The Twists and Turns of Children’s Participation in Family Disputes: What a Tangled Web Professionals Weave

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The Importance of Children’s Participation in Family Decision-Making

The movement towards the inclusion of children in the decision-making process following separation or divorce process is emerging as an important area of practice, policy and research. Scholars and practitioners from many countries have written thoughtfully about the importance of involving children in decision-making post separation and the different ways they can be included.⁴ The Convention on the Rights of the Child⁵ creates an obligation for

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governments to ensure that children are provided with an opportunity to express their views about decisions affecting their well-being, consistent with their age, capacity and desire to participate. Yet, certain controversies and tensions continue to exist with respect to children’s participation in parental decision-making post separation. In part, these tensions are a result of divergent underlying theoretical assumptions.

Some take the view that children have rights and should be encouraged to express their views, particularly when the concerns relate to their future well-being, while others take a more cautious view of children as needing to be nurtured and protected from parental conflict. An important argument for children’s participation is that they have better outcomes if they know that they have been involved and heard, and they understand what will be happening.

Allowing children to directly participate provides more meaningful and respectful listening to their wishes and needs. Arguments against children becoming directly involved include concerns that they lack the ability to assimilate relevant information, and they children may be

5 The child’s right of participation is recognized in the United Nations Convention on the Rights of the Child, which all countries in the world have signed, except the United States. Article 12 of the Convention states:

12 (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

6 Rodham (1973); Freeman (1983).


manipulated by one parent into providing inaccurate information. An important argument against the participation of children in family dispute decision-making is that it is harmful to children, both in terms of short term stress and long term effects on relationships with one, or both, parents and other family members. However, many of these well-meaning arguments against involving children are made by family justice system professionals (i.e., social workers, psychologists, psychiatrists, lawyers, judges) involved in the justice system without apparent awareness of the growing body of research about children who eloquently describe their sense of exclusion from the process and, in many cases their desire to meet with the judge, as well as research about the positive experiences who were involved, including those who met with the judge.

There is a significant scholarly body of literature written about the importance of child representation and the role of children’s lawyers, few studies of the practice experience of

lawyers who represent children\textsuperscript{14}, the views of children being represented by lawyers in child custody disputes\textsuperscript{15}, in child welfare matters\textsuperscript{16} and, judges’ views about meeting with children.\textsuperscript{17}

Moreover, little is understood and written about the practice experience and attitudes of


children’s lawyers involving children in judicial interviews\textsuperscript{18} and none that we are aware of, that compares their attitudes and experiences across different jurisdictions\textsuperscript{19} that have very different practices and policies in representing children in either child protection matters or domestic disputes. This is particularly surprising given the extent social science research and legal literature written on the importance of children having a ‘voice’ in family law matters and the \textit{Convention} that emphasizes children’s legal rights.\textsuperscript{20}

Part 1 of this paper provides the context and empirical research on the experiences of children involved in family cases being represented by a lawyer, interviewed by a court appointed mental health professional and meeting with a judge. We also review the small body of research on lawyers’ experiences with representing children and judges’ experiences with interviewing children. Part II explores empirical research about the experiences and attitudes of lawyers representing children and their views on judicial interviews of children in Ontario and Alberta, Canada; two jurisdictions that have very different approaches to the role of child’s

\textsuperscript{18} In this paper, we often use the terms judges meeting with children as well as judicial interviews of children. While there has been some debate about whether these meetings are ‘forensic’ in nature, our view is that the meetings are an opportunity for the judge to get to know the child and hear what the child has to say about their particular circumstances.


counsel.\textsuperscript{21} We conclude with some limitations to these studies and explore broader practice and research implications. Part III explores the Israeli experiences with children’s participation and judicial interviews. In this section we set the context for children’s participation against the backdrop of Israel’s Rabbinical courts and explore a research study that attempts to meet children’s needs as envisaged by the \textit{Convention}.\textsuperscript{22} What becomes apparent is that irrespective of jurisdiction and legislative regimes children’s participation is very dependent on the attitudes and beliefs of the professionals (i.e., lawyers, mental health professionals, judges) in the family justice system. We conclude with, what a tangled web “we” professionals weave in engaging children’s \textit{active} participation in matters that affect their well-being and explore policy implications for ongoing practice and research with children.

A central argument of this paper is that lawyers and mental health professionals are gatekeepers to the family justice system, and too often does not support appropriate involvement by their child clients in family dispute resolution processes (i.e., mediation, parenting coordination, judicial interviews). As a result, professionals may disregard the views of their clients, and, may also be undermining children’s best interests.

\textsuperscript{21} See Bala, Birnbaum, & Bertrand (in review) for a more thorough analysis.
\textsuperscript{22} There are a number of ways that children can be heard in the family justice system. Typically children’s views and wishes are heard most often through mental health assessments (i.e., psychological, psychiatric and social work assessments/investigations), audio/video or letters written by the child, hearsay evidence by their parents, child legal representation, child-inclusive mediation, and more recently through judicial interviews. Judicial interviews are most common in Ohio and in some states throughout the USA, in New Zealand, Germany and England. In Canada, they are more common in Quebec and while less common in Ontario, there appears to be more judicial interviews occurring with time. See R Birnbaum & N Bala, “The Child’s Perspective on Legal Representation: Yong People Report on their Experiences with Child Lawyers” (2009) 25:1 Can J Fam L 11; R Birnbaum & N Bala, “Judicial Interviews with Children in Custody and Access Cases: Comparing Experiences in Ontario and Ohio” (2010) 24:3 Int’l JL Pol’y & Fam 300; R Birnbaum, N Bala & F Cyr, “Children’s Experiences with Family Justice Professionals and Judges in Ontario and Ohio” (2011) 25:3 Intl JL Pol’y & Fam 398; J Cashmore & P Parkinson, “Children’s and Parents’ Perceptions on Children’s Participation in Decision Making after Parental Separation and Divorce” (2008) 46 Fam Ct Rev. 91; M Fernando, “What Do Australian Family Law Judges Think about Meeting with Children?” (2012) 26 Austl J Fam L 51; T Morag, D Rivkin & Y Sorek, “Child Participation in the Family Courts – Lessons from the Israeli Pilot Project” (2012) 26:1 Int’l J L Pol’y & Fam 1; P Parkinson, J Cashmore & J Single, “Parents’ and Children’s Views on Talking to Judges in Parenting Disputes in Australia” (2007) 21:1 Intl JL Pol’y & Fam 84.
Part 1: Research on Children’s Participation in the Family Justice System

(a) Children’s Experience with Family Justice Professionals

There is a growing body of research based on interviews with children about their experiences in the family justice system being represented by a lawyer, involvement in an assessment by mental health professional, and being interviewed by a judge to bring their views into the family court system. Several themes emerge from this body of research about what children say that they need and want from the different family justice professionals. These themes include but are not limited to:

- children believe that, in principle, children should have an opportunity to express their views and preferences about their living arrangements; however, many children are themselves reluctant to express preferences due to feelings of guilt or loyalty conflict;

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• children understand the distinction between having a voice in the process and making a decision; they understand decisions will be made by adults, whether their parents or the judge;
• children want to be involved in decision-making at an early stage in the separation process, including being adequately informed by their parents about plans for their care in the aftermath of separation;
• children want to share their views and feelings with the different professionals as well as their parents (Birnbaum & Saini, in press, 2012).

Research also indicates that too often children did not feel that they benefitted from their involvement with lawyers or mental health professionals, and would have preferred to have decisions made without involving the family justice system. Figure 1 depicts the broad and overlapping tensions and themes found in both child protection and child custody literature about what children have to say and feel about being involved with the different family justice professionals.

