel, and repeat, that I am at least ambivalent as to the value of such an interview in a situation such as this, where so youthful a person expresses a preference and thus to exhibit a maturity which I simply think not possible. There is a traumatic factor, with possible adverse effect upon Bryce, in the conduct of such a proposed interview. I consider this undesirable.53

*McCartney v. McCartney* was a custody/access case involving a 10 year-old girl whose father wanted the judge to speak with her in chambers; the girl’s mother opposed this request.54 Justice Mullally declined to interview the child and said:

I have decided not to see the child. I am strongly of the opinion that children at this age want and expect these decisions to be made for them...This burden should never be with a child. It must be assumed by adults and in this case the court must make the decision.55

53 Ibid at 67.  
55 Ibid at 71.
Similarly, in *Mannila v. Mannila*\(^{56}\), Stach J. commented on a request from one of the parents’ counsel regarding His Honour possibly conducting an interview with the 11-year-old girl who was the subject of the litigation over which of her parents should have custody:

…I have grave doubts as to the value of an interview, specifically with a shy child. I am reluctant to subject Ashley to this unnecessary trauma, and to the risk that she may feel ‘responsible’ for the ultimate decision which in any event must be made by me alone. I adopt the rationale of another judge who said that this burden should never be imposed upon a child and that it must be assumed by adults. In this case, this court must make the decision.\(^{57}\)

In *S.R. v. C.S.*\(^{58}\), a father of two girls aged 11 and 10 asked the court to interview his children after the mother had cut off his access to them. Justice Skilnick reluctantly met with the children because the parties’ positions were polarized and there was no independent evidence of the children’s views. However, the judge did not ask the children to state a potential preference, nor did he report on any direct statements of what the children had expressed. Justice Skilnick stated:

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.\(^{59}\)

\(^{57}\) Ibid.  
\(^{58}\) [2006] B.C.J. No. 8 (B.C. Prov. Ct.).  
\(^{59}\) Ibid. at para. 18.
In *British Columbia (Superintendent of Family and Child Service) v. S.H.*, the court addressed both the issue of a child testifying in court and being the subject of a judicial interview in chambers. Justice Stansfield held:

Certainly in theory either even should provide an opportunity to assess the child just as one does any other witness, but I doubt it is very realistic to expect that with a young child who is for a brief period asked to speak to a number of strange persons in an intimidating environment that one will find the child sufficiently outspoken and articulate to permit reliable insight or penetration beyond whatever programming may have occurred over a protracted period.

I heartily endorse the view that young children should not be put in the position of ‘choosing’ between proposed caregivers.

**Judicial Role**

By conducting interviews of children the actual role of a judge is brought into issue. In the adversarial system the judge’s role is to be an impartial trier of fact. Yet, by intervening to conduct child interviews, the judge becomes a participant in the evidence gathering process by assuming an inquisitorial role. This latter role is considered by some to be a violation of the judge’s position to be an impartial adjudicator in the Anglo-American legal tradition. A thoughtful observation about the practice of judicial interviews of children was published in 1983 by a Committee comprised of Judge Abella (as she then was), Justice L’Heureux-Dubé and Justice Rothman. The Committee was critical of judicial preference interviews of children and concerned about judges assuming the role of an inquisition in questioning children thereby possibly compromising their impartiality. The Committee stated:

The practice of interviewing children in chambers by a judge is not an ideal way to ascertain a child’s wishes. The interview is conducted in an intimidating environment by a person unskilled in asking questions and interpreting the answers of children. In the relatively short time these interviews take, it is difficult to investigate with sufficient depth and subtlety those perceptions of a child which explain, justify or represent the child’s wishes. Moreover, the interview may be perceived as a violation of the judge’s role as an impartial trier of fact who does not enter the adversarial arena. The impartiality may also be

---

61 *Ibid* at paras. 52-53.
compromised by the judge assuming the role of the inquisitor in questioning children.

