

Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study

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INTRODUCTION

A contested custody case is a relatively rare occurrence¹ despite the fact that divorce has become commonplace.² Fortunately, most parents resolve the custody question between themselves without resorting to a judicial forum. When a custody contest does occur, it often evolves into an emotionally pitched battle in which no one — the children included — is allowed to stand on the sidelines.³ Whether permitted to do so by statute,⁴ or by practice in the jurisdiction,⁵ judges commonly interview

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¹ See, e.g., L. FRANCKE, *GROWING UP DIVORCED* 29 (1983) (over 90% of custody arrangements are "worked out privately between the parents and their attorneys"). Some recent statistics from Oakland County, a Detroit suburb, illustrate this point as well. Of cases filed January 1, 1981 through December 31, 1981, 2600 involved divorces with minor children, but only 26 actually went to trial.

² Within the last 20 years the divorce rate has climbed from 2.2 to 5.3 per 1000 population. Jacobs, *The Effect of Divorce on Fathers: An Overview of the Literature*, 139 *AM. J. PSYCHIATRY* 1235, 1235 (1982). In 1978, more than 1.1 million divorces involving 3.5 million men, women, and children were granted. Glick, *Children of Divorced Parents in Demographic Perspective*, 35 *J. SOC. ISSUES* 170, 170-74 (1979).

³ For two rather dramatic examples, see J. AREEN, *CASES AND MATERIALS ON FAMILY LAW* 439-535 (1978); J. GOLDSTEIN & J. KATZ, *THE FAMILY AND THE LAW* 176-215, 518-57 (1965).

⁴ E.g., *ARIZ. REV. STAT. ANN.* § 25-334(a) (1976); *COLO. REV. STAT.* § 14-10-126(1) (1973). For an excellent survey of practice in the 50 states, see Siegel & Hurley, *The Role of the Child's Preference in Custody Proceedings*, 11 *FAM. L.Q.* 1 (1977).

⁵ E.g., *Lincoln v. Lincoln*, 24 N.Y.2d 270, 247 N.E.2d 659 (1969); *Scott v. Rider*, 248 Pa. Super. 383, 375 A.2d 149 (1977).

the children to determine with which parent they prefer to live. For some children, this interview may be a traumatic experience, and depending on the age of the child, the information the judge obtains may not be accurate and reliable. Moreover, since the interviews are not conducted in open court, the potential for due process violations exists. Despite these reservations, interviewing remains a time honored ritual in most custody cases.

This Article will present and analyze the results of a study of how trial judges in one jurisdiction actually conduct preference interviews. The empirical data was compiled from interviews with twenty-six randomly selected judges from the Detroit metropolitan area.⁶ All of the judges served in courts of general jurisdiction; domestic relations cases represent only a portion of a docket of both civil and criminal matters.⁷

Michigan was selected primarily for two reasons: (1) it was likely that an interview would be conducted in virtually every contested custody case because the Michigan appellate courts seem to insist on it;⁸ and (2) the relevant legislation directs the judge to consider the child's preference as one of the eleven factors bearing on the custody decision.⁹

⁶ Wayne, Oakland, Macomb, and Washtenaw counties were represented. All are immediately adjacent to the city of Detroit.

⁷ In Michigan, domestic relations cases represented slightly more than one-third of the new circuit court filings for 1980-81, the last year for which statistics were available. 1980-81 MICHIGAN REPORT OF THE STATE COURT ADMINISTRATOR (1981).

⁸ See, e.g., *Lewis v. Lewis*, 73 Mich. App. 563, 252 N.W.2d 237 (1977); *In re Custody of James B.*, 66 Mich. App. 133, 238 N.W.2d 550 (1975); *Roudabush v. Roudabush*, 62 Mich. App. 391, 233 N.W.2d 596 (1975).

⁹ See MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1983-84). In determining the "best interests of the child," the court must consider:

- (a) The love, affection, and other emotional ties existing between the . . . parties involved and the child.
- (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and continuation of the educating and raising of the child in its religion or creed, if any.
- (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
- (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
- (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (f) The moral fitness of the . . . parties involved.
- (g) The mental and physical health of the . . . parties involved.
- (h) The home, school, and community record of the child.
- (i) The reasonable preference of the child, if the court deems the child to

However, there is no legislative guidance as to how the child's preference should be ascertained. Thus, judges are pressed to interview children but must devise their own methods to implement the legislative directive. Based on the empirical data collected from interviews with the judges, social science findings, and an analysis of due process requirements, this Article will offer some tentative conclusions about the effectiveness and efficiency of the interview as it occurs in practice, and present some suggestions for modification of the process.

I. WHAT THE SURVEY REVEALED

The survey questioned twenty-six judges¹⁰ about their perceptions of domestic relations duty generally,¹¹ their views on interviewing children in custody cases,¹² how they conducted the interviews,¹³ where they conducted the interviews,¹⁴ who else was present,¹⁵ how long the process took,¹⁶ whether the interview was recorded,¹⁷ and what matters were usually covered in the interview.¹⁸ In addition, the survey posed a few open ended questions exploring how the judges would modify the present system. Their responses present an interesting picture of judicial behavior in an area with few guidelines.

be of sufficient age to express preference.

(j) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.

(k) Any other factor considered by the court to be relevant to a particular child custody dispute.

¹⁰ A copy of the interview form used for the 26 judges appears as Appendix A. The sample comprises approximately 16% of the judges statewide who hear contested custody cases.

¹¹ See *infra* notes 31-32 and accompanying text.

¹² See *infra* notes 37-40 and accompanying text.

¹³ Judicial techniques vary because almost one-half (12/26) of the judges reported that they did not inquire directly about the child's preference but rather asked questions to elicit the information inferentially.

¹⁴ All 26 judges in the sample reported that they always interviewed children *in camera*, and with the change in venue from the courtroom to chambers there came other substantial modifications in the manner in which evidence is received. For example, most judges (23/26) did not administer an oath to the children regardless of their age, and most judges chose not to wear robes during the interview in an effort to make the situation less formal.

¹⁵ See *infra* section C of Part I.

¹⁶ See *infra* notes 34-36 and accompanying text.

¹⁷ See *infra* section D of Part I.

¹⁸ See *infra* section E of Part I.

A. Justifications for the Interview

Many states have statutes which permit judicial interviewing of children in custody cases.¹⁹ While these statutes have, for the most part, been enacted within the last twenty-five years, the practice of considering the child's preference apparently began in the middle of the last century. A very early reported case referring to the practice, *State v. Smith*,²⁰ dates from 1830. Despite this longstanding tradition, the reasons why judges interview children in custody litigation, and why legislators direct them to do so, have received scant attention in the literature.²¹

The surveyed judges offered justifications for interviewing the children. Some judges maintained that the interview gave them a "feel"²² for the case that they would not otherwise have. In short, the interview may help the judge make an informed custody decision by providing her with more information about the family from one of its most acutely concerned members — the child.

The interview may also provide the child with an opportunity to vent her feelings about the perplexing and anxiety provoking situation in which she finds herself. It has been suggested that being excluded from

¹⁹ See, e.g., ARIZ. REV. STAT. ANN. § 25-334 (1973); COLO. REV. STAT. § 14-10-126(1) (1973); DEL. CODE ANN. tit. 13, § 724(a) (1981); ILL. ANN. STAT. ch. 40, § 604(a) (Smith-Hurd 1980); IND. CODE ANN. § 31-1-11.5-21(d) (West Supp. 1983); KAN. STAT. ANN. § 60-1614 (Supp. 1982); KY. REV. STAT. § 408.290(1) (Supp. 1982); MO. ANN. STAT. § 452.385 (Vernon 1977); MONT. CODE ANN. § 40-4-214 (1981); TEX. FAM. CODE ANN. § 14.07 (Vernon Supp. 1982-83); WASH. REV. CODE ANN. § 26.09.210 (Supp. 1983); see also N.M. STAT. ANN. § 40-4-9(A)(2) (1978) (providing that trial court "shall" consider wishes of child as to her custodian; however, in subsection (c) the statute provides "whenever testimony is taken from the minor concerning his choice of custodian, the court shall hold a private hearing in his chambers").

²⁰ 6 Me. 400 (1830). In this case, the Maine Supreme Court recognized that children should be heard in custody cases. The court noted that two of four children ranging in age from four to eleven years were "not of such age as to render it expedient to consult their wishes." *Id.* at 403. Implicit in that finding is the assumption that it was appropriate to consult the older two about their preferences. As the court also observed that the children did not appear dissatisfied with remaining with their mother, and had not requested to be returned to their father, it appears that the court listened to the children's wishes in some fashion.

²¹ There have been only a few articles dealing with this issue. E.g., Siegel & Hurley, *supra* note 4; see also Moskowitz, *Divorce-Custody Dispositions: The Child's Wishes in Perspective*, 18 SANTA CLARA L. REV. 427 (1978); Specca, *The Role of the Child in Selecting His or Her Custodian in Divorce Cases*, 27 DRAKE L. REV. 437 (1977-78).

²² Nineteen percent (5/26) of the judges in the survey specifically mentioned this reason for conducting the in chambers interview.

the decisionmaking process may depress or anger some children.²³ While a few judges seemed enamored of this "social work" potential,²⁴ this was not a commonly offered judicial justification for the interview.

Although several of the surveyed judges expressed concern about the utility of interviewing younger children,²⁵ trial judges generally agree that it is crucial for the court to ascertain the preferences of older children.²⁶ Teenagers who are displeased with the custodial disposition of the court may frustrate the court order by leaving the custodial parent's home. Prudence dictates that the wishes of older children receive serious consideration.

In deciding a custody case, the court exercises its *parens patriae* power — the power that gives a judge the authority to make decisions for the protection of children and other incompetents within her jurisdiction.²⁷ Because attorneys are not automatically appointed to represent children in all contested custody cases,²⁸ it seems logical that the

²³ See Note, *Lawyering for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126, 1164 (1978) [hereafter Note, *Lawyering for the Child*].

²⁴ Three judges in the sample reported that, in addition to using the interview to discover the child's preference, they also tried to help the child. One judge sought to explain the process of divorce to his interviewees, another judge endeavored to explain to the child why she was in the judge's chambers, and a third tried to convince the children that the court was there to help them. The third judge even provided his telephone number to each child he interviewed so the child could call him if necessary.

²⁵ Two of the judges in the survey suggested a lower limit below which interviewing should not be permitted — one suggested seven years of age, and the other suggested ten. Two other judges who had interviewed very young children expressed skepticism about the utility of the procedure.

²⁶ J. Kommel, *Trial Judges Conferences With Children Involved in Custody Disputes Among Divorced Parents* 12 (Dec. 19, 1981) (paper on file at U.C. Davis Law Review office); see also *Barton v. Barton*, 230 Cal. App. 2d 43, 48-49, 40 Cal. Rptr. 676, 679-80 (3d Dist. 1964); Comment, *The Role of the Child's Wishes in California Custody Proceedings*, 6 U.C. DAVIS L. REV. 332, 341 (1973).

²⁷ See *Developments in the Law — The Constitution and the Family*, 93 HARV. L. REV. 1156, 1221-24 (1980) [hereafter *Developments in the Law*].

²⁸ Compare *Veazey v. Veazey*, 560 P.2d 382 (Alaska 1977) (suggesting that there are many cases in which a guardian ad litem is not needed) and *Lacy v. Lacy*, 553 P.2d 928 (Alaska 1976) (suggesting factors which militate in favor of appointment of counsel for children such as the children's ages and nature of claim between parents) with Hansen, *Guardians Ad Litem in Divorce and Custody Cases: Protection of the Child's Interests*, 4 J. FAM. L. 181 (1964) (practice in Milwaukee Family Court to appoint a guardian ad litem whenever custody is disputed). Some commentators argue that the child should always be represented in divorce and custody cases. *E.g.*, Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 355-57 (1972); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917

court, as defender of the child's interests, should make some attempt to ascertain the child's perception of her best interests.