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26 Campbell (2008); Neale & Smart (1998).
(b) Lawyers Experiences with Representing Children

To date, much of the literature on the role of child’s counsel has been based on theoretical perspectives of scholars or the attitudes and experiences of lawyers who represent children. There are a few studies that explore the practice experience of lawyers representing children. In Canada, only two studies conducted to date report findings from a qualitative study of 29 lawyers who represented children on behalf of the Office of the Children’s Lawyer in Ontario and a mixed method study that surveyed lawyers in both Ontario and Alberta concerning their experiences and attitudes about legal representation of children in child

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28 The OCL is a publicly funded legal office that represents children’s legal interests before the court in custody and access disputes, child welfare matters, civil litigation and estate matters. These lawyers were only asked questions in relation to their experiences representing children in custody and access disputes.
protection and domestic cases\textsuperscript{29}. In the first study\textsuperscript{30} many of the lawyers expressed the view that there had been a shift in the role of child’s counsel over the years, away from advocating based on the views of their child clients (instructional advocacy) towards advocating based on the “interests of the child.”\textsuperscript{31} Many of the participants reported that as a result of this shift in the role of child’s counsel, many felt ill equipped to deal with a role that requires advocacy based on counsel’s assessment of a child’s circumstances. In the words of one lawyer,

“[T]o take complicated social work information, process it, and develop a position…..I would rather a child’s counsel, I think, focus on legal issues, meeting with the child, obtaining wishes and preferences, getting instructions and acting more as a lawyer than a social worker”.\textsuperscript{32}

In the only other study in Canada about lawyers representing children our\textsuperscript{33} findings revealed a significant disagreement among lawyers about the role that they should adopt when representing children who want an outcome that differs from their lawyers assessment of what is in their interests. A significant finding in both Ontario and Alberta is a substantial number of lawyers have their own approaches to their roles; official policies seem to have limited impact on the practices of lawyers for children; whether the policies direct lawyers to adopt a best interests guardian or a traditional advocate role. However, lawyers generally seem more comfortable adopting an instructional advocacy role, especially for older children.

Cashmore & Bussy (1994) in Australia reported on the experiences of 20 lawyers involved in child representation in child welfare matters. In regards to the role of counsel and

\footnotesize{\textsuperscript{29} Bala, Birnbaum, & Bertrand (in review).  
\textsuperscript{30} Birnbaum & Bala (2009).  
\textsuperscript{31} See Bala, Birnbaum, & Bertrand (in review) who compare and contrast the different role of child’s counsel in both Alberta and Ontario.  
\textsuperscript{33} Bala, Birnbaum, & Bertrand (in review). Also see Bertrand, Bala, Birnbaum, & Paetsch (2012) for further analysis of the Alberta lawyer’s survey at: http://people.ucalgary.ca/~crilf/sub/research.html. (last accessed December 18, 2012).}
children’s instructions, the researchers found a mixed response; some lawyers reporting their role as an advocate for the child without qualification, some as a guardian representing the child’s interests and the child’s instructions were not binding, and the majority reporting that they represent the child’s wishes to the court and well as their [the lawyers’] own reservations about those wishes and their own view to the court. With respect to the types of discussions lawyers have with their child clients, only 5 lawyers reported that they specifically inform children that their [lawyer] role is to communicate the child’s wishes to the court, many reported that they did not need to see their role as explaining to their child clients what happens in court; and only 4 lawyers believed that children had a right to be present and best for children not to be present at all. In addition, the researchers found that lawyers did not think about children’s views before they began representing them and many expressed that they did not think children would understand the lawyers’ role or that conversations between lawyers and their child clients were confidential. Douglas, Murch, Miles, & Scanlon (2006) in England report a form of children’s representation involving a children’s guardian (typically a social worker). This approach provides a mix of best interests and interests of children approach.

The studies about lawyers’ views and attitudes about child representation are quite limited compared to the body of literature that examines the different roles of child’s counsel.34 We argue that there needs to be more research, continuing education and guidance for lawyers representing children in child protection and domestic disputes about how to engage with children and allow their voice to be heard. Only by unpacking the myths from the realities of children’s lives post separation will lawyers obtain a better understanding of what children need

34 Also see Nicola Ross, “Independent Children’s Lawyers: Relational Approaches to children’s Representation” (2012) 26 AJFL 214 who surveyed lawyers in Australia who represented children in domestic disputes, child protection and juvenile justice matters about their views on the role of child’s counsel in relation to children’s participation.
and how best to support them during times of parental turmoil. While there needs to be flexibility to take into account of the circumstances of individual children, at present; the attitudes of the individual lawyers doing this work can play too great a role in determining how children will be represented and whether their wishes and needs will be conveyed to the decision-maker.

The empirical research also provides a stark contrast between what children say about their participation and their views of different family justice professionals, particularly with meeting a judge and what lawyers, mental health professionals and judges say about involving children in child protection and domestic disputes.

(c) Judges Experiences with Meeting Children

In contrast to the few studies about lawyers practices and beliefs about representing children, there is a growing body of research exploring the practices and experiences of judges meeting with children in family cases, albeit primarily in domestic cases. Birnbaum, Bala, & Cyr (2012) reviewed empirical research that surveyed or interviewed 170 judges from Canada, the United States, Scotland, New Zealand, and Australia about their experiences with meeting children.35 The concerns raised by the judges against meeting with children as well as the reasons they gave about the importance in meeting with children mirror the theoretical and practice arguments about involving children in decision-making post separation—that is, protectionist vs. children’s liberation.

In jurisdictions where judicial meetings with children are more common (i.e., Quebec, Ohio, Germany, New Zealand, Scotland) most judges view these meetings as being very helpful

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35 This number does not include the two studies of 44 judges interviewed in Australia by M Fernando, “What Do Australian Family Law Judges Think about Meeting with Children?” (2012) 26 Austl J Fam L 51;and the 34 family court judges in New Zealand by Cochrane, Billings, & Plymouth (2006).
to them in their decision-making while some other judges view these meetings as less than helpful and believe that emotional harm can result to the child from these meetings. For example, in Quebec, judges reported both helpful:

“I would say that about 90% of cases, it has been helpful. It could be just a small thing that makes a difference to what happens next”.

“I find it interesting to know that this is the “little person” at the end of the process that will live with the decision that I make”.

“I want to see the human being whose life I will assign. It is important for me to see what kind of person is this child”.

“It can be useful, because it allows you to see what the motivation of the child is who wants to talk to the judge”.

“I believe in hearing the child and I do it. My experience over 18 years is that I think it was beneficial for children”.

……..and not helpful:

“Interviewing children did not help me to confirm or question the parent’s allegations”.

“Almost always, though it happened a few times when it was not helpful”.

“I did not know how to handle the strong emotional outburst of the child. Felt he was harmed by this interview”.

36 R Birnbaum, N Bala & F Cyr, “Children’s Experiences with Family Justice Professionals and Judges in Ontario and Ohio” (2011) 25:3 Intl J Pol’y & Fam 398; M Fernando, “What Do Australian Family Law Judges Think about Meeting with Children?” (2012) 26 Austl J Fam L 51; Williams (2004); M Fernando, “What Do Australian Family Law Judges Think about Meeting with Children?” (2012) 26 Austl J Fam L 51; Parkinson & Cashmore (2007). In addition a Resolution was passed at the 5th World Congress on Family Law and Children’s Rights in 2009, Canada Resolution 20 that states whether a judge hears from a child, ‘shall depend on the child’s age and maturity, whether the child wishes to see the judge, and all other relevant circumstances including whether other material is available. 5th World Congress on Family Law and Children’s Rights, Halifax, Nova Scotia, Canada. In a survey conducted with this international group of legal professionals at the 5th World Congress on Family Law and Children’s Rights in 2009, just over one-half of the respondents thought that judicial interviews with children was a good mechanism for hearing their views (Paetsch et al., 2009). It is also important to note that since the Congress in 2005, there have been many conferences, presentations, discussions and debates on this topic. In Ontario, Canada, judicial interviews of children have been occurring in frequency. Bala, Birnbaum, & Cyr (2012) have written a discussion document on guidelines for judges meeting with children (AFCC, Chicago, 2012).