…With the increasing use of independent legal representation for children, the judicial interview is likely to be replaced by a more expert and skilful assessment of a child’s wishes arranged with the assistance of counsel for the child. Where other methods appear to be unavailable, the judge’s interview is an appropriate last resort, provided it is conducted in a manner which does not violate the rights of the parties to due process.62

In *Richie v. Harkness-Gehle*63, Justice Pugsley addressed the mother’s request for him to interview an almost 14-year-old girl to ascertain her views and preferences:

In my view, such a personal meeting runs the risk of the judge’s entering the fray between the parties and the practice should be used very rarely and only where all other means of ascertaining the child’s views are absent. Indeed, in my view, this was one of the founding reasons for the creation of the…Office of the Children’s Lawyer

Eberle J. in *Palumbo v. Palumbo*, commented on the position in which he could have found himself if he had decided (which he did not) to interview the 12 and 14-year-old children:

If, as a result of that, I were to conclude that they wanted to be with one particular parent, if I were to conclude that they had strong feelings one way or another, what is the situation that I would be faced with? It would either be a situation in which I, in effect, abrogate the responsibility (a responsibility that I do not seek but which is put upon me) in deciding what I think is in the best interests of the children. I abrogate that responsibility to simply ascertain their wishes or, having ascertained their wishes, go against them.64

This blurring of roles should be of concern even to those who have a broad view of the role of a judge. Many judges are concerned about legislation which places them in the position of being an investigator. Yet at the same time, some of the same judges, are seemingly, open to becoming, in effect, an investigator, when they conduct a forensic interview with a child.

---

64 Supra note 46 at para. 7.
Recently retired Justice Martinson of the British Columbia Supreme Court has provided some insightful commentary on some of the misconceptions some generalist judges hold regarding their ability to deal with difficult family law matters. Justice Martinson’s observations have applicability to those judges who seek to conduct forensic interviews with a child:

Judges sometimes think that because of their life experience as a child, a partner, a parent and a lawyer, they can figure out the right result in any family law case they face. They were, after all, selected as judges because they were viewed as having what it takes to make decisions. However, being able to identify these cases, determine the nature of the problem and devise the necessary solutions is not intuitive. Nor is the information and expertise required learned from day-to-day life experience. Yet, making the wrong choices can be harmful to children.  

Most judges who have conducted judicial interviews of children or are contemplating doing so, are no doubt, motivated by a desire to act in the children’s best interests by seeking their input or, as judges may perceive it, as giving a voice to the children who are the subjects of the litigation. However, instead of relying on their intuitive belief that they may be able to obtain reliable information from such children, judges would, in my respectful opinion, be wise to consider the social science literature regarding how most qualified mental health professionals view the effects on children of participating in judicial preference interviews. Psychologist Joan B. Kelly provides a clinical perspective that judges would be well served to consider when determining whether to conduct judicial preference interviews of children:

Interviewing a youngster can bring the child into sharp focus for a judge, particularly when parents and their attorneys describe the child’s needs in widely divergent ways. On the other hand, from a clinical perspective, being interviewed in chambers is a formidable and inherently stressful experience for most school-aged youngsters. Except for youngsters who are pathologically alienated from a parent, and who often want and enjoy the power of the judges’ attention, the majority of children are in untenable psychological positions in interviews with judges. Assuming that their discussions are not confidential, they may simultaneously experience intense loyalty, conflict, guilt and fears of retribution or serious damage.

to the parent-child relationship. Further, judges are not trained in child interviewing skills, and generally lack knowledge about developmental differences in cognitive, language, and emotional capacities. Thus, it is hard for even the most experienced judge to place children’s responses in an appropriate context and evaluate the weight that should be given to their wishes.\textsuperscript{66}

Indeed, courts are now far more willing to consider and rely upon social science literature in family law cases, whether or not it was formally introduced into evidence.\textsuperscript{67}