Perhaps the most cogent justification for the interview is that although the child is not technically a party litigant in a custody case, her future may be profoundly affected by the outcome. Our notions of fundamental fairness dictate that significant decisions should not be made without giving the person affected an opportunity to be heard.²⁹ The growing tendency to grant children increasing legal status³⁰ may also be an important motivation for judicial and statutory interview requirements.

B. *Judicial Perceptions of Domestic Relations Duty*

Perhaps one of the most surprising discoveries was the extent of the judges' distaste for domestic relations matters generally, and custody matters in particular.³¹ This distaste was manifested in a variety of ways. For example, the judges in the sample reported that they rarely interviewed children in noncontested cases despite having the power and perhaps the obligation to do so.³² Because the court is exercising its

(1976).

²⁹ See, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Stanley v. Illinois*, 405 U.S. 656 (1972); *Goldberg v. Kelley*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306 (1950).

³⁰ See *infra* note 129.

³¹ The judges made many negative comments about domestic relations duty generally. One judge noted that if a judge were assigned to hear nothing but custody cases "he'll either have a nervous breakdown or else he won't do a good job." Another judge speculated that if one were to take a sample of 50 judges it is likely that only five would want to spend a year on domestic relations. He continued, "It's too emotionally draining. Chicago judges needed psychiatric care every six months."

A survey by three Michigan State University psychologists on a similar population of judges supports the conclusions reached here — that by and large judges dislike domestic relations cases. See *Stollak, Casbergue & Kreider, A Workshop for Judges Involved in Child Custody and Other Domestic Relations Disputes*, 9 J. PSYCHIATRY & L. 469 (1981).

In the Michigan State study one of the judges "referred to 'domestic relations' as among the least desirable of court issues he had to face, and another judge referred to these disputes as the 'armpit of my job.'" *Id.* at 471. Thus, it would appear that for many of the surveyed judges, as well as for the judges in the Michigan State study, domestic relations cases generally represent undesirable duty. In addition, the judges in the Michigan State study rated interviewing children as the second most difficult task in domestic relations cases. *Id.* at 470.

³² Once the parents have decided to terminate their marital relationship, the divorcing court is vested with jurisdiction to determine who shall have custody. *Developments in the Law*, *supra* note 27, at 1323. The court is directed to do so, under the law of

parens patriae powers to insure that the child's best interests are being advanced, one would expect some judicial skepticism about the parental allocation of child care responsibilities on occasion. Such was not the case. By and large, the judges were content to allow the parents' wishes to control without judicial investigation.

C. *The Interview: Participants and Observers*

Thirty percent (8/26) of the judges interviewed the child alone. Fifty-seven percent (15/26) had present either a court reporter, a secretary, or a representative of a court agency which sometimes investigates custody cases for the court. Only eleven percent (3/26) of the judges allowed attorneys to attend the interview on occasion. Of the twenty-two judges who interviewed alone, or with a secretary or court agency representative present, almost sixty-four percent (14/22) said that they would not allow the attorneys to be present even if the attorneys made such a request; thirty-six percent (8/22) said that they might permit the attorneys to be present under certain circumstances. Thus, attorneys are not present during most judicial interviews, and from the tenor of the judges' responses, it appeared that attorneys seldom asked to attend.

When asked why they were reluctant or unwilling to have the attorneys present, the judges expressed concern that the interview would become a far less useful exercise if attorneys were permitted to either observe or participate. The judges feared that the presence of an attorney would result in increased formality. The child, it was hypothesized, might react to the formality by refusing to reveal anything to the judge that she did not wish her parents to know. Under such circumstances, the judge could be deprived of significant information. As one judge noted, if attorneys are present, "you might just as well put the kid on the stand."

many states, by determining what custodial arrangement would be in the child's best interests. *Id.* These statutes apply to all custody cases, whether contested or not. Thus, theoretically, the judge is obliged to satisfy herself that a particular placement — whether a result of parental agreement or a custody contest — is indeed in the child's best interests. The implicit assumption is that since parents do not always act in their children's best interests, the state ought to be able to scrutinize their agreements.

It has been argued that when parents agree, the court cannot, consistent with constitutional safeguards, upset that agreement. *Id.* at 1323-24. Others have argued that the courts should not upset such agreements for policy reasons. See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 30-31 (1979); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 994-96 (1979).

D. Availability of Interview Information

Since counsel was rarely present during the interview, it was important to determine whether counsel had access to any data obtained during the interview. Thus the survey included some questions about the availability of a record. Fifty-four percent (14/26) of the judges make no stenographic record of the interview, twenty-seven percent (7/26) always have the interview stenographically recorded, and nineteen percent (5/26) sometimes record it. However, the fact that the interview is recorded does not guarantee that counsel will have access to the record. Forty-five percent (5/11) of those judges who always or sometimes record the interview would make it available only to the appellate court, eighteen percent (2/11) would make it available to the appellate court and the attorneys, but not to the parents, and thirty-six percent (4/11) would make the stenographic record available to the parents as well as the appellate court and the attorneys.

Of those judges who do not stenographically record the interview, almost forty-three percent (6/14) always take notes themselves, twenty-one percent (3/14) "sometimes" take personal notes, and almost twenty-nine percent (4/14) make no record of the interviews at all. It seems quite unlikely that a judge's personal notes would be available to counsel for either side. Therefore, with respect to those judges who make no stenographic record, there is, for all practical purposes, no reliable record available to counsel. To discover what went on during the interview, the attorney must rely either on her own discussions with the child or on what the judge reveals in the written opinion *after* the case has been decided.

E. The Interview: What the Judges Learn

Survey data indicates that the judges not only obtained information concerning the child's preference, but also acquired other information which might influence the ultimate custody decision. The judges were asked: "Has a child ever brought up things that changed your opinion? If so, what kinds of things?" Fifty-four percent (14/26) of the judges acknowledged receiving reports of mistreatment or abuse, including sexual misconduct, by a parent or her live-in friend, as well as information pointing toward drug or alcohol abuse by the custodial parent. The survey results demonstrate that, in many cases, judges received information that went well beyond the child's preference, whether they sought it or not. Yet there were no formal procedures to guarantee the litigants access to this information which might weigh heavily in the ultimate custody disposition. Michigan does not require judges to rec-

ord the interviews, and those judges who do record are not likely to make a transcript available to the litigants.³³

F. How Much Time Judges Spend Interviewing

The interviews are relatively short in length. The judges estimated that they spend a median of eighteen and a half minutes interviewing in custody cases.³⁴ However, it is likely that they lengthened their estimates to convey the impression that they took their role as a decisionmaker in these cases seriously. In addition, since most of the judges reported that they spend some time getting acquainted with the child and attempting to put her at ease, the time actually spent discussing matters relevant to the child's preference is in fact much shorter than the eighteen minute median suggests.³⁵

³³ See *Lesauskis v. Lesauskis*, 111 Mich. App. 811, 314 N.W.2d 767 (1981) (no error to exclude attorney from *in camera* preference interview or to refuse to supply attorney with transcript of conference); cf. *Gulyas v. Gulyas*, 75 Mich. App. 138, 254 N.W.2d 818 (1977) (suggesting trial judge need not reveal child's preference to anyone including appellate panel).

While half of the judges (7/14) who received this "extra information" always had the interviews stenographically recorded, three of the seven judges in this group were willing to make the record available only to the appellate court. Thus, it is possible that information detrimental to the parent seeking custody may reach the judge's attention without any guarantee of its veracity, since counsel, ignorant of it, will not have the opportunity to present contradictory evidence. Of the remaining seven judges who reported getting "extra information as a result of the interview," six never stenographically recorded the interviews, and one recorded occasionally. In summary, while 14 judges in the sample reported receiving information from the child which changed their minds about the custody disposition, only four regularly had a stenographic record made and allowed counsel ready access to it. It is not entirely clear what the remaining 10 judges did with this "extra preference" material (whether they revealed it to counsel or asked that more evidence be presented on the issues raised in the interview) since no follow up questions were posed as to how the judges dealt with this evidence. Nonetheless, it is clear that judges learn much more than the child's preference during the judicial interview.

³⁴ For a more detailed breakdown of how the judges fell into groups with respect to this data, see Appendix C. Note that this 18.5 minute calculation is based on each individual judge's own estimate of the time spent interviewing children rather than on an actual timing of the interview by an independent researcher. Compare this figure with the suggestion made by two judges that the interviewer spend from one-half hour to one hour with each child. Newman & Collester, *Children Should Be Seen and Heard — Techniques for Interviewing the Child in Contested Custody Proceedings*, FAM. ADVOC., Spring 1980, at 8, 11.

³⁵ Judges may be content to spend such a short period of time interviewing the children for several reasons. Many judges think that they are able to accomplish their goal within this short period of time. See *infra* note 37 and accompanying text. The pres-

To complicate matters further, almost half of the judges (12/26) reported that they did not inquire directly about the child's preference, but instead asked questions designed to elicit the information inferentially. Although one might expect that a judge using an indirect approach might spend more rather than less time with the child, there does not appear to be any correlation between the length of time a judge spends with a child and the interviewing method.³⁶

G. *Judicial Perceptions About Interviewing*

The judges expressed confidence in their ability to achieve rapport with the children interviewed.³⁷ They were similarly confident that they were successful in their efforts to discover the child's preference.³⁸ Yet despite this expressed confidence in the process, seventy-three percent (19/26) recommended that other experts do the interviewing, either in addition to or in lieu of the judges. These data indicate that the judges are aware of the difficulties inherent in their task, and are less confident of their success than the responses to the survey suggest. However, most of the judges seemed firmly committed to the notion that children should have input into the custody decisionmaking process.³⁹ Moreover, despite the seemingly wide variations in interviewing practices, most judges reacted negatively to the suggestion that the procedure be standardized statewide by the adoption of either a court rule or statute which would detail procedural requirements for conducting preference

sure of heavy case loads undoubtedly dictates that they allocate a minimal amount of time to the relatively unstructured interviewing process. Further, the distaste many judges expressed for domestic relations cases generally, *see supra* note 31 and accompanying text, and the discomfort they experience performing unfamiliar tasks such as interviewing children unquestionably contribute to the relatively brief time devoted to this task.

³⁶ Those judges who did not ask directly about the child's preference spent a median of 15.5 minutes with each child compared to the overall median of 18.5 minutes.

³⁷ Only one judge in the survey group did not think that he was successful. Another said that he did not always achieve rapport with his interviewees. A third judge did not know, and a fourth said he thought he was successful half of the time. The remaining 22 (84.6%) thought they were successful in achieving rapport.

³⁸ One judge questioned his success in this area, and a second believed that he was successful half of the time. All the remaining judges believed that they were successful in determining the child's preference in the interviewing process.

³⁹ Slightly more than 84% (22/26) firmly believed that children should be interviewed. Some judges, however, advanced qualifications based on the child's age. For example, one judge believed that only children over ten should be interviewed, and another wished to bar interviews of all children under seven.

interviews.⁴⁰

The survey data summarized in Part I raises serious questions about the utility and reliability of the interviewing process. Two sets of concerns are presented. First, because our system promises all litigants due process of law, a system using data which is unavailable to the parties may violate due process guarantees. Second, the manner in which the interview is conducted raises serious doubts about the reliability of the information the judge gathers. Although these two problem areas are obviously interrelated, they will be analyzed separately in the following parts of this Article.

II. THE INTERVIEW SITUATION: SOME DUE PROCESS OBSERVATIONS

Procedural due process guarantees were designed to assure the accuracy and reliability of the facts which enter into the decisionmaking process.⁴¹ Given the interview procedures reported by the judges, and the concerns expressed by behavioral scientists, there is a substantial probability that judges receive inaccurate information.⁴² This misinformation may then influence the custody decision.