37 Quebec data was obtained by Cyr in our ongoing study of judicial interviews with children.
There are controversial issues about judicial interviews, and especially in Canada, there is only limited appellate authority or legislation to provide guidance. In Ontario, the *Children’s Law Reform Act*\(^{38}\) provides that judges “may” interview children to ascertain their “views and preferences,” but gives little guidance about when and how this is to be done, except providing that a record is to be kept, and stipulating that if a child has counsel, the child has the right to have counsel present. Child protection legislation in Ontario\(^{39}\) provides for the presumptive right of the child to attend a child welfare proceeding if the child is 12 years or older.

One way to allow a family law judge to hear from a child in a manner that is less distressing to the child than appearing in court or testifying in the presence of the parents is for a judge to have an opportunity to talk to the child in the judge’s chambers. Outside of Quebec, it has not been common for Canadian judges dealing with family law cases to hear directly from a child, but this practice is common in some other jurisdictions and there is growing interest in this in Canada. If a decision is made that the judge should hear directly from the child about his or her wishes in a family law case, it is often preferable for this to happen in the less intimidating setting of the judge’s office, without the parents or their counsel present. For example, Quebec judges report:

“I remove my robe, so as not to impress the child. Then I descend from the bench judge and sit next to the child at his level”.

“I shake the child’s hand and welcome him with a little babbling and introduce myself to him, tells him who I am, what I do and how and why I will hear him”.

“I sit somewhere in the room on a seat where I'll be at the same level as the child”.

\(^{38}\) R.S.O. 1990, c. C-12.  
\(^{39}\) Child and Family Services Act, R.S.O.,C.11,s 39(4).
“I explain to the child my role as a judge. I tell him that I am going to make the decision, but before that I want to hear everyone notice or opinions about the situation”.

Most provinces in Canada do not have legislation to authorize such interviews, but case law has clearly established that in a family law proceeding where the welfare of a child is the central issue, the judge has an inherent authority to interview a child in chambers. In *Saxon v. Saxon* the trial judge decided in a custody matter to see children in his chambers as both parties, through their counsel, consented. The judge emphasized that he did not allow the comments of the children to be the sole basis upon which he decided the case. The Manitoba Court of Appeal has held that while the judge has a discretion to conduct such a private interview, its purpose must be limited to ascertaining the children’s wishes, and a record of the inquiry is necessary, finding that it is an error of law for the judge to use the interview to collect information upon which to test a party litigant.

Martinson Prov. Ct. J. reviewed the jurisprudence on judicial interviews in child custody cases, concluding that the court has jurisdiction to interview the children, even in the absence of the consent of both parents. If a private judicial interview is conducted, the question arises as to the extent of disclosure of information to the parties subsequent to such an interview. The British Columbia Court of Appeal decision in *Re Allan and Allan* and the Manitoba Court of Appeal decision in *Jandrisch v. Jandrisch*, stand for the proposition that where the judge sees the child in private, even on the consent of the parties, the information obtained by the judge should be

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40 See e.g., *Jandrisch v Jandrisch*, [1980] 3 Man R (2d) 135 at 249-50, 16 RFL (2d) 239 (Man CA); *M.E.S. v D.A.S.*, 2001 ABQB 1015 at paras, 98 Alta LR (3d) 216, Lee J.
42 *Jandrisch v Jandrisch*, [1980] 3 Man R (2d) 16 RFL (2d) 239 (Man CA).
43 See also *Uldrian v. Uldrian* (1998), 14 RFL (3d) 26 (Ont CA) (1988), which states that there is no duty to have a judicial interview, but the trial judge has the discretion to do so.
44 *Allen v Allen* (1958), 16 DLR (2d) 172 (BCCA).
45 (1980), 16 R.F.L. (2d) No. 239 (Man. C.A.) at 249-50
disclosed to the parties so that they might have an opportunity to controvert it. The 1985 decision of the British Columbia Court of Appeal in Jespersen v. Jespersen\textsuperscript{46} however, held that if the judge conducted a private interview with the child with the consent of both parties, there is no obligation on the judge to set out any details of the interview for the parties. The Court reasoned that the interview was intended to “obtain... a very frank statement by the child [in a manner] which will not cause embarrassment to the child or either parent”, and hence “it must remain in the prerogative of the trial judge” to decide what, if anything, should be said to the parties about the results of the interview. The Court in Jespersen made no mention of its earlier decision in Re Allan, which had held that there is always an obligation to disclose to the parties the substance of what children say in a judicial interview.\textsuperscript{47}

Despite the historically cautious approach of Canadian family courts (outside Quebec), interviews by judges of children in custody and access disputes do take place. In the past couple of years, there has been a growing willingness by Canadian judges to interview children in family cases.\textsuperscript{48} This is in part a recognition of the “right” of the child, as set out in Article 12 of the United Nations Convention on the Rights of the Child, to participate in processes that affect them. It is also in part a recognition of the fact that experience in Canada and research elsewhere suggests that children who are the subject of a custody or access dispute will not be harmed by

\textsuperscript{46} Jespersen v Jespersen (1985), 48 RFL (2d) 193 at para. 25 33 ACWS (2d) 449 (BCCA).

\textsuperscript{47} See also L.J.A. v. L.A., [2002] B.C.J. No. 491 (B.C.C.A.), where the 10-year-old boy who was the subject of a custody dispute felt considerable pressure from his parents and did not want to hurt either one. In a letter to the court, the boy wrote that he only wanted to tell the judge about his wishes, and the parties agreed to this. The judge kept notes, but they were not disclosed to the parties or the appeal court. The judge said the child’s stated desire was “but one factor” in making a decision, and awarded custody to the father. While the court of appeal expressed a “very serious concern” about the process adopted since the parties did not have the “opportunity to meet” all of the evidence considered by the court, since the parties both consented, the court held that they could “not complain.”

\textsuperscript{48} R. Birnbaum & N.Bala, “Judicial Interviews With Children In Custody And Access Cases: Comparing Experiences In Ontario And Ohio” (2010), 24(3) International Journal of Law, Policy and the Family 300-337; see also B.J.G. v D.L.G., 2010 YKSC 44, per Martinson J.
meeting with the judge. These reasons were canvassed by Martinson J. in *B.J.G. v. D.L.G.* to determine whether a 12-year old boy should be allowed to express his views to the court in an application to vary an existing custody order. She concluded that, pursuant to both the *Convention* and Canada’s own domestic laws, “all children in Canada have legal rights to be heard in all matters affecting them”. Also, noting the relevant social science literature, she held that obtaining information from children regarding their preferences and views “can lead to better decisions . . . that have a greater chance of working successfully”.

She observed (at para. 6).

“Children have legal rights to be heard during all parts of the judicial process, including judicial family case conferences, settlement conferences, and court hearings or trials. An inquiry should be made in each case, and at the start of the process, to determine whether the child is capable of forming his or her own views, and if so, whether the child wishes to participate. If the child does wish to participate then there must be a determination of the method by which the child will participate”.

Judicial interviews of children may be more common in jurisdictions (e.g., British Columbia) where there are no publicly funded resources such as lawyers for children. While being the subject of litigation between hostile parents can be extremely stressful for children, the actual meeting with the judge is unlikely to add to a child’s distress, provided that the interview is conducted in an appropriate fashion and that the child knows exactly that their voice does not mean a choice. Some research suggests that children who feel engaged in the decision-making

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process may actually have better outcomes, though it is important to emphasize to children that they have a “voice but not a choice.”

It is generally accepted that a child should never be forced to meet with a judge. While some children will want to express their views about parenting arrangements, and they should be permitted to do so, judges who interview children should be cautious not to directly ask children to “choose” between their parents. The purpose of the meeting should be to allow the judge to meet with the child and get a better sense of the child’s interests and needs, as well as to allow the child to ask any questions that the child may have. A single interview with a judge has real limitations, however, and will not provide the type of reliable information that may be obtained by an experienced mental health professional or children’s lawyer at a series of meetings held over a period of time. More research and educational training of judges in interviewing children should form the necessary next steps about children’s participation.