Judges sitting in family courts have an extremely challenging job determining child custody and access cases. It is made far more difficult when, in increasingly high numbers, the litigants appear without counsel, usually because they do not qualify for legal aid. In addition, the cost of obtaining custody/access assessments is, for many people, prohibitive. The Children’s Lawyer in Ontario offers both legal and clinical services to children but is unable to be involved in every case before the courts. Most other Canadian provinces and territories offer little or no legal services to children in these areas. In addressing all these concerns (in the context of government restraint in British Columbia in 2002), Justice Martinson commented that it has become more difficult to determine what a child’s wishes are, in a neutral way, through a third party:

> The effect of these cutbacks may be to deny access to justice to families and to deny children the individual justice to which they are entitled. It would be unfortunate if the courts find themselves in the position where judges are resorting to a judge interview because it is the only option available, rather than because it is the method that is in the best interests of the child whose future is at stake.\textsuperscript{68}

\textit{Circumstances in which it may be Appropriate for a Judge to “Meet” with a Child}

There are circumstances where a judge, who ideally has received some appropriate formal training on child development and how to talk to children of various ages, could meet and have a

conversation with the child who is the subject of the litigation. As long as this get-acquainted meeting is contained and does not devolve into a forensic interview seeking the child’s preferences, it may, in fact, humanize the case for the judge. In *Stefureak v. Chambers*\(^6^9\), Justice Quinn addressed this perspective:

> …[S]ome judges have held that meeting with the child is not necessarily a matter of attempting to determine the wishes of the child, but may better serve simply to come to a further understanding of who the child is for the purposes of determining best interests.\(^7^0\)

Similarly, the British Columbia Court of Appeal commented on judicial interviews:

> …[T]hose private interviews are often undertaken not in the purpose of obtaining statements of preference from the child, but to obtain a better idea of the nature of the child. It is helpful to a judge considering the difficult question arising in custody cases to know the child as well as he can.\(^7^1\)

Finally, in *More v. Primeau*\(^7^2\), Justice Blair interviewed an 8-year-old boy in his chambers and stated that:

> Before doing so I advised counsel that I did not intend to question him about his wishes about the outcome of this trial. I had no illusions about my ability to determine the true wishes of a child in such a short discussion conducted under all the emotional pressures surrounding this trial. I simply wanted to see what kind of a boy he was…

Although courts use the term “interview” in the context of a “get-acquainted” interaction, it is probably more useful in this debate to characterize this contact as a “meeting” or “conversation” as opposed to a “forensic interview” with its primary purpose to elicit the views and preferences

---

\(^7^0\) Ibid. at para. 67.
\(^7^2\) [1977] O.J. No. 913 (Ont. Sup. Ct. – H.C.)
\(^7^3\) Ibid. at para. 22.
of a child. This process allows children to feel that they have been heard while at the same time, does not burden them with feeling that it is their responsibility to resolve their parent’s disputes.

A judge may want to meet with a child at a preliminary stage of the proceedings to explain what may happen as the case progresses. For example, a judge may want to talk to a child to explain that an assessment was ordered and that the child and his parents (and possibly others) will be meeting with a social worker, psychologist or psychiatrist who will then be making recommendations to the judge about various issues, including custody and access.

A judge may also want to explain a court order to a child and both parents that s/he has made and express the expectation that the order be followed. In *Reeves v. Reeves*74, Justice Mossip dealt with a severe alienation case in which she transferred custody of 16 and 13-year-old boys from their father to their mother. In proposing to meet the children, Her Honour stated:

> I intend to advise them of my Court order and what is going to happen immediately following my discussion with them.75

Given the dramatic nature of a reversal of custody order, especially with older children, it is of some, albeit likely minor benefit, for a judge to assume responsibility for the decision, relieving some of the burden from the new custodial parent.