Little judicial attention has been directed toward the due process implications of interviewing children *in camera* in custody cases.⁴³ A few states impose statutory restrictions on the interview process. At least two states require that counsel be present during the interview,⁴⁴ and

⁴⁰ Eighty-eight percent (23/26) of the judges opposed the promulgation of such a court rule or statute.

⁴¹ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 503 (1978) (due process minimizes unfair or mistaken deprivations); C. WHITEBREAD, *CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS* 358 (1980) (courts have held that reliable pretrial identification procedures do not violate due process); *cf.* Neil v. Biggers, 409 U.S. 188 (1972) (when rape witness had extensive opportunity to view her assailant during the commission of the crime, using a show-up instead of a line-up was not so suggestive as to violate due process).

⁴² For a complete discussion of this issue, see *infra* Part III.

⁴³ See, e.g., Lesauskis v. Lesauskis, 111 Mich. App. 811, 314 N.W.2d 767 (1981) (due process challenge to trial court's failure to allow either counsel to be present at *in camera* interview or counsel to have access to transcript of interview rejected without appellate court mentioning due process); Lincoln v. Lincoln, 24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842 (1969) (finding no deprivation of "fundamental rights" for judge to interview children in private over objection of counsel, but expressing confidence that court will somehow check on accuracy of information).

⁴⁴ ILL. ANN. STAT. ch. 40, § 604(a) (Smith-Hurd 1980) (court may interview child in chambers; counsel shall be present unless agreed otherwise); MO. ANN. STAT. § 452.385 (Vernon 1977) (court may interview child; court shall permit counsel to be

others require that the interview be stenographically recorded.⁴⁵ However, a review of the case law reveals few appellate cases in which due process challenges have been raised.⁴⁶ The dearth of appellate cases undoubtedly means that the issue is also infrequently raised at the trial level. This may be due in part to counsel's passivity, but it more likely arises from counsel's fear that such a challenge may prejudice her client's case. Most statutes governing custody awards allow the trial judge a great deal of discretion.⁴⁷ An attorney may fear that if she raises too many technical objections the judge will be less inclined to find that her client would be the best custodian.⁴⁸ Theoretically, it would be easy for

present at interview and to participate).

⁴⁵ COLO. REV. STAT. § 14-10-126(1) (1973); ILL. ANN. STAT. ch. 40, § 604(a) (Smith-Hurd 1980); KY. REV. STAT. ANN. § 403.290(1) (Baldwin Supp. 1983); MO. ANN. STAT. § 452.385 (Vernon 1977); MONT. CODE ANN. § 40-4-214 (1983); N.M. STAT. ANN. § 40-4-9(c) (1978) (court reporter shall not file transcript unless appeal taken); WASH. REV. CODE § 26.09.210 (Supp. 1983). Two states have reached the same result by judicial decision. *Marshall v. Stefanides*, 17 Md. App. 364, 302 A.2d 682 (1973) (Maryland); *Scott v. Rider*, 348 Pa. Super. 383, 375 A.2d 149 (1977) (Pennsylvania).

In some states recording the interview is mentioned in the statutes, but is not required in all cases. DEL. CODE ANN. tit. 13, § 724(a) (1981) (record to be made only upon request of party); IND. CODE ANN. § 31-1-11.15-21(d) (West Supp. 1983) (record made only if court permits counsel to be present at interview); KAN. STAT. ANN. § 60-1614 (1983) (record made only upon request of party); TEX. FAM. CODE ANN. § 14.07 (Vernon Supp. 1984) (record made only upon attorney's request or when the child is over the age of 12). Ohio has reached the same result by judicial decision. *See Walker v. Walker*, 40 Ohio App. 2d 6, 317 N.E.2d 415 (1974) (if interview conducted, it must be recorded at the request of a party).

⁴⁶ *See, e.g., Strain v. Strain*, 95 Idaho 904, 523 P.2d 36 (1974) (if interview necessary to support trial judge's decision, it must be recorded); *Callen v. Gill*, 7 N.J. 312, 81 A.2d 495 (1951) (allowing private interview but requiring disclosure to parties of facts which led to decision).

⁴⁷ Many states have "best interests" statutes which grant the trial judge an enormous amount of discretion. *Compare* MICH. COMP. LAWS ANN. § 722.23 (West Supp. 1983) (defining factors comprising "best interests") *with* PA. STAT. ANN. tit. 23, § 1004 (Purdon Supp. 1983) (authorizing award of custody based on "best interests" of the child; "best interests" remains statutorily undefined).

⁴⁸ Some opponents of joint custody have expressed similar fears that one parent may be forced to agree to a joint custody arrangement she does not want for fear that the judge may look less favorably on a litigant who seeks sole custody. *See Schulman & Pitt, Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 GOLDEN GATE U.L. REV. 539, 549-50 (1982); *cf. Clingempeel & Reppucci, Joint Custody After Divorce: Major Issues and Goals for Research*, 91 PSYCHOLOGICAL BULL. 102, 105 (1982) (when joint custody not awarded, courts favor parent most likely to allow child to maintain continuing relationship with other parent; thus parent opposed to joint custody might be perceived as less

a judge to find one parent more fit than the other without running the risk of an appellate reversal.

The fact that counsel, like many judges, may believe that secrecy is in the child's best interests may also explain the dearth of cases. A lawyer who subscribes to this view would be unwilling to raise due process objections to the procedure, despite the fact that it might be in her client's interests. Moreover, the client may not wish to know what transpired during the interview.⁴⁹

Even when raised, due process challenges to the *in camera* interview have not often been successful.⁵⁰ Some courts have held that parents waive their due process objections by agreeing to the *in camera* interview in the first place.⁵¹ It is questionable, however, whether such a consent constitutes a knowing waiver, unless the parents were fully informed of their right to refuse to allow an interview.⁵² Even if the parents were informed of this right, they may be reluctant to exercise it, fearing that a judge may find overly litigious parents unfit custodians. While not all due process challenges have been unsuccessful, the case law reveals that recognition of due process problems with *in camera* interviewing has come very slowly.⁵³

tolerant of child's continuing relationship with other parent).

⁴⁹ *But see* R. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION 155, 173 (1982) (suggesting nonpreferred parent is usually aware of the fact that the child prefers other parent) [hereafter R. GARDNER, FAMILY EVALUATION].

⁵⁰ *See* Siegel & Hurley, *supra* note 4, at 57 ("Due process challenges to the validity of [private interviewing] . . . have proven largely unsuccessful."); *see also* Lesauskis v. Lesauskis, 111 Mich. App. 811, 314 N.W.2d 767 (1981) (reporting constitutional challenges to *in camera* interviewing); *Lincoln v. Lincoln*, 24 N.Y.2d 270, 247 N.E.2d 659, 299 N.Y.S.2d 842 (1969) (same).

⁵¹ *See, e.g.,* *Stevens v. Stevens*, 26 N.C. App. 509, 215 S.E.2d 881 (1975); *Brauhn v. Brauhn*, 10 Wash. App. 592, 518 P.2d 1089 (1974) (dictum); *Newman & Collester*, *supra* note 34, at 8, 11; *Siegel & Hurley*, *supra* note 4, at 48-54. *But see* *Gunter v. Gunter*, 240 Pa. Super. 382, 361 A.2d 307 (1976) (parent cannot waive right to complete record of judge's interview with the child when state law mandates that such a record be kept).

⁵² *See* *Siegel & Hurley*, *supra* note 4, at 54 ("[I]t would seem that something more than mere tacit acceptance should be required to establish an effective waiver of constitutional rights.").

⁵³ *See, e.g.,* *Berryhill v. Berryhill*, 410 So. 2d 416, 418 (Ala. 1982) (recognizing due process rights of cross-examination in context of *in camera* questioning of child); *King v. Scarborough*, 231 Ga. 747, 204 S.E.2d 174 (1974) (dicta) (permissible to interview minors without parties being present so long as their attorneys are present and given opportunity to cross examine child); *Strain v. Strain*, 95 Idaho 904, 523 P.2d 36 (1974) (if interview necessary to support trial court's decision, it must be recorded); *Conkling v. Conkling*, 185 N.W.2d 777 (Iowa 1971) (interview can be conducted only by stipula-

A court faced with a due process challenge to the practice of *in camera* interviewing should begin its analysis with the much used and cited test the Supreme Court set forth in *Mathews v. Eldridge*.⁵⁴ The Court outlined the relevant factors which must be considered:

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." . . . [It requires] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁵⁵

Although *Mathews* involved an administrative proceeding concerned with the government's attempts to terminate the defendant's social security benefits, it has recently been applied by the Supreme Court in litigation between two private parties. In *Little v. Streater*,⁵⁶ the plaintiff, seeking child support, alleged that the defendant was the father of her illegitimate child. The defendant was adjudged to be the father and ordered to support the child. He appealed to the United States Supreme Court claiming that, as an indigent, his due process rights had been denied when the state refused to pay for his blood grouping tests. The court held for the defendant, analyzing the situation according to the three-pronged *Mathews* test.⁵⁷ Although there are distinctions between *Little* and the typical custody case, a court would likely apply a similar analysis when faced with a due process challenge to the *in camera* interviewing procedure. Thus it is appropriate to measure the custody-interview situation with the *Mathews* due process "yardstick."

A. Private Interest Affected

Under *Mathews* and *Little*, the first factor to be considered in custody litigation is the private interest which will be affected by the court's decision.⁵⁸ Since the noncustodial parent is almost always ac-

tion, but court reporter and counsel should usually be present).

⁵⁴ 424 U.S. 319 (1976).

⁵⁵ *Id.* at 334-35 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

⁵⁶ 452 U.S. 1 (1981).

⁵⁷ *Id.* at 13.

⁵⁸ *Id.*; *Mathews*, 424 U.S. at 335. The assumption underlying this analysis is that a parent's interest in maintaining a relationship with her children is entitled to protection under the due process clause. The argument supporting this assumption has been detailed elsewhere and need not be repeated here. See Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121, 124-39; see also Bell, *Termi-*

corded visitation rights, the loss of custody is arguably not as serious as the loss of social security benefits in *Mathews*, or the erroneous attribution of paternity in *Little*. However, closer analysis reveals that an erroneous decision to grant custody to one parent rather than the other may be very harmful for parents as well as children. Denying custody to one parent and according her visitation rights is not the same as complete termination of her rights.⁵⁹ But, especially in the case of a young child, if the noncustodial parent is only permitted visitation for a few hours every week, the deprivation may have an impact which approaches termination.

In one of the least controversial portions of their book, *Beyond the Best Interests of the Child*, Goldstein, Freud, and Solnit support this assertion, positing that the child's sense of time differs from the adult's sense of time:

Emotionally and intellectually an infant and toddler cannot stretch his waiting more than a few days without feeling overwhelmed by the absence of parents. He cannot take care of himself physically, and his emotional and intellectual memory is not sufficiently matured to enable him to use thinking to hold on to the parent he has lost.⁶⁰

Thus, from the young child's point of view, a few hours of weekly visitation may be perceived as infrequent; this infrequency of association could weaken the parent-child bond. A decision to deny custody to one parent based on erroneous facts, while not the precise equivalent of a total deprivation of all parental rights, may profoundly affect the parent-child relationship.

From the parent's perspective, the visiting parent loses some influence to the custodial parent by virtue of her status as a once-a-week visitor. A visiting parent also loses some rights to control the upbringing of the child.⁶¹ While the noncustodial parent probably retains the

nation of Parental Rights: Recent Judicial and Legislative Trends, 30 EMORY L.J. 1065 (1981); Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After Lassiter v. North Carolina*, 15 FAM. L.Q. 205 (1981); cf. *Lassiter v. Department of Social Serv.*, 452 U.S. 18 (1981) (rejecting indigent parents' right to counsel in all cases in which termination is at issue in favor of a case by case analysis).

Moreover, the fact that the parents are unable to agree on custody, and resort to the courts to resolve their conflict, should not affect the fact that they have constitutionally protected interests. See *Developments in the Law*, *supra* note 27, at 1326-29.

⁵⁹ See Novinson, *supra* note 58, at 131-32.