As several judges said:

“I believe that training should be given to judges who interview children: “Yes, because it is fine to say” we will hear children “but how?”.

“There is no “best practices” or nothing. I think it would be a good idea that a specific course on how to talk to children is added to our training as judges”.

Part II: Experiences & Attitudes of Children’s Lawyers about Judicial Interviews

In this section we present survey research conducted in two provinces in Canada that have very different policies and practices about representing children. The approach in Alberta presumptively requires lawyers for children who express their views to be instructional advocates, taking direction from their child clients in a manner similar to the way that they

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51 See Birnbaum & Bala, “Judicial Interviews With Children In Custody And Access Cases: Comparing Experiences In Ontario And Ohio” (2010), 24(2) International Journal of Law, Policy and the Family 300-337.
would from adult clients. The policy of Ontario’s Children’s Lawyer directs lawyers for children to ensure that the court is aware of the child’s wishes, but allows them to advocate for a different position, one that in the view of the lawyer promotes the child’s interests.\(^{52}\)

\((a)\) Survey Methodology and Participants

Birnbaum, Bala, and Bertrand undertook three web-based surveys of lawyers attending legal education programs in Alberta and Ontario\(^ {53}\) concerning their practice experiences and attitudes about child representation of children in child protection and domestic cases. The participants responded to an email requesting them to complete a voluntary on-line survey prior to the educational programs in Ontario and Alberta, with an undertaking to present some of the key survey results at the program.\(^ {54}\) Many of the lawyers who attended do child representation work, but some did not; as indicated in the discussion below, however, most of the data is presented on lawyers experiences with judicial interviews.

The surveys addressed the same issues, with similar or identical forced choice and open-ended questions; slight variation in questions was needed to take account of differences in legislation, policy and context between the two provinces. Among the survey questions asked,

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\(^{52}\) It is not within the scope of this paper to address the practice and policy differences across Canada about child representation. However, it is important to note that Ontario, Quebec and Alberta have very different approaches. For a more thorough analysis of these differences see Bala, Birnbaum, & Bertrand (in review).

\(^{53}\) See Bala, Birnbaum, & Bertrand (in review) who report on survey questions related to the appropriate role of child’s counsel and the number of meetings and length of these meetings with children in Alberta and Ontario. The authors, Birnbaum & Bala are most grateful to Terri Davies, Senior Manager for Legal Representation of Children & Youth (LRCY), Calgary, Alberta for providing administrative support for the internet web-based survey of children’s lawyers attending the, Best Practices in Child Legal Representation Conference, Banff, Alberta on September 15-16, 2011. The authors are equally grateful to Shari Slonim, Continuing Professional Development, Law Society of Upper Canada, for providing administrative support for the internet web-based survey of lawyers attending the, 3rd Annual Voice of the Child Conference, Law Society of Ontario Continuing Education, Toronto, Ontario on March 28, 2012. The authors, Bala & Bertrand are grateful to the Canadian Bar Association, Alberta for facilitating their survey of lawyers attending the May 3, 2012 education program.

\(^{54}\) There were a few registrants at the programs who were not lawyers; they were identified through the demographic questions and their results are excluded from data presented here. The web surveys were kept open for a short period after the programs, and the results from those respondents are included in results presented here.
lawyers provided some basic demographic information (i.e., gender, years practicing, years practicing child representation in child protection and domestic disputes, the number of children represented in child welfare and domestic disputes, how often and how long they meet with children), and questions related to whether lawyers tell children the different ways they can be heard in the justice system, their experience with representing children who had a judicial interview in a child protection matter or a domestic dispute (i.e., how many children, was the interview recorded, did parties have access to the transcript of the interview, what age did they think it was appropriate, if at all, for children to be interviewed by a judge); and lastly, to provide any other comments about children’s participation in the family court process.

(b) Demographic Information about Participants

The Ontario survey was undertaken in conjunction with a Law Society’s program on Voice of the Child in Family Proceedings held in Toronto in late March 2012; 79 lawyers (32% of the registrants) completed the survey.\(^{55}\) They had an average of 19 years of experience as members of the Bar, and 10 years doing child representation work, with an average of 87% of their practice in the family law area.\(^{56}\) Of the 79 lawyers who responded to the survey, 33 identified themselves as doing work for the Office of the Children’s Lawyer (O.C.L.), either on the panel of lawyers in private practice or as staff lawyers. Eight of the respondents indicated that they had experience in representing children privately.\(^{57}\)

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\(^{55}\) There were 23 who identified as male and 56 as female. There were 7 lawyers who did not identify their gender.

\(^{56}\) Percentages do not always add to 100 as each question had a different response rate in the Ontario and Alberta surveys.

\(^{57}\) While the OCL is the only government body that represents children in child welfare and custody and access disputes, some lawyers in private practice can be retained privately to do this work. This type of practice has been a source of debate between lawyers at the OCL and the judiciary for some time. Interestingly, the role of child’s counsel has received far less attention.
There were web-based surveys of attendees at two Alberta continuing legal education programs held in September 2011 and May 2012, with a total of 87 respondents (% of attendees is not known). One survey was undertaken in conjunction with a two day education program held in Banff in September 2011, specifically for lawyers in private practice who do work for the Legal Representative for Children and Youth (LRCY), representing children in child protection cases. The other Alberta survey was undertaken by the Canadian Research Institute for Law and the Family (CRILF) at a late afternoon Canadian Bar Association program on judicial interviewing of children held in May 2012 in Calgary. The Alberta respondents had an average of 18 years of experience as members of the Bar, and an average of 8 years of experience representing children, and reported an average of 70% of their practice was in the family law area.

(c) *Telling children about how they can be involved, including meeting the judge*

In Ontario and Alberta, over 90% of the lawyers who represent children reported that they tell their child clients about the different ways children’s views can be shared with the court (i.e., through a report by a social worker or psychologist, a child’s lawyer, a child having an interview with a judge or testifying, or through hearsay related by their parent.) However, in their comments, lawyers indicated that there are limits on what they tell their child clients about how their views can be presented to the courts:

“With older children (e.g., 10+), I provide extensive information about the court process and how judges make decisions. I usually provide more abbreviated information to younger children. However, I don’t typically advise the children that I represent (in

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58 There may have been a small number of Alberta respondents who completed both surveys, the one in September and the one in March, though an effort was made to prevent duplicate responses.

59 Participants were asked both quantitative and qualitative questions. The qualitative responses are provided to enrich the responses that quantitative data alone cannot capture about these important issues concerning children’s participation in decision-making.
custody/access cases) that they have an option to meet with the judge if they want to (although I do advise children 12 & over in child welfare cases that they have a right to attend court). At this stage, I’m usually assuming that the parties/court have decided that the child’s views will be shared with everyone via child’s counsel” [Ontario lawyer].

“I explain to a child that I will tell the judge about the child’s views, however I also tell them that their views are just one piece of the pie (evidence) that the judge considers and their views are not necessarily what the judge decides” [Ontario lawyer].

“I have never really explained it that way. Usually I explain that I will share their views. That everyone has their own views of the events and that the social workers tell their stories and their parents tell their stories…..” [Alberta lawyer].

The comments also express how lawyers perceive children’s [dis]abilities and whether children will be allowed to fully participate in decisions that so profoundly affect their lives.

(d) Meetings with judges

Table 1 shows how lawyers report that children rarely meet with judges, though it appears to be somewhat more common in Ontario than Alberta.
The figure above demonstrates that (children actually meeting the judge) is less common in Alberta than Ontario despite the fact that lawyers in Alberta seem more supportive of these judicial interviews. In fact, in response to the question about whether lawyers ever encourage their child clients to meet with a judge for an interview, 76% of the lawyers in Ontario and 57% of the lawyers in Alberta reported that they do not encourage this practice, while 24% in Ontario and 43% in Alberta do encourage children to meet with a judge. When lawyers were asked under what circumstances they would encourage a child to meet a judge, responses included:

“If the child requests such a meeting, depending on age and ability, I will facilitate.” [Alberta lawyer].

