



**The Honourable  
Judge R James Williams**

*Let the Child Speak Out*

“IF WISHES WERE HORSES,  
THEN BEGGARS WOULD RIDE”

## **Child Preferences and Custody/Access Proceedings**

*IF WISHES WERE HORSES*

*If wishes were horses,  
Then beggars would ride.  
If turnips were watches,  
I'd wear one by my side.  
And if "ifs" and "ands"  
Were pots and pans,  
There'd be no work for tinkers!*

*- Traditional Nursery Rhyme*

Judge R. James Williams  
February, 1999

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## INTRODUCTION

Custody and access cases involve the competing interests of parents. They also involve a state or judicial interest in the protection of children and youth. They also, of course, involve the interests and rights of those children.

In determining or choosing a custody and/or access regime for a family, a Judge considers evidence from a number of sources, on a number of issues. One of the sources is the child. One of the issues is the child's choice, wish or preference with respect to his/her custody/access arrangement.

There are at least two reasons for Courts to consider a child's or youth's wishes or preferences with respect to a custody/access issue.

First, the child is a person with rights, the person whose future is being determined. Common sense, fairness, and a host of other rationale can be identified for the child's views to be seen as relevant to the determination of his/her future. We should not need a *Charter of Rights* or statute or case law to tell us this.

Second, the law - both statute and case law - does mandate such consideration.

Like so much of law, and especially, it seems, family law, there is some distance between the theory and its execution. It would be, from a Judge's point of view, easier to deal with children's wishes and preferences if there was a rule or statute that simply stated that a child's wish or preference was dispositive of custody/access cases. There is no such rule or statute in Canada - the child's wishes and preferences being one of many considerations in determining the best interests of the child. Questions abound - how does, can this information come to the Court, what should the Court do with it, what of the child's maturity level, the influences on the child? This paper will examine some of these issues, not answer them.



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## B. JUST WORDS? WISH, WANT, NEED, PREFER

It is useful to consider the meaning of the words we use. Fowlers<sup>1</sup> provides some context, meaning to our word usage:

<b>wish</b>	...has been a revival of an obsolete use of wish as a Genteelism for <u>want</u>
<b>want</b>	implies a subjective judgment
<b>need</b>	implies an objective judgment
<b>prefer</b>	would choose

Wishes and wants are related to subjective judgments. Here we are speaking of the subjective judgments of children and youth. To prefer involves a choice. To choose in an informed manner we should know our possible choices.

## C. A NEW ISSUE, AN OLD ISSUE

The issue of the wishes and preferences of children in custody/access proceedings has received very recent attention.

For the Sake of the Children, the December 1998 “Report of the Special Joint (Senate/House) Committee on Child Custody and Access”, specifically addresses the issue of “Hearing Children’s Voices” in custody/access proceedings. The Report includes the following recommendations<sup>2</sup>:

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<sup>1</sup>Gowers, Sir Ernest, Fowlers Modern English Usage (2<sup>nd</sup> Ed.), Oxford, 1985.

<sup>2</sup>Recommendations 1 to 4, pages 14 and 15.

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## Recommendations

1. This Committee recommends that the *Divorce Act* be amended to include a Preamble alluding to the relevant principles of the United Nations *Convention on the Rights of the Child*.
2. This Committee recognizes that parents' relationships with their children do not end upon separation or divorce and therefore recommends that the *Divorce Act* be amended to add a Preamble containing the principle that divorced parents and their children are entitled to a close and continuous relationship with one another.
3. This Committee recommends that it is in the best interests of children that
  - 3.1 they have the opportunity to be heard when parenting decisions affecting them are being made;
  - 3.2 those whose parents divorce have the opportunity to express their views to a skilled professional, whose duty it would be to make those views known to any Judge, assessor or mediator making or facilitating a shared parenting determination;
  - 3.3 a Court have the authority to appoint an interested third party, such as a member of the child's extended family, to support and represent a child experiencing difficulties during parental separation or divorce;
  - 3.4 the federal government work with the provinces and territories to ensure that the necessary structures, procedures and resources are in place to enable such consultation to take place, whether decisions are being made under the *Divorce Act* or provincial legislation; and
  - 3.5 we recognize that children of divorce have a need and a right to the protection of the Courts, arising from their inherent jurisdiction.
4. This Committee recommends that where, in the opinion of the Court, the

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proper protection of the best interests of the child requires it, Judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child.

Many of these recommendations are resource-based recommendations. The legal system has ways of “hearing children’s voices” now. This paper will discuss those ways in terms of existing statute and case law.