Finally, a judge may have a case involving exigent circumstances. There may be a need to ascertain the preferences of a child where time is of the essence and the quick intervention of a mental health professional or child’s counsel is, practically, not possible. One example of this in Ontario was in September 2009, when a judge interviewed a child on the eve of school starting

---

with the parents proposing two different and credible school options. Given that school was about to start, the judge believed that an immediate decision was necessary and that the 15-year-old child was capable of communicating a preference on this issue, independent of her parents.\textsuperscript{76}

One must be careful, however, not to label all high conflict cases as exigent simply because they are high conflict. Most cases do not need an immediate decision requiring the direct involvement of the child.

\textbf{Conclusion}

There is a need to confront the reality that although some judges might want to interview children, it is the experience of children’s counsel in Ontario that the vast majority of children have no interest or desire to be interviewed by a judge. Of course, it is acknowledged that these children are already having their views placed before the court by child’s counsel. However, many older children understand that child’s counsel, as part of their responsibilities, will also be informing the court of the context or circumstances surrounding these views which may not support the child’s views, yet they are still not interested in attending court or speaking to a judge. Typically, those very few cases in which a child has expressed to their counsel a desire to speak to a judge involved severe parental alienation where there was a parent motivating the child to inform their counsel of this desire so that the child could then advise the judge of their (influenced) wishes.

The lack of strong social science research on judicial interviewing of children should not be filled by an emerging mythology which suggests that many or most children actually want to talk to a judge about their preferences and that this is a desirable and sound practice.

\textsuperscript{76} Davies v. Aldcroft (3 September 2009) Toronto D29015/05 (O.C.J.).
Judges also need to be alert to the unintended consequence that if a preference interview is conducted with a child who is legally represented, there is a risk that the child will be empowered to the point of refusing to then talk to their counsel, wanting only to talk with the judge.

Quite apart from the issue of interview training, without fundamentally altering a judge’s role as an adjudicator, judges, as a practical matter, simply cannot conduct multiple interviews and do so in a familiar place to a child, such as a school. The result of this is that it is difficult, in most cases, for a judge to develop a genuine rapport and trust with a child, which would likely yield more accurate and reliable information regarding the strength, consistency and independence of a child’s views along with the significant circumstances surrounding those views.

I suggest that the issue of judicial interviewing of children for forensic purposes should be revisited only when a majority of mental health experts conduct credible, empirical, peer-reviewed studies which clearly and conclusively demonstrate that, in their currently defined role as adjudicators, judges can ascertain accurate and reliable information from children and that, in doing so, no harm will be visited upon the children. The legal community should pay serious attention to lessons learned from qualified psychologists, social workers and psychiatrists who, I believe, are far more knowledgeable in this area than people trained in the law.

In many western jurisdictions family law has evolved positively from the former practice of judges sometimes interviewing children in chambers to elicit their preferences, to the use of well-trained mental health professionals or child’s counsel. While there is always room for improvement, this has been a marvellously progressive and successful development which has been expressly and tacitly acknowledged by courts.
The well-meaning and renewed efforts to provide children with input into the decision-making process about their custodial placement and visitation schedules by conducting judicial interviews seeking their preferences, has been posited by some as progressive. I respectfully disagree with this characterization and would submit that, save for very limited exigent circumstances, this approach is a step back to an era to which we should not be returning. Instead, efforts should be directed to establishing guidelines to which judges can refer when considering whether to have a meeting or conversation with a child, a preference interview or neither. These guidelines should, of course, be drafted by judges, who could benefit from the input of qualified mental health professionals and experienced child’s counsel. Although judges in many jurisdictions will still have the authority and discretion to conduct judicial interviews, guidelines, with broad and multidisciplinary input, is the optimal way to deal with a debate that has, seemingly and regrettably, resulted in polarized and entrenched positions. We owe such an effort to children who, through no fault of their own, find themselves in high conflict cases in the family justice system. There is a need to develop a sensible approach to judicial interviews/meetings that serves children’s interests and is grounded in sound social science literature and research.