“I never encouraged my adult clients to have an interview with the judge either. Speaking for them in court is why people have lawyers in the first place” [Ontario lawyer]

“Meeting with the Judge should be a last resort, and creates a host of problems. Among them are the extent to which a judge should disclose what is told by the child. The Judge cannot simply state that s/he has taken into account the child’s wishes at arriving at a decision. Another problem relates to disclosures made by the child. What is the Judge to do if, e.g. the child discloses, e.g. previously un-disclosed sexual abuse at the hands of a parent. The Judge is now a witness to the disclosure and must consider the extent to which questioning should be pursued and the need to report the disclosure” [Alberta lawyer]

“Generally, I would never encourage a child to meet with a judge. However, if a child asked to meet a judge and it would be beneficial to the child, I would present it as an option under the right circumstances” [Ontario lawyer].60

In response to a question asking when, if ever, lawyers thought that judges should interview children, most respondents indicated that they believe that it is rarely appropriate. Comments about when it would be appropriate included:

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60 This question garnered far more responses and ‘reactions’ from both Ontario and Alberta lawyers than can be addressed in this paper given the space limitations. It is clear from their emotive reactions (mostly negative or at the very least with strong reservations against it) that children’s lawyers can be powerful gatekeepers to how and whether a child will have access to the court process and more significantly how their [lawyers] own views and attitudes color their practice experience.
“To let the child know the outcome of the case and to explain decision.” [Ontario lawyer]

“I do not think it would be appropriate for a judge to interview a child in any situation, there is a danger the judge would get a distorted view of the child’s position; secondly there is a danger that the Judge becomes the advocate for the child.” [Ontario lawyer].

“I think it may be appropriate for a Judge to have a meeting with a child early in the litigation, i.e., a case management judge, or in the case of a trial judge prior to commencement of the trial.” [Ontario lawyer]

“When a child is reasonably mature, is articulate, is expressing a strong view that is strongly opposed to one of the parties and wants to speak to the judge”. [Alberta lawyer]

“I do not agree with “judicial interviews”. The court process should be open and appropriate experts should advise the court. Judges do not have specialized training required to make assessments and they should not be descending into the pit of battle by “interviewing” a child/youth. All of the parties and counsel are entitled to know all of the information/evidence that lead to a decision by the court. I do not support any process where a judge gathers information in a closed meeting.” [Alberta lawyer]

Table 2 summarizes the responses to a question about the appropriate minimum age for children to have a meeting with a judge. Interestingly lawyers in Alberta, who generally are expected to take an instructional advocacy approach, generally favour children who are somewhat younger meeting with a judge in comparison to lawyers in Ontario.
Table 2
Lawyer’s Views of Appropriate Ages for Judges to Interview Children: Comparison Alberta and Ontario*

<table>
<thead>
<tr>
<th></th>
<th>Alberta (Custody/Access)</th>
<th>Alberta (Child Welfare)</th>
<th>Ontario (Custody/Access)</th>
<th>Ontario (Child Welfare)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Age Range</td>
<td></td>
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<td></td>
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<tr>
<td>Under 3 years</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
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<tr>
<td>3-5 years</td>
<td>10%</td>
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<td>10%</td>
<td>10%</td>
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<tr>
<td>6-9 years</td>
<td>30%</td>
<td>30%</td>
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<tr>
<td>10-11 years</td>
<td>10%</td>
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<td>10%</td>
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<tr>
<td>12-13 years</td>
<td>20%</td>
<td>20%</td>
<td>20%</td>
<td>20%</td>
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<tr>
<td>14 years and older</td>
<td>50%</td>
<td>50%</td>
<td>50%</td>
<td>50%</td>
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<tr>
<td>Not at any age</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
<td>0%</td>
</tr>
</tbody>
</table>

*The data displayed in the chart is based on different methods of calculating n's. Alberta (Custody/Access) has the following n's: birth to 3 years n = 2; 3-5 years n = 2; 6-9 years n = 10; 10-11 years n = 14; 12-13 years n = 16; 14 years and older n = 16; not at any age n = 1. Alberta (Child Welfare) has the following n's: birth to 3 years n = 1; 3-5 years n = 1; 6-9 years n = 11; 10-11 years n = 14; 12-13 years n = 15; 14 years and older n = 15; not at any age n = 3. Ontario (Custody/Access) n = 38. Ontario (Child Welfare) n = 30.

Comments about whether lawyers think it is appropriate for judges to interview children in child welfare matters suggest that it should be done infrequently, and included:

“It should be done rarely.” [Ontario lawyer]

“It may depend more on the child’s level of development and willingness to speak to the judge than age” [Ontario lawyer]

“Only if this is a much older child who is mature enough to understand what is happening” [Alberta lawyer]

Similarly, lawyers comments suggest that interviews should rarely be done in family cases:

“I believe it is appropriate when the child asks to make representations in court.” [Alberta lawyer]

“It is not appropriate …It puts the child in the middle of adult conflict.” [Ontario lawyer]

“I think we are far too protective of children in the process and as such we often cause more harm and uncertainty. Judges should engage families much earlier in the process.” [Ontario lawyer]
(e) **Lawyers Experiences with Judicial Interviews**

The lawyers were asked a number of questions about their experiences with a child being interviewed by a judge in a family cases, with similar questions about child protection and domestic cases. The questions were asked of all lawyers, not just those doing child representation work.

**i. Child Protection Matters**

In regard to child welfare matters, 75% of the Ontario lawyers and 59% of the Alberta lawyers reported that they are *sometimes* involved in a case where a judge interviews a child. Ontario lawyers reported that there was a child’s lawyer present (50%; *sometimes*) of the time compared to 10% who reported *sometimes* in Alberta. The Ontario lawyers reported that the interview was recorded *very often* (29%) compared to 20% in Alberta. Interestingly, 60% of the Alberta lawyers reported that judges *never* recorded the interview (60%), and 29% of the Ontario lawyers that judges did not record the interviews. The vast majority of lawyers in both provinces reported that judges *never* share a transcript of the interview with the parties.\(^6\)

**ii. Domestic Disputes**

In Ontario, 84% of the lawyers and 38% in Alberta reported that they sometimes have been involved with a case where a judge interviewed a child in a custody dispute. Ontario lawyers

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\(^6\) It is important to note that while these percentages appear large, the actual number of responses to each of these questions varied. It is noteworthy that these results parallel the findings in the Birnbaum & Bala (2011) study of Ontario and Ohio judges meeting with children in judicial interviews. More importantly, they also parallel the findings in Birnbaum, Bala, & Cyr (2011) and the literature reviews of Birnbaum & Saini (in press, 2012)—that is, ‘children’s voices’ are subject to the gatekeepers in the justice system (i.e., lawyers, mental health professionals, parents and judges).
reported that there was a child’s lawyer sometimes present (67%) and sometimes present (38%) in Alberta. The Ontario lawyers reported that the interview was recorded sometimes (43%) and sometimes in Alberta (25%). Interestingly, both Alberta and Ontario lawyers reported 50% of the time, judges never recorded the interview and never shared the transcript of the interview with the parties.62

Participants were also asked if they had any other comments about children’s participation in child welfare and domestic disputes. Comments ranged from,

“There needs to be better training that lawyers who are representing children are not giving evidence…..lawyers need training in how to present a case when they have a client who will not appearing and giving evidence, There is far too much weight being given to lawyer’s representation without the evidentiary evidence” [Alberta lawyer].

“Children should have a voice, most cases don’t need it, but many do” [Alberta lawyer].

“There are so many ways to get the child’s views before the court and judges should avail themselves of these methods before even attempting to interview children” [Ontario lawyer].