Article 12 of the *United Nations Convention on the Rights of the Child*<sup>3</sup> provides:

**Article 12**

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

As a result of this Report, “hearing the voice” of children in custody and access disputes is almost certain to become a more frequently, raised, heard and dealt with issue in the months and years ahead.

These are not, as I have said, new issues.

In 1774 in Blissets Case<sup>4</sup>, Lord Mansfield refused to change the custody of

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<sup>3</sup>November 20, 1989, General Assembly Resolution 44/25.

<sup>4</sup>(1774) 98 Eng. Rep. 899 (K. B.).

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a six-year old girl from her mother and maternal grandfather to her bankrupt, abusive father. The Court specifically considered the child's wishes, concluding that she wanted to stay with her mother.

In the mid-19<sup>th</sup> century, Kent's Commentaries<sup>5</sup> described the role of the child's wishes (as a factor in a custody dispute) as follows:

The (parent) may obtain the custody of his children by the writ of *habeas corpus*, when they are improperly detained from him; but the Courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere upon *habeas corpus*, and take a child, though under fourteen years of age, ...and deliver it over to the (parent) against the will of the child. They will consult the inclination of an infant, if it be of a sufficiently mature age to Judge for itself, and even control the right of the (parent) to the possession and education of his child when the nature of the case appears to warrant it.

Robinson<sup>6</sup> See Queen v. Howes (1860), 121 E. R. 467 (Q. B.); In re Agar-Ellis (1998) 24 Ch. D 317 (C. A.). observed in 1972 that where custody was an issue before a Court by way of a writ of *habeas corpus*:

...it has been laid down in several old English cases that if the child is of the 'age of discretion' and the child does not consent to being delivered into the custody of the applicant, *habeas corpus* will not be granted. The 'age of discretion' has been held to be 14 years in the case of a boy and 16 years in the case of a girl.

In 1925 the Supreme Court of Canada, in Stevenson v. Florant expressed more than a little caution concerning judicial reliance on the wishes or preference of children. Rinfret, J. S. C., quoted<sup>7</sup> the Trial Judge, Greenshields, J.:

<sup>5</sup>Kent, James, Commentaries on American Law, (7<sup>th</sup> Ed) 1851, at p. 194.

<sup>6</sup>Robinson, L. R., "Custody and Access", Chap. 8, Vol. 2, Studies in Canadian Family Law, D. Mendes da Costa (ed.), Butterworths: Toronto, 1972, at p. 600-601.

<sup>7</sup>(1925) 4 D. L. R. 530 (S. C. C.) at p. 544.

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But let it be well understood, that the interest of the child is not to be confounded with the wish or will of the child.

and then observed:

Nothing, in fact, seems less satisfactory than trying to decide as to the interest of the child in accordance with its caprice of the moment especially to deduce them from the more or less uncertain statements which it may make in Court...the odds in favor of a preference for those whom they have been accustomed to live, are overwhelming.

Even this brief sampling of older opinions illustrates some of the inconsistencies, differences and problems in our (the legal system's) handling of these cases.

Rinfret speaks of the "caprice of the moment", the influences of the child's environment. Robinson speaks of a gender-based age of discretion, of the possibility of a child's views being dispositive of a custody issue. Kent's Commentaries and Lord Mansfield speak of a child's views being a consideration - with other factors including the age, maturity and context of the expressed preference. We will see that in many ways we have not come far from these views.

#### D. WHAT ROLE FOR THE CHILD?

As a legal system, we are anything but consistent in our treatment of children and youth. They, for example, generally:

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- vote at 19,
- drive at 16,
- are criminally responsible at 12,
- in some provinces must give their consent for an adoption to occur if they are 7, others 12 or over<sup>8</sup>
- do not, most often, have party status in custody proceedings.

“Social science” offers few answers. Garrison<sup>9</sup> concluded in one study that 9-10 year olds were as competent as 14-18 year olds in their reasonableness of preference for choosing one custodial arrangement over another. The conclusion is eye-catching but the study used subjects from intact families and the emotional dislocation associated with divorce or separation was non-existent for the children in this study. Others have concluded that direct involvement in custody decisions can be destructive, especially for pre-adolescents<sup>10</sup>. Rosen<sup>11</sup> states that children will be fearful of alienating one or both parents if they are forced to make a custodial choice.