⁶⁰ J. GOLDSTEIN, A. FREUD & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 40 (1975) (new edition with epilogue).

⁶¹ As a general matter, the custodial parent has the right to make all decisions concerning the child's care, education, and religious training unless the court order awarding custody specifies otherwise. See H. CLARK, *LAW OF DOMESTIC RELATIONS* 574

right to consent to medical treatment by virtue of her continuing status as a parent, she may lose the right to decide which school her child will attend, the courses she will study, the church she will attend, and when and whether she will be permitted to smoke, drink, and date, as well as a host of other matters which substantially contribute toward shaping the child's future adult life.⁶² In addition, the visiting parent is deprived of the opportunity to engage in discussions with her child relating to values, morals, and behavior that are best confronted when difficult situations arise.⁶³ Day-to-day contact allows fuller and freer discussion of issues which become important to the child as she moves toward maturity than once-a-week visitation which often produces superficial relationships and discussions.⁶⁴ Because the noncustodial parent and the child have a limited amount of time to spend together, they may be unwilling to raise troublesome or painful issues during their infrequent and brief encounters.⁶⁵ Both parent and child are the losers in this situation: the child is deprived of the insights another adult may bring to a problem she is experiencing, and the visiting parent is deprived of the opportunity to influence her child's emotional and cultural development. While the custodial parent may consult the visiting parent on any of these matters, if the custodial parent chooses not to do so, it is unlikely that a court would order consultation.⁶⁶ The literature sup-

(1968); R. MNOOKIN, *CHILD, FAMILY & STATE — PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 474 (1978); Schulman & Pitt, *supra* note 48, at 540-41.

⁶² See Greif, *Fathers, Children, and Joint Custody*, 49 *AM. J. ORTHOPSYCHIATRY* 311, 312-14 (1979). However, if the noncustodial parent provides the child's financial support, she may still have some control in the upbringing of the child. For example, if the custodial parent wants to do something for the child that costs money, she may be forced to seek an additional stipend from the noncustodial visiting parent. If the parents cannot agree as to the wisdom of the expenditure, the court may have to intervene. In either event, the wishes of the noncustodial parent will be taken into account. To the extent that the custodial parent's course of action does not require added expenditures, or the custodial parent has access to additional funds, it will not be necessary to ask the visiting parent for more money, and her views will not be consulted unless the custodial parent wishes to do so.

⁶³ See J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 60, at 38 ("A 'visiting' . . . parent has little chance to serve as a true object for love, trust and identification.").

⁶⁴ Greif, *supra* note 62, at 314-15.

⁶⁵ J. WALLERSTEIN & J. KELLY, *SURVIVING THE BREAKUP* 123 (1981) ("Father-child relationships rest entirely on what can be compressed into the new and limited form.").

⁶⁶ The visiting parent has few rights. *Cf. DeVita v. DeVita*, 145 N.J. Super. 120, 366 A.2d 1350 (1976) (father with visitation rights may not have female friend stay overnight while children are visiting). Behind the impetus for joint custody was the idea that both parties should have an equal say in the raising of their child. This led to the

porting joint custody suggests that many visiting parents experience their status as visitors as involving a significant loss.⁶⁷ Thus, from the visiting parent's perspective, the denial of custody represents the denial of an important interest.

Status as a visiting rather than a custodial parent may have even more serious ramifications if the custodial parent decides to leave the immediate geographical area. A visiting parent may be accorded lengthy summer visitation in lieu of the weekly visitation she previously enjoyed. It is doubtful, however, that even intensive contact for several months is as effective in creating parent-child bonds as the continuous day-to-day contact which the custodial parent experiences. The parent who is continually present to deal with the child's daily problems, and to provide constant support, affection, and attention will likely be more important in the child's life.⁶⁸ Even if the visiting parent approaches this status during the long summer visitation period, the child who visits the next year or even three months later will have changed. The visiting parent who does not observe this growth process is deprived of the opportunity to respond to the child's increasing maturity by making the subtle day-to-day adjustments necessary to maintain a smooth relationship. While the distant parent is hardly unimportant or insignificant in the child's life, the quality of her relationship, based as it is on summer and holiday visitation and an occasional phone call, may not come close to the quality of the relationship the custodial parent shares with the child. Both the child and the visiting parent may lose that closeness which comes from continuous intimate association.

In addition, although denial of visitation occurs infrequently, it remains a possible outcome of the custody hearing. If visitation is seriously curtailed or cut off entirely, there is scant difference between a permanent termination of parental rights and a denial of visitation rights. If such a drastic possibility is even contemplated, the case for reliable factfinding during the hearing becomes compelling from a due process perspective.

creation of a joint decisionmaking type of joint custody in which both parties are supposed to consult on important decisions. *E.g.*, MICH. COMP. LAWS ANN. § 722.26a(7)(b) (West Supp. 1983). It is not clear even in this situation whether or how a court would enforce such an obligation.

⁶⁷ Greif, *supra* note 62, at 314-15 (detailing the frustrations experienced by visiting parents); Jacobs, *supra* note 2, at 1237 (citing study in which fathers diminished frequency of their visits because they could not tolerate pain of seeing their children only intermittently). *See generally* M. ROMAN & W. HADDARD, *THE DISPOSABLE PARENT* (1978) (favorable view of joint custody).

⁶⁸ Greif, *supra* note 62, at 313-15.

B. *The Safeguards*

The second prong of *Mathews* requires consideration of the likelihood that the decisionmaker will be led to an erroneous result by the procedures currently in force.⁶⁹ The survey results revealed that judges receive information from children which they would not get from any other source.⁷⁰ If such information were inaccurate, it might contribute to erroneous custody dispositions. Moreover, the system allows relatively untrained interviewers, the judges, to elicit information from children in secret and provides no checks on its reliability. Although the judge may choose not to weigh the child's stated preference too heavily in any given case, the judge may be substantially influenced nonetheless by other information about parental behavior obtained during the *in camera* conference. For example, if a child reports that her mother frequently serves peanut butter and jelly sandwiches for dinner, a judge may be less inclined to grant custody to this parent on the grounds that a mother who does not make a hot, well balanced meal every evening is not sufficiently concerned about her children. The point is simply that the judge may be influenced by factors other than the child's stated preference, but the litigants may never know what the child said during her conference with the judge that tipped the balance in favor of one parent or the other.

Issues concerning the value of any additional safeguards will be more fully discussed in Part IV of this Article, which deals with suggestions for change in the system. It is clear, however, that if the interviews were recorded and the transcripts made available to counsel, some of the difficulties outlined here might be avoided.

C. *The Government Interest*

The final prong of the *Mathews* test requires consideration of any government interest which supports the present manner in which preference interviewing is conducted. The fiscal and administrative burdens that additional procedures might entail must also be explored.⁷¹

The government has a valid interest in assuring that children are not harmed by their involvement in custody litigation. As noted in *Little*,

⁶⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁷⁰ See *supra* section E of Part I. While this may not occur in all cases, the fact remains that it happens on occasion. Six of 19 judges in the sample reported receiving information from the child during the *in camera* interview about sexual and physical abuse of which the judges were previously unaware.

⁷¹ *Mathews*, 424 U.S. at 335.

the state has an interest in the child's welfare.⁷² If the interview is recorded, the mere presence of either a stenographer or tape recorder might inhibit the child. As a result, the court could receive substantially less information from the child than in an unrecorded interview. An inadequately informed court may be unable to make a decision in the child's best interests.

The survey results did not reveal that those judges who recorded the interviews perceived the quality of the information received any differently from those who did not. Thus, it does not appear that the presence of a court reporter appreciably impeded the flow of information between the child and the judge. For example, some of the judges who recorded interviews also received information about abuse (7/12) despite the presence of either a tape recorder or a stenographer.⁷³ However, since there is no instance in which one judge experimented both with and without a recording system, it is unclear whether subtle differences exist between a recorded and a nonrecorded interview.

The government interest in protecting the child may be offended in yet another way. If interviews are recorded and transcripts made available to the child's parents, the relationship between the child and the nonpreferred parent may be seriously harmed.⁷⁴ The implications of this will be explored fully in Part III. For present purposes it is sufficient to point out that secrecy may be as harmful to parent-child relations as disclosure would be.

The only significant burden recording would place on the state is economic in nature. Custody trials might be lengthened if interviews were recorded and the parties given an opportunity to challenge the interview evidence. However, this added burden is likely to be minimal. The benefits to all the participants of ensuring that the decisionmaker

⁷² *Little*, 452 U.S. at 14.

⁷³ Six of the 14 judges who received information about abuse never stenographically recorded the interviews. An additional judge occasionally recorded the interview. It is impossible, with such a small sample, to reach any conclusions about the deterrent effect of recording. Cf. T. SHAFFER, *LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL* 77 (1976) (suggesting that modern interviewers use tape recordings which do not "become an interference" if properly explained to client).

⁷⁴ Compare R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 156 ("Children generally expect me to reveal what they tell me to their parents.") with J. SIMMONS, *PSYCHIATRIC EXAMINATION OF CHILDREN* 12-13 (1981) (suggesting children receive preview of what therapist plans to tell parents to establish trustworthiness of therapist).

In at least one reported case a child expressed discomfort at having to state her preference in open court, thus revealing her feelings to her parents. As a result of the child's complaint, the trial judge agreed to conduct the interview in chambers. See *Goldstein v. Goldstein*, 115 R.I. 152, 341 A.2d 51 (1975).

receives accurate information will far outweigh the costs.

III. THE INTERVIEW: FROM A BEHAVIORAL SCIENCE PERSPECTIVE

Experts in child development, such as psychiatrists and psychologists, often have extensive experience and perspective on the process of interviewing children. The insights they have developed are useful in evaluating the procedures employed in the legal system.⁷⁵

Interviewing children is an inherently difficult task, even for an expert; interviewing with the goal of ascertaining the child's preference presents added difficulties. The interviewer must assess the extent to which information received from the child represents reality. In addition, some younger children may change their preferences from day to day.⁷⁶ Ideally children should be interviewed on more than one occasion.⁷⁷ Yet the judges in the survey spent an average of eighteen minutes with each child and never conducted a second interview.⁷⁸ Standardized tests may also be useful under some circumstances. One expert suggests that an intelligence test may enable the examiner to determine how seriously the child's preference ought to be taken.⁷⁹ For example, the preference of a six year old who is determined to be functioning at a nine year old level might be given more credence than if her level of functioning were unknown. In any event, while some children may be unwilling or unable to express a preference, an examiner would be foolish to accept the preference of those who do at face value. There is an obvious need for further inquiry into the reasons behind the stated preference.⁸⁰

⁷⁵ *E.g.*, R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 151-94; J. SIMMONS, *supra* note 74. Dr. Richard A. Gardner is a leading expert who has focused his attention on the problems children experience when their parents divorce. In his book he devotes an entire chapter to describing how a preference interview should be conducted. While a trial judge conducting a preference interview and Dr. Gardner may share the same objective — to discover with whom the child wishes to live — even a brief perusal of Dr. Gardner's work reveals few similarities between his method and that used by the judges. Gardner reports that he inquires about the physical aspects of the child's home, how the child spends a typical day, and how visitation is going. He asks the child to describe his parents, his siblings, his friends, and his grandparents. R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 151-75.

⁷⁶ R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 151.

⁷⁷ *Id.* at 152; *see also* Levy, *Child Custody Determination — A Proposed Psychiatric Methodology and Its Resultant Case Typology*, 6 J. PSYCHIATRY & L. 189, 192 (1978).

⁷⁸ *See supra* note 34 and accompanying text.

⁷⁹ R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 171.