I think we are all jumping on the bandwagon of judicial interviews of children without even guidelines in place or research that shows it is beneficial” [Ontario lawyer].

“I really worry if children were going to be directly involved in court proceedings. The legal system is adversarial and although our hearts may be in the right place, you can’t control what happens to a child in court, or after court in the homes of his/her parents. The more removed a child is form the court proceedings, the more protective will be the child. We don’t want to further victimize children for the needs of the legal system” [Ontario lawyer.]”.

The majority of the comments were against judges meeting with children for a variety of “adult” reasons. While the majority of lawyers reported that they told their child clients

62 In both Alberta and Ontario it is important to note that the responses from lawyers about these questions regarding their practice experience in child welfare and child custody disputes had very small sample sizes and do not necessarily reflect the actual practices of the lawyers and judges in each jurisdiction.
about the different ways that children’s views can be shared with the court, one has to wonder whether they ever tell children about meeting with a judge as one option, given their seeming lack of support.

**Summary Comments**

There are no easy answers in addressing how lawyers should and can engage children meeting with a judge in child welfare and custody disputes to make them feel heard and listened to. The results demonstrate that lawyers are at minimum very cautious to outright against the notion of their child client meeting a judge despite what children say about this, their needs and wanting to meet with a judge as another possible way of being heard. It is concerning that much of barriers to supporting children in meeting with a judge is based on their own individual beliefs, values and assumptions of what children want and need; rather than, what children have been telling researchers across the globe of what they want and need from their parents, lawyers and judges.

From a research perspective there are methodological limitations to the surveys of these lawyers in Alberta and Ontario. For example, the responses were limited based on the design of the survey, timing, and the questions asked about lawyers’ practices and attitudes in supporting children to meet with judges. Although the survey was anonymous, most lawyers are rarely asked to respond to questions that may reveal their actual practice and attitudes about the children they represent, particularly when the majority of the lawyers surveyed are paid by governments that have very different policies and practices for lawyers representing children. More research needs to be done on exploring the perceptions of all those involved in the justice
system judges (i.e., mental health professionals, social workers, judges, parents) to unpack the myths and assumptions of children needing to be protected and most of all children, about their experiences with their lawyers, different mental health professionals and meeting with judges. As a result mental health professionals, lawyers, and judges could become better informed about children’s participation and their needs; rather than the, ‘needs of the court”.

Despite the limitations, the study raises some important, albeit tentative, conclusions and directions for future work in this area. One is that lawyer’s attitudes and experiences about how to fully engage children in the justice system can only be challenged through educational programs that provide a social science perspective on the pros and cons of children’s participation that includes a discussion of the implications for lawyers practicing in representing children in child protection and domestic disputes. Lawyers receive no formal training in law school about interviewing children or being exposed to the changing landscape of the sociology of childhood that has occurred over the last several decades. While lawyers receive somewhat limited educational opportunities from the appropriate government bodies that are charged with representing children, the fiscal realities of government and the knowledge base of these organizations about children and their needs in the justice system demand more accountability about representing children.63

There is much that can be done for children in the justice system that allows their

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active participation in the family justice system. While not all children want to or should be interviewed, judicial interviews should be supported by children’s lawyers more than is the current practice in Ontario and Alberta. Training and education of lawyers on how to support children in meeting with a judge would greatly assist the decision-makers who effectively make life altering decisions about children’s best interests. As several children who offered advice to lawyers eloquently state,

“if they [lawyers] are going to say that they [lawyers] will support you in court, they [lawyers] have to live up to it, they [lawyers] can’t let you down” [we would add that it should also include supporting children in meeting with a judge].

“Should represent the child as if he was the child himself. Really tell the judge what the child said/told him”.

“The lawyer has to be convincing. He should explain in depth to the judge everything the child told him”.

“It is very important to listen well to what the child has to say to be able to defend his point of view correctly, because this has a big impact on the final decision”.

We now turn to the Israeli experience with judicial interviews and children’s participation. Though our respective countries have different historical and religious roots in affirming children’s participation in decision-making post separation there are more similarities across the globe than differences.

**Part III: Child Participation in Israeli Family Courts**

Under the Israeli Legal system issues related to family law are dealt by both family courts, which are part of the civil court system, and religious courts (including rabbinic courts for Jews and other religious courts for Moslems and Christians) have parallel jurisdiction. Most
custody cases are litigated in family courts, with appeals heard by District Courts and by the Supreme Court.

**Recognition of Children's Participation Rights in Israeli Case Law**

A. Israeli Civil Courts

Israeli case law since the 1950’s and 60’s recognized the need to take into account the child’s wishes in custody proceedings.64 These rulings, however, do not point to an obligation to hear the minor. Since the 1990’s, after Israel’s ratification of the *Convention on the Rights of the Child*, significant change is evident in the case law, mainly at two levels. The first level is the recognition of children’s right to participation as an independent right in matters bearing on their custody, which is prominently linked to the ratification and specifically to Article 12. Thus, for instance, Supreme Court Justice Edna Arbel says:

> “Hearing the child’s will, as required by Section 12 of the *Convention on the Rights of the Child*, conveys his perception as an autonomous person, as an independent bearer of rights with independent desires.”65

Increasing recognition of the right to participation is also evident in the case law of family courts, where the changing trend is also linked to the Convention. Thus, for instance, Judge Hani Shira of the Family Court notes:

> “A significant change has been recorded in recent years in the case law of the Court on the issue of the minor’s will and on hearing minors, particularly in light of the Convention on the Rights of the Child of 1989, which was ratified in Israel in 1991.”66

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64 CA 433/67, *Tsabar v. State of Israel*, PD 22(1) 162, 166
66 Family court file (Kfar Saba) *A.M. v. Sh. Sh.* 1030/02 (Unpublished).
The second level concerns the mode of hearing: in an increasing number of rulings, the courts now relate to the importance of hearing children directly. A review of family courts’ rulings shows that children are directly heard in a growing number of cases (Schuz, 2008). Although neither the case law nor the legislation contain instructions as to the confidentiality attached to the child’s hearings, judges tend to grant them partial immunity. They do not reveal the proceedings as a whole but do include their general impression from the child’s testimony in their rulings. Judicial practice in this regard is not consistent.

The recognition of children's right to participate in family courts varies widely according to the approach of the presiding judge. Furthermore, even when children are heard and their right to be heard is recognized as an independent right, the courts do not usually specify the weight to be assigned to the minor’s wishes. The variety of views and practices among family court judges in this regard thus detracts from the significance of this change.

**Case Law of the Rabbinical Courts**

Barring any relevant research, the policy of the religious tribunals cannot be systematically evaluated. Yet, recent research has noted the importance attributed to children’s views in some of the rabbinic courts’ decisions and the significant weight ascribed to the child's views in these cases (Shochetman, 2005). According to some rabbinic court rulings, the minor’s wishes must also be taken into account concerning the child’s education in cases of dispute between the parents, when “the child is of judgment and understands what is before him and

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67 Supreme Court case -CA 10480/05, John Doe v. Richard Roe (unpublished) (Judge Rubinstein’s ruling). Family Court- Family File (Jerusalem) 3140/01, Father v. Richard Roe (unpublished), (Judge Menachem Cohen’s ruling)
insists upon his wishes” because “this is the way of Torah, that not from every person does one wish to learn, and a man can only learn when his heart is in it.”

If the rabbinic court summons children, it may hear them without their parents being present (Shochatman, 2005). Often, however, the court is satisfied with opinions about the children’s wishes without meeting them personally. A review of Jewish law, including Halakhic rulings cited in rabbinic courts, indicates that they ascribe importance to the children’s wishes even at a young age. Several cases determine that, according to Jewish law, six is the relevant age for taking into account the child’s wishes (Schochatman, 2005). One should note though that the practice of the Rabbinical Courts is inconsistent and in most cases dealt by the Rabbinical

The Regulations Regarding Child Participation and the Pilot Project that Led to their Enactment.