⁸⁰ *Id.* at 173. Twenty-three percent (6/26) of the judges mentioned that they sought

A psychiatrist attempting to discover a child's preference must devote a great deal of time and energy to the task to get an accurate picture of the child's preference.⁸¹ Even a highly trained judge would be unable to cover the same ground with the same care that a psychiatrist does, and it is clear that judges have neither the time nor the training to conduct such an interview.⁸² Because of their lack of training, judges interviewing children may experience additional difficulties. Children's cognitive and perceptive abilities vary widely according to their ages as well as their individual stage of development.⁸³ A skilled interviewer will adjust her approach, including the vocabulary she uses, to accommodate the abilities of the child.⁸⁴ As an initial matter, the skilled interviewer will make an effort to discover precisely where the child is on the developmental scale so that, based on her prior experience, she will best be able to understand and be understood by the child. The professional also constantly monitors the child's comprehension during the course of the interview to make sure the child continues to understand her, perhaps by asking the same question several times in slightly altered form.⁸⁵ Most judges have neither the training nor the time to engage in such an exercise except at the most perfunctory level. In addition, since judges spend the bulk of their time communicating with other professionals at a high level of abstraction, it must be especially difficult for

to determine why a child expressed a particular preference. However, since these comments were not directly responsive to a particular question, it cannot be safely assumed that the remaining 20 judges did not also explore the "why" as well as the "who."

⁸¹ See Watson, *The Children of Armageddon: Problems of Custody Following Divorces*, 21 SYRACUSE L. REV. 55, 75-76 (1969). It is clear from his discussion that Watson would spend a great deal of time interviewing the children.

⁸² A suggested scope of inquiry is illustrated by the proposed set of questions for minors in divorce actions developed by the Family Law Council of the Michigan State Bar published in 10 MICH. FAM. L.J. 20-22 (Oct. 1983), set forth *infra* in Appendix B.

⁸³ Levy, *supra* note 77, at 191; *cf.* Watson, *supra* note 81, at 75-76 (since younger children are not able to describe their feelings, psychological examination of them takes more skill).

⁸⁴ B. BIRD, TALKING WITH PATIENTS 80, 114 (1955); Rosenfeld, *Sexual Abuse of Children, Personal and Professional Responses* 80, reprinted in CHILD ABUSE (E. Newberger ed. 1982); see also Freud, *On The Difficulties of Communicating with Children — The Lesser Children in Chambers*, in V THE WRITINGS OF ANNA FREUD 436-43 (1969). Dr. Freud analyzes the transcript of three separate interviews between a judge and three children whose parents were divorcing. The interviews themselves appear in J. GOLDSTEIN & J. KATZ, *supra* note 3, at 176-81. Simmons also discusses the problems of communicating with young children and adolescents. J. SIMMONS, *supra* note 74, at 66-67.

⁸⁵ B. BIRD, *supra* note 84, at 80.

them to abandon this technical manner of communicating and adopt the simpler, concrete vocabulary necessary to communicate effectively with a child. Moreover, a high percentage of divorces involve young families, so younger children are likely to be overrepresented in the group being interviewed.⁸⁶ Communication problems are most likely to occur in interviews with these children.⁸⁷ Even the most verbally sophisticated teenagers, although capable of adult discourse, may find it difficult to communicate effectively with judges.⁸⁸

Trial judges undoubtedly do the best they can under the circumstances. Yet a comparison of the actual practices disclosed by the survey with the recommended approach of experts raises serious questions about the reliability of the information obtained under the present system.

Even if the only question the interviewing judge posed were, "with whom do you want to live?" and the child responded quickly, "my mother," the interviewer could not confidently conclude, without further inquiry, that this was child's true preference.⁸⁹ Children may only be able to express a preference for one parent, but "secretly have positive feelings for the other as well."⁹⁰ These children may only be able to express these positive feelings for the ostensibly nonpreferred parent "through exaggerated condemnation of the nonpreferred parent."⁹¹ In addition, a child may express a preference for a parent the child feels is weaker and in need of care,⁹² or a child may express a preference for one parent in the hope that the choice will cause the nonpreferred parent to abandon the divorce.⁹³ In short, exploration of the reasons behind

⁸⁶ "According to the 1980 Census Population Report, the average length of first marriages was 6.8 years. . . . Over half these divorces . . . included children. . . . The greatest number of children were between six and eight years old at the point of divorce" L. FRANCKE, *supra* note 1, at 27.

⁸⁷ "The younger the child the more skill is . . . required." Watson, *supra* note 81, at 75-76. Some of the judges in the survey interviewed children who were quite young. One judge reported interviewing a child of 3 and a half. Another talked to a child of four, and a third judge said that he interviewed all children over three or four. *See also* Freud, *supra* note 84, at 437 (suggesting that six year olds do not feel at ease with strangers and often meet a stranger's questions "with a blank wall of silence").

⁸⁸ A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* 149 (1976).

⁸⁹ R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 173-74.

⁹⁰ *Id.* at 178. Dr. Gardner was relying on Levy, *supra* note 77, at 31.

⁹¹ R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 178.

⁹² L. FRANCKE, *supra* note 1, at 203; Levy, *supra* note 77, at 194; interview with Virginia Sargent, M.A., family therapist in Grosse Pointe, Mich. (Oct. 17, 1982).

⁹³ Levy, *supra* note 77, at 194; *see also* Moskowitz, *supra* note 21, at 441-42.

the expressed preference enables the interviewer to properly evaluate it, and to determine how much weight it should be given. While many of the judges professed to inquire into the underlying reasons for the child's expressed preference,⁹⁴ it seems most unlikely that a judge who only allocates eighteen minutes to the interviewing task is able to explore the child's real motivations.

Another problem is the child who vacillates.⁹⁵ If the child's preference varies from day to day, the results of the preference interview may depend upon whether the child is asked Monday or Wednesday. Without an in-depth exploration of the reasons why the child has expressed a preference for one parent over the other, it is difficult to determine how certain the child is about her stated preference. When the child's vacillation is the product of real ambivalence, rather than lack of understanding about what it means to be in one parent's custody, the judge should recognize this factor in determining how much weight to accord the child's stated preference. Yet, a judge who only interviews the child once is unlikely to be aware of her subsequent changes of heart.

Other difficulties are likely to be encountered. Almost half of the judges in the survey (12/26) do not inquire directly about the child's preference, but instead draw inferences from other information they obtain during the interview. Such a procedure has a built-in potential for error since it is easy for an untrained interviewer to draw the wrong conclusion from information that is obtained during an eighteen minute encounter. While the judges who are willing to adopt the indirect approach may be commended for their sensitivity to children, it is likely that they may occasionally reach erroneous conclusions.

The information about physical and sexual abuse which the judges in the survey reported receiving raises additional troublesome issues.⁹⁶ If such information plays a factor in either the award of custody or the visitation provisions, its accuracy should be carefully explored. However, even behavioral science experts experience difficulty in this area.⁹⁷

⁹⁴ See *supra* note 80.

⁹⁵ R. GARDNER, *FAMILY EVALUATION*, *supra* note 49, at 151; Levy, *supra* note 77, 203-04.

⁹⁶ See *supra* section E of Part I.

⁹⁷ Rosenfeld, Nadelson & Krieger, *Fantasy and Reality in Patients' Reports of Incest*, 40 J. CLIN. PSYCHIATRY 159, 163 (1979) (suggesting children may at times make false accusations of incest stemming from child's "wish to punish or torture a hated adult"). However, there are few instances of erroneous reports cited in the literature. See D. RENSHAW, *INCEST 69-71* (1982) (reference to literature detailing erroneous reports); Katan, *Children Who Were Raped*, 28 PSYCHOANALYTICAL STUD. CHILD

On the other hand, because of their lack of training in communicating with children, judges may fail to comprehend stories of abuse which come from the children they have interviewed. In either event, this type of material requires sensitive treatment. A judge who is limited by the press of other business may not be able to accord it the attention it deserves.

Another major criticism of the judicial interviewing process was raised in Wallerstein and Kelly's groundbreaking work on the effects of divorce, *Surviving the Breakup*.⁹⁸ The authors found that school age children experienced the divorce as a "struggle in which each participant demanded one's primary loyalty, and this conception greatly increased the conflict and unhappiness of the child."⁹⁹ For these children "a step in the direction of one parent was experienced by the child (and sometimes by the angry parent as well) as a betrayal of the other."¹⁰⁰ It would probably produce even greater anxiety for them if they were required to express a preference. Wallerstein and Kelly's findings that loyalty conflicts produced "despair, depression and guilt"¹⁰¹ suggest that preteens should not be asked to state a preference;¹⁰² to require them to do so may only exacerbate an already painful situation.

It is clear that if our colleagues in the behavioral sciences were asked to pass judgment on the manner in which the child's preference is determined in contested custody cases, they would be highly critical of the current procedures.

IV. SUGGESTIONS FOR CHANGE

The due process analysis as well as behavioral science materials strongly suggest that procedures currently in use need modification. But in what direction should such modification proceed? Judges may erroneously assume that there are only two available options — either to put the child on the witness stand in open court, or to conduct an unre-

208, 219 (1975) (wondering how many of Freud's patients were right about their seduction but wrong about identification of perpetrator). The prevailing view among mental health professionals is that more often than not reports of incest and other sexual abuse are truthful. Interview with Joseph Fischhoff, M.D., Professor of Psychiatry, Wayne State University Medical School, Detroit, Mich. (Mar. 8, 1984).

⁹⁸ J. WALLERSTEIN & J. KELLY, *supra* note 65.

⁹⁹ *Id.* at 49.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 88.

¹⁰² While Wallerstein and Kelly did not conclude that these children should not be asked, they were careful to point out that the preferences of such children ought not to be seriously considered by decisionmakers. *Id.* at 314-15.

corded *in camera* conference with only the judge and the child present. Consideration for the sensibilities of the child might easily lead a judge to opt for complete secrecy. But these options are not the only alternatives. This Part examines three suggestions for modifying the present system. The underlying assumption is that the child deserves some specialized protection in a custody case. Being called as a witness in a judicial proceeding is an extremely unsettling experience for most adults,¹⁰³ and it may be even more disturbing for a child, since the questioning focuses on the child's relationship with her parents and her preference.¹⁰⁴ Therefore, it is not suggested that the child be treated as an ordinary witness. All three proposals recommend that interviewing take place *in camera* outside the presence of counsel. Although some critics will undoubtedly argue that the only way to guarantee due process is to require the child to present her evidence as would any other witness, this approach has been traditionally rejected.¹⁰⁵ The suggestions which follow represent an attempt to balance the interests of all concerned.¹⁰⁶

¹⁰³ Even lawyers may find their first time in court an unsettling experience. See Ranii, *Lawyers Talk About Their First Time*, NAT'L L.J., Sept. 26, 1983, at 1, cols. 2-4.

¹⁰⁴ In the survey, 20 of the 26 judges found the children they interviewed "uneasy." Four judges said whether the children were uneasy depended upon how the situation was handled, and two judges found that the children they interviewed were not uneasy. While unease does not necessarily translate into "trauma," one judge noted that crying children took longer to interview, so at least some children were quite upset during the interview.

¹⁰⁵ Siegel & Hurley, *supra* note 4, at 47-48. *But see* Goldstein v. Goldstein, 115 R.I. 152, 341 A.2d 51 (1975) (child initially questioned in open court, but interview moved to chambers when child expressed discomfort).

¹⁰⁶ It appears that the need for judicial interviewing to determine custodial preference will continue despite the advent of new procedures such as mediation and new arrangements such as joint custody. True joint custody arrangements in which physical custody is shared equally may not be as prevalent as the popular media suggest. See Schulman & Pitt, *supra* note 48, at 543-44. Thus, it is unlikely that the existence of this option will cut down substantially, if at all, on the number of contested custody cases which come before the courts. In addition, even if joint custody is contemplated, the court may have to interview the child to determine whether joint custody is in fact in her best interests.

Similarly, the relatively new technique of mediation is not suitable for all divorcing couples; thus, we cannot expect to see contested custody cases "mediated" out of the system. Undoubtedly a certain number of divorcing spouses will find it necessary to fight over the children no matter how the legal system is designed. Neither the existence of mediation nor of joint custody will make a difference to this group. So long as the judiciary is called upon to decide these cases, there will be interviewing. On the subject of mediation, see generally O. COOGLER, STRUCTURED MEDIATION IN DI-

A. *A Modest Proposal from a Lawyer's Perspective*

The most obvious way of modifying the present system would be to require that the *in camera* interview be recorded, and that a transcript be made available to all interested parties.¹⁰⁷ The parties would then have an opportunity to rebut any significant information the child has given the judge. The litigants would be allowed to present any type of rebuttal evidence short of actually calling the child as a witness.¹⁰⁸ While a parent may be hindered by her inability to cross-examine the child, on balance, it seems better to avoid subjecting the child to the rigors of testifying in open court. In addition, in many instances, rebuttal from the child may be unnecessary. To the extent that the transcript reveals something about the direction in which the judge is leaning, counsel may redirect oral argument to issues raised during the interview.

Obviously, recording all interviews, either on tape or stenographically, would increase the cost of the proceedings. However, given the rather abbreviated nature of the interviews, this burden would not be excessive. Even if increased concern about due process causes judges to take more time in their interviews, thus increasing the cost, the benefit in terms of the increased guarantee of accuracy would be well worth it.

Court time for rebuttal testimony will also increase costs, but such

VORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS (1978); Gold, *Mediation in the Dissolution of Marriage*, 36 ARB. J., Sept. 1981, at 9; Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982); Spencer & Zammit, *Mediation - Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911; Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1981).

Furthermore, even when joint custody is implemented, the parties may later come before the court with a dispute over some aspect of the arrangement. Even those parents with more conventional custodial arrangements frequently end up litigating over visitation problems. One third of the judges in the survey (9/26) indicated that they interviewed children not only in initial custody determinations, but also in troubled visitation situations. These same judges would probably opt to interview children when joint custodians have difficulties with their arrangement. In short, it is likely that interviewing is here to stay for the immediate future.

¹⁰⁷ This is not a new idea. See UNIF. MARRIAGE & DIVORCE ACT § 404, 9A U.L.A. commissioners' note at 203 (1979) (allowing the judge to interview the child at her discretion, but requiring a record to be made "so that counsel for all parties will have access to the substance of the interview").

¹⁰⁸ The reason for this limitation is that to allow the child to be called even in rebuttal would be contrary to this proposal's objectives — to maintain a degree of protection for the child while allowing counsel an opportunity to challenge significant misstatements that the child may have made.

evidence will not be needed in every case. Even if overzealous attorneys seek to present rebuttal frequently, the trial judge retains the right to refuse to hear evidence that is too collateral. If only a few cases are prolonged, adoption of this proposal will not result in serious harm to the judicial system.

The major objection to this proposal is that the availability of the transcript to counsel, and hence to the parents, may permanently damage the parent-child relationship. A parent who discovers she is "second best" in the child's eyes may be inclined to withdraw from the child, damaging the future course of their relationship. Such a withdrawal may cause emotional injury to the child who, at the time of a divorce, needs assurance that she is still loved by both parents.¹⁰⁹ Without hard data it is difficult to assess the weight which should be accorded this argument. One expert has observed that the "nonpreferred parent usually knows anyway his or her status in the child's mind."¹¹⁰ If so, concerns about destroying the parent-child relationship may be misplaced. If the stated preference comes as a surprise, however, it may be necessary for both the trial judge and counsel to emphasize to the "rejected" parent the importance of maintaining a continuing loving relationship with the child. If the nonpreferred parent becomes the noncustodial parent the possibility of professional counseling to aid and encourage the visiting parent in maintaining her relationship with the child should be suggested.¹¹¹ But those parents who truly care for their children will probably not easily jettison the relationship merely because the child has said that she prefers to live with the other parent. If a parent chooses to terminate all contact with her child, or treat her less kindly than formerly because of the expressed preference, counsel should emphasize to her client the importance of continuing contact with the child, and urge the client to seek professional help. On balance, it appears that the benefits from "piercing the veil" of interview secrecy outweigh the potential harm to the parent-child relationship.

Beyond the threat of parental rejection, what effect will the revelation have from the child's point of view? It is difficult to generalize because, as has been observed previously,¹¹² children of different ages

¹⁰⁹ R. GARDNER, THERAPEUTIC COMMUNICATION WITH CHILDREN 597 (1971) (child becomes less secure that the custodial parent will remain and fears total abandonment) [hereafter R. GARDNER, THERAPEUTIC COMMUNICATION]; J. WALLERSTEIN & J. KELLY, *supra* note 65, at 45-46.

¹¹⁰ R. GARDNER, FAMILY EVALUATION, *supra* note 49, at 155.

¹¹¹ Cf. J. GOLDSTEIN, A. FREUD & A. SOLNIT, *supra* note 60, at 185 n.8.

¹¹² See *supra* notes 83-88 and accompanying text.

react differently. Older children, especially teenagers, may not find it particularly bothersome when their parents are informed with whom they prefer to live.¹¹³ Young adults may be quite capable of tolerating any guilt which may arise out of such a revelation. Younger children, particularly children between six and twelve years old, are likely to experience an intense loyalty conflict.¹¹⁴ Consequently, they may be distressed at the prospect that their preference would be revealed to their parents.¹¹⁵

Confidentiality may not, in fact, be a major problem. It has been suggested that most children expect that anything they say will be revealed to their parents, and that they may even accept the necessity of revealing their preferences if they have a strong desire to reside with one parent rather than the other.¹¹⁶ If this is true, concern about the effects of taping the preference interview and revealing the contents to the child's parents is misplaced. In any event, the effect of the revelation may well depend on how the situation is handled. Preparations should be made before the information is conveyed to help the child and nonpreferred parent work out any difficulties which may arise as a result of the revelation.

Moreover, it is possible that secrecy may be as harmful as disclosure. A six to ten year old child might feel overwhelmed at the burden of keeping the awful secret that she revealed to the judge — that she preferred one parent to the other. To have verbalized her preference may be equated in the child's mind with having expressed negative feelings

¹¹³ It is interesting to note that the judges varied in their assessments of children. One judge found younger children were less at ease but more honest than older children, while another judge thought that younger children were more at ease than older ones. A third judge believed older children were more sophisticated and perhaps more likely to try to mislead the judge. Compare the approaches of three children of varying ages to the preference question in J. GOLDSTEIN & J. KATZ, *supra* note 3, at 176-81, 196, 197-98, 204-05, with Anna Freud's analysis of the children's reactions in Freud, *supra* note 84, at 436-43.

¹¹⁴ J. WALLERSTEIN & J. KELLY, *supra* note 65, at 49, 70-71, 88; Levy, *The Meaning of the Child's Preference in Child Custody Determination*, 8 J. PSYCHIATRY & L. 221, 223, 224-26 (1980).

¹¹⁵ It does not appear that children under six experience as intense a loyalty conflict as children six to 12 years old, although very young children do experience feelings of guilt, isolation, loneliness, and bewilderment. J. WALLERSTEIN & J. KELLY, *supra* note 65, at 55-64. Because of their increased vulnerability, it can be hypothesized that younger children may also be quite distressed by being asked about their preference.

¹¹⁶ *Id.* Note, however, that a few judges (4/26) expressly promised the children they interviewed that whatever the children told them would be held in confidence. Since this information was not offered by the judges in response to a specific question, one cannot safely conclude that only four out of 26 judges promised confidentiality.

about the other parent. This may be particularly threatening to a child who experiences the fear, common during divorce, that not one but both parents will be lost.¹¹⁷ If the information remains secret, the child may never discuss her feelings with anyone, and buried secrets are frequently the cause of subsequent childhood and adult problems.¹¹⁸ If, on the other hand, both parents know of the child's preference and the child knows they know, she may be able to accept the fact that she expressed a preference for one parent. If she is then able to experience the continued love and support of the nonpreferred parent, any potential harm which might arise from her having made a choice can be minimized.¹¹⁹

The other major objection to this proposal is that children who know that their words are being recorded and that the recording will be available to their parents may be unwilling to confide in the judge. This argument is difficult to evaluate. Much may depend on the age and personality of the child. For example, teenagers may be more forthcoming than younger children. In addition, the skill of the interviewer in creating a hospitable environment is probably the most significant factor affecting the amount of important information obtained, and recording may have little or no effect when a skilled interviewer is at work.¹²⁰ It has also been reported that, in other interviewing contexts, after the first few minutes, interviewees commonly forget about the presence of a microphone and proceed as if it were not there.¹²¹ The presence of a third party such as a court reporter may complicate the situation, but as long as the option of using a tape recorder remains open, these potential complications can be avoided. Moreover, the survey results cast doubt on the assumption that the presence of a court reporter would be too inhibiting. Judges who always or sometimes

¹¹⁷ R. GARDNER, THERAPEUTIC COMMUNICATION, *supra* note 109, at 597; J. WALLERSTEIN & J. KELLY, *supra* note 65, at 45-46.

¹¹⁸ See E. ERIKSON, CHILDHOOD AND SOCIETY 48-58 (2d ed. 1963) (therapist discovers child's "secrets" and is able to effectuate a "cure").

¹¹⁹ There is of course no data which would support this thesis, but it is at least plausible. Thus, it is not clear which way secrecy cuts. Since there are demonstrable dangers in the present situation in which secrecy prevails, the argument that a transcript of the interview should always be available is considerably strengthened.

¹²⁰ R. GARDNER, FAMILY EVALUATION, *supra* note 49, at 155-56.

¹²¹ Louise Campbell, who actually conducted the interviews with the judges in this study, reported that the presence of the tape recorder did not seem to bother the judges. Many interviewers make use of a tape recorder these days. See T. SHAFFER, *supra* note 73, at 77. A tape recorder figures prominently in Dr. Gardner's "Mutual Story Telling Technique." See R. GARDNER, THERAPEUTIC COMMUNICATION, *supra* note 109, at 25.

stenographically recorded their interviews obtained information about abuse more frequently than judges who made no recordings.¹²² Thus, while the presence of the court reporter may not facilitate communication, it does not appear to have a significant deterrent effect on obtaining sensitive information.

When one examines the judges' perceptions about the efficacy of the interviewing process, it appears that, by and large, those judges who recorded the interviews as well as those who did not were confident that they were successful in achieving rapport with the children and discovering their preferences.¹²³ Although these responses may be self-serving, the judges who recorded did not appear to feel that the presence of the court reporter hampered their ability to conduct a successful interview. In any event, the assertion that the presence of a tape recorder or a court reporter in and of itself will stifle the child's spontaneity during a judicial interview remains unproven.¹²⁴ Given the potential harm that may arise from the use of unverifiable data, there are strong arguments for making some modifications in the present system.

While the proposal to record all interviews, and to make the tapes available to counsel, is responsive to fears that a judge may reach a decision on unchallenged, unreliable information, the proposal remains unresponsive to another set of concerns — concerns that the children from six to twelve, who experience the most intense loyalty conflict, may be harmed by the mere process of being interviewed. The children may be harmed because they are, in effect, being encouraged by an authority figure, the judge, to behave in a disloyal manner by stating a preference for one parent over the other.

Additionally, this proposal is not necessarily responsive to fears that both participants, judge and child, may unwittingly misunderstand each other,¹²⁵ and that this misunderstanding may affect the judge's perception of the child's preference. Having an attorney review a transcript of

¹²² See *supra* note 33.

¹²³ See *supra* notes 37-38 and accompanying text.

¹²⁴ Any "stifling" that occurs may be the product of the situation itself rather than the presence of a tape recorder. Freud, *supra* note 84, at 437, notes that children commonly meet adult questions "with [a] . . . blank wall of silence or . . . contradictory statements" when "a delicate or dangerous situation is investigated." These reactions constitute the child's automatic defense, according to Dr. Freud. She also observes that "no six-year-old can feel at ease when he is interviewed by a stranger and . . . such a situation invariably produces a wary and respectful blandness which proves rather unrevealing." *Id.* at 438; see also J. SIMMONS, *supra* note 74, at 65-67 (discussing hostility of child to interview in psychiatric setting).