Background- Israeli Family Courts

In 1995, the Family Courts Law was enacted in Israel. The Family Courts are special civil courts, at the level of magistrate's courts, in which one judge presides over all matters relating to the family. The Ministry of Welfare and Social Services operates social services units which assist the family courts. The units are staffed by social workers and psychologists and their function is to assist the court in reaching decisions on matters involving family disputes, including assistance in clarifying expert opinions that were submitted to the court and in

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68 Jerusalem Rabbinical Court Ruling 2/ 1964. RC. 7 1610, 1615.
referring parties to professional bodies within the community. Similarly, the unit provides counseling and short term therapy for parties, and holds mediation proceedings.

**The Israeli Pilot Project on Child Participation**

In 1998, the Israeli Minister of Justice appointed the CRC Legislative Committee. The Committee was charged with examining the entire corpus of Israeli child law in view of the principles of the UN Convention on the Rights of the Child. The Subcommittee on Children and their Families formulated recommendations on child participation in family courts, and drafted a bill on the issue.

A pilot program based on the Committee’s proposal operated by the ministry of Justice in two family courts in Haifa and Jerusalem during the years 2006-2009. Special regulations were enacted to facilitate the pilot’s operation. 448 children participated in the pilot. 37% of the children were 10-13 years old, 31% were 14-18 years old, and 29% were 6-9 years old. 3% were 3-5 years old. The pilot was accompanied by an evaluation study.

**The Procedure for Child Participation Proposed by the Committee and Implemented within the Pilot:**

The procedure set by the pilot's regulations for child participation is as follows:

A. Departments for children’s participation were set up in the welfare units operating within the family courts. These departments were staffed by participation workers (PW), who were social workers or clinical psychologists.

B. The court invited the child to a meeting at the participation unit following a judicial decision that was transmitted to the parents through the PW and sent together with
explanatory material intended for the parents and the children. If the parents had legal representation, the material was sent through their lawyers.

C. At a preliminary meeting in the participation unit, children were offered the possibility of meeting directly with the judge hearing the case or of conveying their view to the court through a PW. It was also explained to the children that they were entitled to waive their right to be heard.

D. If the child chose to be heard by the judge, a meeting was arranged where the judge and the PW would be present.

E. If the child chose to be heard by the PW, the PW would give the court a written record of what the child wished to convey to the court, together with a written review of his or her impression of the child’s behavior and the situation at the time of the hearing.

F. The record of the PW and the court protocol were kept in the court’s safe and were confidential, except for the court of appeal. A court that heard a child would not record the child’s statements in its decision, but could decide to disclose some or all of these statements if the child consented and the court found that the disclosure would advance the child’s best interests.

G. When the court was asked to ratify an agreement between the parents on matters that concerned their child, the judge clarified whether the child was heard by the parents. If the judge decided it was necessary to hear the child, the judge could refer the child’s parents to a PW in order to provide them with information and guidance about hearing their child and the means for doing so.
H. If the child was heard by a judge or a PW, the judge explained to the child when issuing the decision, or soon thereafter, directly or through the PW, the main points of the decision relevant to him or her. Following the meeting with the child, the PW was permitted to establish contact with the parents to inform them of the messages and contents of the child’s statements, with the consent of the child.

The Pilot Project's Evaluation Research

The pilot operated from June 2006 until March 2009.

A. Research Population

1. Children

*Documentation forms for the participation workers:* Forms were completed by the PSWs for every child who was invited to participate during the period of the research, i.e. 448 children aged 6 – 18 years (whether or not the child was actually heard).

*Telephone interviews with children:* Interviews were conducted with 99 of the 155 children aged 10-18 years who were invited to participate in court proceedings after July 2008. The children were approached only with the consent of both parents: thus, 47 (of 155) children were not interviewed due to the refusal of one or both parents. After obtaining parental consent to the interviews, the children were asked if they agreed to be interviewed. Nine children refused.

2. Parents

Telephone interviews with parents: One hundred and three interviews were conducted with parents of children who had been invited to participate, out of 119 parents whose children were
invited to participate after July 2008. Sixteen of the 119 parents approached refused to be interviewed. In all, interviews were conducted with 73 parents of children who were heard by a PSW or the court and 30 parents of children who were not heard. Semi-structured in-depth interviews with parents: Of those interviewed by telephone, nine parents were selected for semi-structured in-depth interviews. Six of the parents agreed to be interviewed.

3. **Professionals**

**PSWs:** Eighteen semi-structured in-depth interviews were conducted with PSWs: Ten interviews were conducted with the workers at the section at the first stage, and eight at the second.

**Judges:** Seven semi-structured in-depth interviews were conducted with family court judges within the pilot:

**Lawyers:** Seven semi-structured in-depth telephone interviews were conducted with lawyers whose clients have cases in the courts in which the pilot was operating, i.e., Jerusalem and Haifa.

B. **Principal Findings**

**Feedback on Participation**

1. **The Contribution according to the Participation Workers**

The PSWs estimated that participation contributed a great extent to 71% of the children; participation contributed a small extent to 17% of the children, and the extent of the contribution of participation could not be estimated for 12% of the children.

2. **Parental Satisfaction with the Participation Process**
In all, 77% of the parents of children who participated in the court process who were interviewed expressed satisfaction: 31% said they were extremely satisfied and 36% said they were satisfied. The parents were asked to specify what in particular they were satisfied with.

3. **Contribution of Participation in the Eyes of the Children and their Level of Satisfaction**

The children who participated in the legal process were asked whether they think it is a good idea to offer children the chance to express themselves on the subject of their parents' conflict. Ninety-three percent answered in the affirmative.

The children were asked whether they would recommend a friend to participate. Ninety-two percent said yes. To the question of whether the participation had helped them, 62% of the children responded that it had helped. The children who said that the participation had helped them were asked how it helped. The most frequent answers were that they felt that they were being shown respect and consideration for their opinions and feelings, that the conversation helped them decide what they really wanted, and that the involvement with the PSWs contributed to an improved relationship with one of the parents. The children who said that the participation did not help them were asked, why not. The most frequent response was that nothing changed following the participation, or that the participation did not sway the judicial decision in the direction in which they would have liked.

D. **Types of Contribution and the Benefit of Participation**

Two possible types of beneficial contributions to the children were examined: contribution to the judicial decision, and contribution on to the psychological well being of the child of the family.

1. **Contribution to the Judicial Decision.**
It was beyond the scope of this study to examine in depth whether, and how, the participation of the children contributed to the judicial decision.  

**The positions of the judges:** Judges were asked in the feedback questionnaires about each of the children they met, whether the meeting with the child contributed to their understanding of the case or shed a different light upon it. The judges reported that in 54% of the cases in which they met the child, the meeting with the child indeed contributed to their understanding of the case or shed new light on it and contributed to the decision-making process: 6% responded that the meeting contributed “to a very great degree” and 48% responded that it contributed “to a great degree”.

According to the judges, in certain cases the participation of the child is likely to be significant in the decision-making process. According to one judge:

> “In cases of profound disagreement, when the child expresses his authentic voice and wants a significant change, such as a change of custody and place of residence, it is extremely important to hear him.”

One judge described a case in which a child of eleven expressed her wish to be transferred from the custody of her mother to that of her father:

> “Her voice was so authentic, and her wish – so clear and acute […] I underwent a process following the meeting with her. In the final analysis, I ruled that the custody of the child would be transferred to the father. Her wishes were accorded enormous weight in the decision.”

There were judges who mentioned the significant contribution of the child's participation in the decision-making process, and there were judges who thought the contribution was less. For

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69 It is interesting to compare the reasons given by the children in this study to very similar reasons reported by Parkinson and Cashmore (2007) at 160: Having a say and being acknowledged, making better decisions, speaking confidentially and speaking directly without any filters or interpretations.
example, one judge said: “The child's participation does not usually change my view of the case. In general, participation is more important to the children than to the court.”