¹²⁵ See *supra* notes 83-94 and accompanying text.

the interview might serve as a check on some misunderstandings between judge and child. However, it is unlikely that, without specialized training, an attorney will have the sophistication to detect subtle clues which may point to other than the most obvious misunderstandings by the participants.¹²⁶ Even if the attorney vigorously pursues the issue, it is unlikely that she will be successful in convincing the judge that she (the judge) misunderstood the child, or that the child misunderstood the judge. In short, concerns about the reliability of the communication process during the interview are only partially addressed by this proposal.

B. A Second Proposal: A Suggestion from the Behavioral Science Perspective

The second proposal is that no child under twelve years of age should be interviewed in a child custody case.¹²⁷ When children twelve years of age and older are interviewed, the contents of the interview should be recorded and the record made available to the interested parties.

This proposal is responsive to many concerns explored earlier, such as the communication difficulties that are likely to arise when younger children are interviewed, and that younger children are more likely to be harmed by the process itself. If judges were limited to interviewing children over twelve, these problems could be largely avoided. Moreover, to the extent that concern has been expressed about the relatively short time judges spend interviewing children, short interviews may be less harmful for older children since teenagers are more likely to have a clear idea with whom they wish to live, and will be able to more easily communicate their wishes in a short period of time.

In addition, potential harm to children in the six to twelve year old group who may experience distress by being asked to select one parent over the other could be avoided if they were not interviewed at all. As older children do not seem to experience a loyalty conflict as intensely as younger children,¹²⁸ a judge posing the preference question directly to them will not run the same risk of inflicting emotional harm as she

¹²⁶ Even if the attorney does detect such communication failures, she is unlikely to raise the issue or, if she does, she is unlikely to press the issue vigorously, given the degree of discretion judges have in custody cases, and the fact that appellate reversals are difficult and costly to obtain.

¹²⁷ One of the judges in the survey suggested that children under ten not be interviewed. Another suggested that children under seven years not be interviewed.

¹²⁸ See *supra* notes 98-102 and accompanying text.

would if the question were posed directly to a younger child. Since it has been argued that the older child's preference should be given serious consideration because teenagers may effectively frustrate a judge's order by running away to the home of the preferred parent, this proposal continues to allow older children input into the decisionmaking process.

Despite the fact that this proposal has much to recommend it, it appears unlikely to achieve widespread support. The legal trend has been to recognize that children, even very young children, have rights despite their minority and lack of maturity.¹²⁹ While the rights children have been accorded may differ in quantity as well as quality from the rights enjoyed by adults, this legal trend cannot easily be disregarded.

Custody statutes in many states expressly allow the appointment of a guardian ad litem for children in divorce cases at the discretion of the trial judge.¹³⁰ Perhaps implicit in this procedure is the notion that, although the child is not officially a party to the divorce proceeding, her interests in the outcome are substantial, and she ought to be heard through counsel in some instances. A court rule or statute which declared that children under the age of twelve should not be heard by the judge runs counter to this philosophy.

Even children under the age of twelve may have information relevant to the custody matter.¹³¹ Depriving the decisionmaker of that information to protect the child from some judicial involvement may not be the optimal way of striking a balance among the diverse interests. Certainly the judges in the survey would object to such a complete prohibition, since they strongly favored hearing from children in custody cases. These judges would likely be displeased with any per se disqualification unless it applied only to extremely young children.¹³² But to allow

¹²⁹ See, e.g., *Parham v. J.R.*, 442 U.S. 584 (1979) (parents may not civilly commit their children to a mental institution without review of the reasonableness of the commitment decision by a medically trained third party); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969) (children have some first amendment rights to express themselves at school on political issues); *In re Gault*, 387 U.S. 1 (1967) (according children brought before the juvenile court for criminal offenses many of the same safeguards as adult offenders).

¹³⁰ Note, *Lawyering for the Child*, *supra* note 23, at 1127-28 n.8 (listing those jurisdictions in which counsel may be appointed for child).

¹³¹ *Id.* at 1164 (suggesting that some children may feel depressed or angry as a result of being left out of decisionmaking process); cf. Freud, *supra* note 84, at 439 (discussing that some children believe that "no one tells [them] . . . anything").

¹³² It is apparent that the judges are not totally pleased with the present situation in which they feel compelled to interview in practically every case. For example, after reporting he had interviewed a 3 and a half year old, one judge said that he felt com-

judicial interviews of children in the six to twelve year age group would probably produce the kind of emotional harm that this proposal attempts to avoid. And, as one reaches the lower end of the six to twelve year old spectrum, judges will undoubtedly experience the difficulties in communication detailed earlier.

C. A Third Proposal: Another Behavioral Science-Legal Solution

The final proposal removes the task of interviewing from trial judges, and assigns it to individuals with specialized training in child development or related areas. Experts assigned the task of interviewing under this proposal should have the skills and time effectively to create a hospitable environment to encourage communication with the child. While using experts does not guarantee accurate information, it is likely that any information they obtain will be reliable. Many of the judges in the survey (16/26) expressed a desire to have behavioral science experts interview the children in contested custody cases. This proposal is partially responsive to their desires.

Behavioral experts would be able to minimize the potential harm the interview situation poses for the child in two ways. First, an expert's questioning would be low-key and designed to cause as little embarrassment and anxiety as possible. An expert would be able to discover early in the interview whether the child was experiencing an intense loyalty conflict. If the expert determined that to be the case, she could avoid asking outright which parent the child preferred. The interview could be expertly tailored to the child's stage of development and particular needs. Even the most sensitive judge has neither the training nor the time to function in this fashion.

Secondly, the court's expert could "debrief" all children toward the end of the interview to make sure that there is no residual harm from the process. As used here, debriefing refers to the behavioral expert's

pelled by appellate decisions to interview the child "for whatever it is worth." A second judge observed that to interview a four year old was "nonsense," but said that he had done so believing the law of the state required it.

Sixteen out of the 26 judges (61.5%) thought it might be helpful to have a behavioral science expert do the interviewing, although several were careful to note that the judge should interview as well. This does not necessarily mean that the judges wished to relinquish their duties as interviewers; it does, however, suggest that some of the judges were uneasy about their interviewing skills and wished to have an expert verify the accuracy of their conclusions.

effort to dampen the effect a potentially traumatic experience has on an individual.¹³³ For example, an interviewer who has conducted a preference interview with a child in a custody case would first try to ascertain the meaning of the interview experience to the child. If the child were sophisticated enough to verbalize her impressions, she would then be given the opportunity to verbalize any fears or misconceptions which may have materialized as a result of the interview itself.¹³⁴ Finally, the interviewer and child would discuss the experience in a manner designed to enable the child to comprehend the experience in a realistic way. If the debriefing process is completed successfully, no lasting scars from the interview process will result. Obviously, most judges have neither the time, training, nor inclination to perform this debriefing function. Yet for those children who are at risk — and that may be all children whose parents are locked in a custody battle — it is an important procedure.

If the interviewing function is reassigned to behavioral experts, the question arises as to how the expert's findings should be introduced in the custody case. The expert will explore the child's preference as well as the reasons why the child may prefer one parent over the other. Detailing the reasons underlying the child's choice is as important as reporting the preference itself, since this information will aid the judge in determining how much weight to accord the child's preference.¹³⁵ The expert interviewer should be required to file a report with the court which will be available to both parties.¹³⁶ When the report is formally received into evidence, the litigants should be given the opportunity to cross-examine the expert and present their own evidence to

¹³³ For a discussion of the use of debriefing following deception experiments, see J. KATZ, *EXPERIMENTATION WITH HUMAN BEINGS* 395-404 (1972).

¹³⁴ For young children, who may not be sufficiently verbally sophisticated, it may be necessary to communicate via play. How many judges would be able to accomplish this? See Watson, *supra* note 81, at 75-76.

¹³⁵ See *supra* text accompanying notes 89-94.

¹³⁶ The Uniform Marriage and Divorce Act permits the judge to "seek the advice of professional personnel," but requires that any advice the expert gives be "in writing and made available by the Court to counsel upon request." UNIF. MARRIAGE & DIVORCE ACT § 404, 9A U.L.A. 203 (1979). The Commissioners' Notes observe that the expert's advice should be made available to counsel "so that the judge's decision will not be based on secret information." *Id.* It has elsewhere been suggested that a transcript should be made of the expert's interview or that counsel be allowed to be present. J. AREEN, *supra* note 3, at 556.

challenge the expert's conclusions, short of actually calling the child as a witness.¹³⁷ Due process would require no less.¹³⁸

This proposal contemplates that the expert's interview will be in lieu of, rather than in addition to, the judge's interview. If this proposal were adopted, trial judges would be removed from the interview process entirely. While judges who believe the interview gives them a unique feel for the case may be reluctant to adopt a system which only provides them with the report of an expert, the arguments for assigning the interviewing responsibility to a court appointed expert are obvious. Most judges lack the time and the expertise to do a good job. The potential for harm to the child that the interview situation presents strengthens

¹³⁷ The Uniform Marriage and Divorce Act also provides that counsel may examine any expert who provides advice to the court. UNIF. MARRIAGE & DIVORCE ACT § 404, 9A U.L.A. 203 (1979); *see also* State *ex rel.* Fisher v. Devins, 294 Minn. 496, 500, 200 N.W.2d 28, 32 (1972) (parties should be given notice of the contents of an expert's report "so as to afford them every opportunity to test the credibility of the reporter through cross examination").

¹³⁸ The closest analogy to the present situation involves the use of the presentence report in criminal cases. The Supreme Court held in *Williams v. New York*, 337 U.S. 241 (1949), that reliance by the sentencing judge on a presentence report which the defendant had not seen did not violate due process. However, the judge in *Williams* revealed the details of the report to the defendant when he imposed sentence, and the defendant did not challenge the accuracy of the judge's statements. *Williams* has been roundly criticized, although the Supreme Court has never overruled it. *See, e.g.,* Note, *Right of Criminal Offenders to Challenge Reports Used in Determining Sentence*, 49 COLUM. L. REV. 567 (1949); Note, *Due Process and Legislative Standards in Sentencing*, 101 U. PA. L. REV. 257 (1952).

In 1975, the Supreme Court adopted Rule 32(c)(3) of the Federal Rules of Criminal Procedure, which generally provides that the presentence report shall be made available to defense counsel, but allows the judge to withhold some portions of the report when necessary in the interests of justice. If a judge opts to withhold portions, she is required to summarize those portions for defense counsel so that the defendant will have access to all the data on which the judge relied in imposing sentence. While the system may not operate perfectly, *see* Fennell & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 HARV. L. REV. 1615 (1980), Rule 32(c)(3) represents a clear vote in favor of disclosure.

The sentencing situation is distinguishable from custody litigation. However, these changes in the Federal Rules of Criminal Procedure illustrate that the Court has, in the past quarter century, become more sensitive to problems of secrecy. In a more analogous situation, some state courts do not allow reports compiled by investigative agencies in custody cases to be admitted without the express consent of both parties. *See, e.g.,* State *ex rel.* Fisher v. Devins, 294 Minn. 496, 200 N.W.2d 28, 31-32 (1972) ("care should be taken to give fair notice of the contents of such reports to the parties"); *DiStefano v. DiStefano*, 51 A.D.2d 885, 380 N.Y.S.2d 394 (1976) (consent to investigation does not constitute consent to use).

the case for interviewing by outside experts.

There is some danger that custody litigation may be lengthened under this proposal. In addition, if a judge permits each litigant's expert to reinterview the child as a method of challenging the court appointed expert's testimony, the potential for harm to the child would increase. However, a trial court has the ability under its *parens patriae* powers to preclude the parties from subjecting the child to additional probing to ascertain her preference even if such probing is conducted by experts hired by the parents.