According to the report of the PSWs, in several cases the children's participation caused a clear change in the legal process, such as a shortening of the process or even a withdrawal from the action.

2. **Contributions to the Psychological Health of the Child and That of the Family**

According to the impressions of the PSWs, many of the children with whom they met had no one to confide their feelings to about the conflict: their parents were not emotionally available for them and had difficulties coping with their children's problems in the throes of the conflict. In the estimation of the PSWs, 88% of the children benefited from the opportunity to express their feelings and for emotional containment. The children too, spoke of this contribution in their interviews: for example, “It was good to release those things that were weighing down on me, and not to keep everything inside. I felt good that it was with a professional.”

One of the important findings of the evaluation research was that the significance of the realization of the right of participation in decisions of custody, within the framework of the pilot, lies not only in the importance of the children's views being brought before the judge but also the importance in having the children’s views brought before their parents. From the in-depth interviews with the PSWs it emerged that oftentimes the parents are not aware of the wishes, emotional state, distress and needs of their children. One of the PSWs reported:

“It is not rare that I surprise the parents with the things that their children say. The intensity of the children’s pain really shocks the parents, and there were some things that disturbed the children which the parents had not imagined.”
In accordance with the Regulations, the PSWs are authorized to disclose what the child said to the parents with the child’s consent, and also to invite the family – parents and children - to three or four short-term intervention sessions with them and/or the sectional psychologist within the participation section. The reports of the PSWs indicate that their impressions of the emotional state and the needs of the child were relayed to the parents regarding 63% of the children. In relation to 25% of the children, the PSWs reported that, following the participation meeting, the conduct of one or both of the parents became more suited to the needs of the child. One 14 year-old boys said: “The participation meeting acts as a bridge between children and parents. Following the meeting, my conditions at home have improved”70

The extent of requests of the child to meet with the judge:

The project operated in two stages. The first stage ran from June 2006 until March 2008. The preliminary findings on the operation of the pilot project were then presented. These findings led to the introduction of several changes in the format of the pilot. The second stage of the pilot ran from March 2008 until March 2009. During Stage A of the pilot, only 15% of the children who were heard chose to meet with the judge. The Implementation Committee regarded meetings with the judges as important, and therefore instructed the PSWs to invest greater effort in encouraging the children to take advantage of this option. The PSWs did so, for example, by explaining the nature of the meeting. They also showed the children photos of the court in order to reduce their anxiety about the place. These efforts were very effective: during Stage B of the

70 For discussion of the therapeutic benefits of involving children by assisting parents and children to communicate see Parkinson and Cashmore, at 111.
pilot, a higher percentage of children who participated in the legal process asked to meet with the judges (32%).

In the telephone interviews, the children who met with judges were asked why they chose to do so. They gave various reasons:

“There wanted the judge to know them directly. One girl said: “I wanted him to see me as a person and not as a piece of paper.”

“They wanted to meet the judge because of his role as the maker of decisions affecting their lives”

According to one girl, “It was very important to me to meet him and form an impression of him, because he will make very important decisions for me.”

“They wanted to make sure that some of what they said would not be reported to their parents. One child said: "I wanted to explain to the judge what to tell my parents and what not to tell, and to know exactly what he was going to tell my parents in connection with what I told him”

In the telephone interviews, the children who chose not to meet with the judge were asked to explain their choice. They gave various reasons:

“They did not feel comfortable, or they were scared of the judge.”

One boy said: “I felt that the judge is someone who is too official for such personal situations”.

One girl said: “I was embarrassed in front of the judge and I felt that I could not tell him everything.”

“They rely on the PSW to relay what they said accurately to the judge. For example, one girl said: "I felt that it was the same thing to talk with the PSW, and I felt that she would be able to relay what I said instead of me."

Policy implications
A. Direct Hearing by the Judge or Hearing through a Mental Health Professional

From the interviews with judges and PSWs it emerges that none of the professionals think that the court must hear all the children who were invited to participate. This view was based on the very heavy workload to which the court is subject and of the fact that in a significant proportion of cases, the children did not express a position which could have had a significant effect on the decision in their case. However, both the PSWs and the judges agreed that the meeting with the judge is important in particular cases, such as: cases where there is a deep-seated conflict, cases where there are exceptional circumstances that must be considered such as decisions on emigration, cases where the child has a strong and clear view which differs from the view of his/her parents, and cases in which the child has clearly indicated a wish to meet with the judge.

The important role that the participation workers therefore play in enabling the voice of the children to be heard by their parents reinforces the importance of the need for including a therapeutic professional in the process. From the interviews with the judges and the PSWs it was evident that in addition to the wish of the child to be heard directly, the main criteria in deciding on direct hearing are the existence of an independent position on the issue at hand and the nature of the conflict. The age of the child was not found to be a central criterion in determining whether he or she should meet with the judge. In view of the above, it seems that the model outlined in the pilot's regulations should be retained, together with the development of clear guidelines for the PSWs as to the characteristics of the cases in which a recommendation should be made to the child to meet directly with the judge.
B. **Confidentiality**

On the matter of confidentiality, the Regulations state as follows:

“The record of the court or of the Social worker, or what the child sought to tell the court, as relevant [...] will be kept in the court’s safe and will be confidential vis-à-vis every person, except for the court of appeal. A court that heard a child will not report the child’s statements in its decisions, but the court may decide to disclose all or some of them if the child agreed to the disclosure and the court found that the disclosure will advance the child’s best interests.”\(^1\)

The interviews with the children show that 77% of the children sought to maintain full or partial confidentiality of their conversations vis-à-vis their parents: 50% asked that full confidentiality be maintained, and 27% wanted partial confidentiality. 23% asked to waive confidentiality vis-à-vis their parents and to fully share what they said with their parents.

Granting sweeping confidentiality to the position of the child is controversial, and has aroused opposition amongst some judges and lawyers. This is due to the adversarial nature of the Israeli legal system. Nevertheless, the findings of the research on this matter, and the importance attributed by children to retaining control of the use that will be made of what they say,

C. **Age of the Children**

It appears that most young children, beginning at age six, performed well during participation. And that in view of the fundamental position whereby we should strive to involve young children, the age threshold of six years should be preserved. At the same time, additional tools should be developed to enable the hearing of children younger than six. Efforts should also be

\(^1\) Reg. 258(33)9 of the Regulations.
made to develop tools aimed at reducing the influence of parents on the positions taken by younger children.

Gradual Implementation of the Model in All Israeli Family Courts

In October 2011, the Israeli Minister of Justice signed the regulations for continuing the project in these two family courts on a permanent basis, and its gradual implementation in all family courts in Israel. On a partial basis the project is also being gradually implemented in Rabbinical Courts although the Religious Courts have not yet been included in the regulations.

Conclusion

High-conflict separations are emotionally traumatic for children, a properly conducted judicial interview with a child who wants to meet the judge is not likely to further traumatize the child. However, except for urgent cases, we are not advocating that judicial interviews be replacements for child legal representation or an assessment by a mental health professional, but should be viewed as supplements. Children need different types of support at different times and judges meeting with children can be a useful additional support to children. Like all professionals who work with children, education about children’s developmental needs and the sociology of childhood will benefit children and more importantly respect their right to be heard that increases their self-esteem and worth.
The studies described in this paper while conducted in different jurisdictions with different legislative regimes and perspectives on children’s participation post separation are meant to provide context about what children say, feel and think about the importance of their participation in the family justice system, but equally as important, what children can teach us about what they need and want from professionals, if ‘we’ listen. More work needs to be done from a research and policy perspective on making children’s voices “heard” as opposed to the tangled web we professionals weave in the name of the best interests of child.
References


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Drews, M.D. & Halprin, P.J. (2002). Determining the effective representation of a child in our legal system: Do current standards accomplish the goal? *Family Court Review, 40*,


Shochetman, E., “Consideration of the Wishes of a Minor in Child Custody Cases” (in Hebrew), *Netanya Law Review 2005 (4), 545*