Some state statutes¹³⁹ and the Uniform Marriage and Divorce Act¹⁴⁰ already provide for the use of experts in custody cases. However, the fact that a statute mentions the possibility of appointing an expert does not guarantee that the expert's services will be called upon frequently. While the judges in the survey reacted favorably to the use of experts for doing preference interviewing as an abstract proposition,¹⁴¹ and Michigan law permits the appointment of experts, in practice the judges continued to interview the children themselves. The reasons for this are not difficult to fathom. Judges who are confident that they are able to achieve rapport and to discover the child's preference are not likely to seek expert assistance. If the courts are not sensitized to some of the issues raised in this Article — concerns about the reliability of the information they obtain as well as concerns about the impact of the interview on the child — it is unlikely that they will perceive the need for outside assistance, let alone ask for it.

This proposal is responsive to most of the criticisms which have been leveled at the current system. It seeks to insure reliability, provides the litigants with access to all the data used by the judge in reaching a decision, and minimizes the harm to the child by providing an opportunity for her to discuss her experience with the expert. On the other hand, it may increase the length and cost of custody proceedings, and judges may resent losing the opportunity to gain a "feel" for the case from their interviews with the child. When the benefits of the proposal are weighed against its detriments, however, it appears that this solution is most responsive to the problems identified as arising under current practice.

¹³⁹ *E.g.*, COLO. REV. STAT. § 14-10-126(2) (1973); MICH. COMP. LAWS ANN. § 722.27 (West Supp. 1983).

¹⁴⁰ UNIF. MARRIAGE & DIVORCE ACT § 404, 9A U.L.A. 203 (1979).

¹⁴¹ *See supra* note 132.

CONCLUSION

The judicial interview of a child in a contested custody case to determine the child's preference has almost become a ritual in many jurisdictions. Yet the survey results discussed in this Article reveal that there is good reason to be dissatisfied with the method as well as the results of the process currently employed. Perhaps the time has come to reassess the procedure entirely and to consider making some changes in the process. Any modification proposed should be designed to assure that the judge has accurate information, that the child continues to have some input into the decision, and that the process operates in a manner which seeks to minimize the potential trauma to the child.¹⁴²

¹⁴² Solutions other than those proposed here are possible. For example, if counsel were appointed for the child, the judicial interview might not be necessary, since counsel would be able to advocate that the court decide in accordance with the child's preference or at least inform the court of the child's wishes. See Note, *Lawyering for the Child*, *supra* note 23, at 1163-83. However, counsel may have some of the same problems communicating with the child that judges do, and an expert may need to be called in in any event.

APPENDIX A

JUDGE _____ DATE _____

PLACE _____

QUESTIONS FOR JUDICIAL INTERVIEWS

How long have you been a judge? _____

Prior to becoming a judge did you have much of a domestic relations practice?

Approximately how many divorce cases do you hear a year? _____

In how many of those is custody contested? _____

How many times a year do you have occasion to interview the children? ____

[If there is a difference between the last two questions] In what other circum-
stances do you interview the children? _____

_____What do you think the function of the interview is/should be? _____

_____What factors cause you to conduct an interview, or do you interview in all
cases in which custody is contested? _____

_____In those cases in which you choose not to interview why do you choose not to
interview? _____

_____Have you ever interviewed kids in a noncontested case? Explain. _____

_____Now I have some yes/no, or short answer questions which are concerned with
physical surroundings.

Where do you interview kids? (Circle answer)

Courtroom

Chambers

Elsewhere (state where) _____

Is the child sworn? Yes No

Who else is present? (Circle answer)

Court Reporter

Other Personnel. Describe. _____

Are attorneys present? Yes No

If they asked would you allow it? Yes No

Why not? (Aside from the fact that a panel of the Court of Appeals said recently that you don't have to in Lesauskis v. Lesauskis, 314 N.W.2d 767 (1981).

Is stenographic record made? Yes No

If so, to whom is it available? (Circle answer)

Attorneys

Appellate Court

Anyone else? _____

If not,

Is any kind of a record made? Yes No

Do you take notes? Yes No

If there are several children do you interview them (Circle answer)

Separately

Together

How long does an average interview last? _____

Now we'll turn to questions that might require more discussion on your part.

Do you interview early in the procedure to help you in making the decision or do you interview later on in the litigation to see whether the decision you have tentatively made is correct?

Has a child ever brought up things that changed your opinion? If so, what kinds of things?

Are children uneasy when they come in to see you? _____

Does it depend on their age? _____

How do you put them at ease? _____

What material do you usually cover in this interview? _____

Do you have a set plan for each interview or do you prefer a more unstructured approach?

If you have a plan for each interview, do you vary it according to child's age? If so, how? _____

Do you inquire outright about child's preference? How do you ask? If not, how do you ascertain his or her preference?

Do you think you are successful in achieving rapport with the children you interview?

Do you think that by and large you are successful in discovering their preferences?

Does it depend on age? _____

Have you detected any problems with parental "bribery"? If so, how have you dealt with them?

Assuming you could redesign the system any way you want, how would you set it up? I have a few yes or no questions here, then I would appreciate any general comments you might have.

Should child be interviewed to determine preference?

Yes No

If yes, should child be interviewed by (Circle answer or answers)

Psychiatrist, Psychologist, Social Worker w/o judge present, w/ judge present, Friend of Court personnel

Should child be tested? Yes No

Should someone be sent to house? Yes No

Should statute spell out specifics of interview?

Yes No

Do you have any other general comments you would like to make on how system should be changed w/respect to ascertaining child's preference?

APPENDIX B

Introduction

These questions were prepared by attorneys specializing in the practice of family law in consultation with child psychologists. They were reviewed and edited by the Child Custody Committee of the Family Law Section of the State Bar of Michigan and approved by the Council.

It is hoped that the questions provided will cover a broad enough range of subject matter to give the individual judge the necessary input from the minor child to make a finding as to that particular child's preference by the use of indirect questions that will not frighten the minor child.

The attached questions are not meant to replace your own intuition and judgment. They are to be used to assist you in developing an appropriate line of questioning in order to determine what is the minor child's preference. It is within the sole discretion of each of you to make your own determination as to how to make the best use of these proposed questions. While age is not the sole criteria in determining the use of these questions, it is suggested that a child be at least five years old in order to elicit coherent responses. These questions may not be suitable for children beyond the age of 12.

Proposed Questions to Minor Children in Divorce Cases

Opening Statements

I'm Judge _____. I'm pleased to meet you today. Sit down and make yourself comfortable. You know that your parents are getting divorced and will not be living together anymore. I have to decide where you will live.

Your thoughts and feelings will really help me to make a decision as to which parent you will live with. I would like you to know it will not be your decision.

In order that you may help me I must ask you some questions. If at any time you want to ask me any questions, please do so!

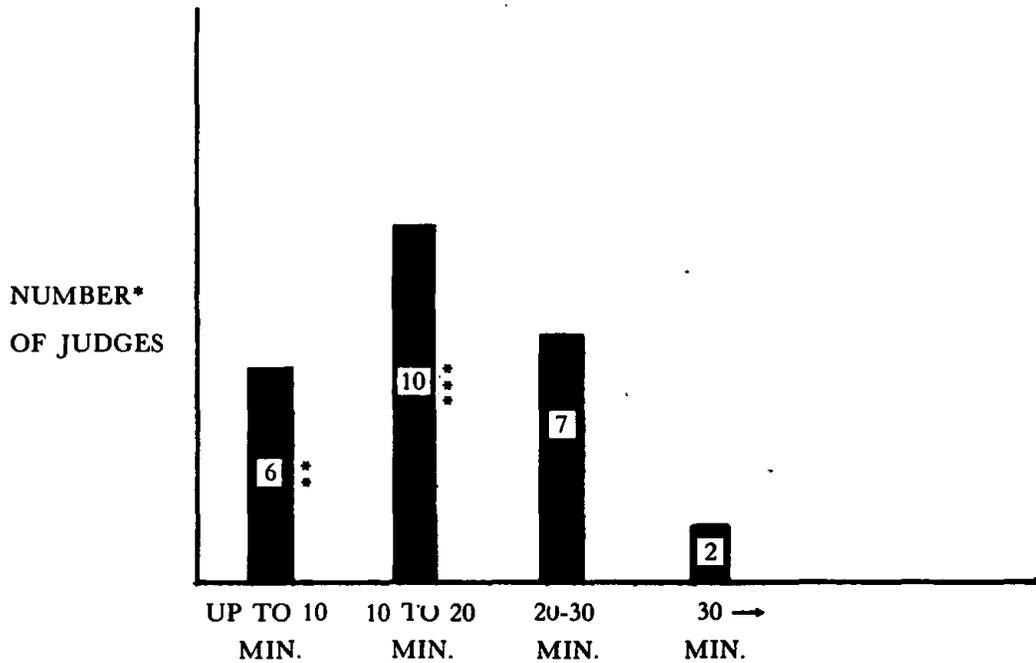
Questions

1. Please tell me your full name.
2. How old are you? When were you born?
3. What is your mother's name?
4. What is your father's name?

5. What does your mother do during the daytime?
6. What does your father do during the daytime?
7. When do you go to school?
 - a) What are your school hours?
 - b) What are your grades?
 - c) What are your favorite subjects?
 - d) What do you do after school and during your free time?
 - e) What are your hobbies?
 - f) How do you think you will do in school this year?
 - g) Could you do better at school?
 - h) Who helps you with your homework?
8. Where do you eat your breakfast? Your lunch? Your dinner?
9. Who prepares your meals?
10. What do you do on weekends?
11. Who are your closest friends? What do you do with your friends?
12. What do you do with your mother?
13. What do you do with your father?
14. Have you talked to your mother about talking to me or coming to court? What did she say?
15. Have you talked to your father about talking to me or coming to court? What did he say?
16. When you have done something wrong, who punishes you or talks to you about it?
 - a) How does your mother punish you?
 - b) How does your father punish you?
17. What is the one thing your mother does that makes you the maddest?
18. What is the one thing your father does that makes you the maddest?
 - a) What problems do you talk to your mother about?
 - b) What problems do you talk to your father about?
 - c) If you accidently broke a window, what would your mother do? What would your father do?
 - d) If you fell and injured your knee, who would you go to?
 - e) If you had a fight with your best friend, who would you talk to? Why did you pick that person?
 - f) If you were picked on at school, who would you talk to? Why?
19. When you're sick, who takes care of you?
20. When you have to go to the doctor or dentist, who takes you?
21. How long have you lived where you are living?
22. Is your mother in good health?

23. Is your father in good health?
 24. If you were home in the afternoon alone with your mother, what do you think you would do?
 25. If you were home in the afternoon alone with your father, what do you think you would do?
 26. When you go on vacation, where do you go? With whom do you go? What do you do on your vacation?
 27. Do you have any heroes? What kind of people are your heroes? What do you want to be when you grow up?
 28. What are your interests in life, such as music, sports, church and any other activities?
 - a) Has your mother helped you develop your interests?
 - b) Has your father helped you develop your interests?
 29. Has either your mother or your father said anything bad about the other?
 30. Do you know what divorce is?
 31. How did you learn about your parents divorce?
 - a) Who told you?
 - b) When were you told?
 - c) Do you remember what was said?
 - d) How did you feel about the divorce?
 32. If I decide that you must live with your mother, how would you feel about my decision?
 33. If I decide that you must live with your father, how would you feel about my decision?
 34. Do you have any questions? Is there anything you would like to ask of me?
- Thank you very much. It has been very nice talking to you.

APPENDIX C



- * There are only 25 judges on the graph; one was deleted who reported only that the time he spent "varied"
- ** This category includes one judge who reported that he spent a "few" minutes with each child but that crying children took longer
- *** This category includes three judges who were not obviously within the category — one who reported spending 15-30 minutes with each child, another who reported spending 10 with a maximum of 35-40 minutes, and a third who said he spent between 5 and 30 minutes with each child