Into this we layer our desire as a legal system to involve children in decision-making, but not hurt them, to treat them as having rights, but needing protection, to treat them as needing guidance, but allowing them a degree of freedom and independence. These, in essence, are the sources of the mandate given us, as Judges. It is a mandate that is at once conflicting and ambivalent. Inevitably it leaves a good deal of discretion to individual Judges in individual

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<sup>8</sup>Infra, footnote 18.

<sup>9</sup>Garrison, E. G., “Children’s Competence to Participate in Divorce Custody Decision-Making” (1991) 20 J. of Clinical Child Psychiatry, 78.

<sup>10</sup>Wallerstein, J. S. and Kelly, J. B., “The Effects of Parental Divorce: Experiences of the Child in Later Latency” (1976) 46 Am. J. of Orthopsychiatry, 256.

<sup>11</sup>Rosen, R. “Children of Divorce: An Evaluation of Two Common Assumptions” (1979) 2 Cdn. J. of Family Law, (403).

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cases.

## E. THE “GUIDANCE” OF THE LAW

The discretion of Judges is guided by statute and case law.

### 1. Statute

We live in a federal system. Legislation varies.

Some legislation is extraordinarily general. An example of this is the Divorce Act<sup>12</sup> which provides with respect to custody/access issues:

**s. 16(8)** In making an order under this section the Court shall take into consideration only the best interests of the child of the marriage as determined by reference to the conditions, means, needs or other circumstances of the child.

Innumerable divorce cases have considered the child’s wishes as part of his/her condition, means, needs or other circumstances<sup>13</sup>.

Obviously a Trial Judge is left with virtually unencumbered (by

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<sup>12</sup>Divorce Act 1985, R. S. C. 1985 (2<sup>nd</sup> Supp.), c. 3, as amended.

<sup>13</sup>For e.g., Harnish v. Harnish (1998) Carswell N. B., 381 (N. B. Q. B.).

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statute) judicial discretion in dealing with children's wishes under such legislation.

Some legislation provides that the Court shall when considering the "best interests of the child" consider:

...the wishes of the child, to the extent the Court considers appropriate, having regard to the age and maturity of the child...<sup>14</sup>

...the views and preferences of the child, where such views and preferences can reasonably be ascertained...<sup>15</sup>

...the child's views and wishes if they can reasonably be ascertained...<sup>16</sup>

...the child's views and preferences if they can be reasonably ascertained...<sup>17</sup>

This type of legislation creates two points for the exercise of judicial discretion:

- a. can the child's wishes be reasonably ascertained?
- b. consideration of those wishes with the rest of the evidence.

Legislation dealing with child placement can be more assertive in

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<sup>14</sup>S. 8(a)(vii), Children's Law Act, S. Sask. 1997, c. C-8.2.

<sup>15</sup>S. 1 Family Services Act, R. S. N. B., 1980, c. F-22.

<sup>16</sup>S. 3(2)(j) Children and Family Services Act, S. N. S., 1990, c. 5.

<sup>17</sup>S. 24(2)(b) Children's Law Reform Act, R. S. O. 1990, c. 12 as amended.

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respecting children's wishes and preferences.

Adoption legislation provides some examples:

a. In Ontario, where the child or young person to be adopted is seven years or older, no order may be made without his/her consent. The Court may dispense with the child's consent where it is satisfied either that obtaining the child's consent would cause him/her emotional harm or the person is not able to consent due to a developmental handicap.<sup>18</sup>

b. In P. E. I. the Adoption Act provides that:

The Court shall inquire into the child's capacity to understand and appreciate the nature of the application, and consider the child's views and wishes if they can be reasonably ascertained, and where it is practical to do so, the Court shall give the child the opportunity to be heard.<sup>19</sup>

Some U. S. States go further in structuring Court's consideration of children's wishes and preferences in custody/access proceedings.

a. In Georgia:

...where the child has reached the age of fourteen years, such child shall have the right to select the parent with whom such child desires to live

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<sup>18</sup>S. 137(6) Child and Family Services Act, R. S. O. 1990, c. 11. For some other provinces the age at which consent is required is 12 - for e.g. s. 5(1)(b), Adoption Act, Stat. Sask. 1989.

<sup>19</sup>S. 34 Adoption Act, S. P. E. I., 1992, c. 1.

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and such selection shall be controlling unless the parent so selected is determined not to be a fit and proper person to have the custody...<sup>20</sup>

b. Ohio similarly allows:

...any child twelve years or more...to choose that parent with whom the child is to live unless the Court finds that the parent so selected is unfit to take charge or unless the Court finds, with respect to a child twelve years of age or older, that it would not be in the best interests of the child to have the choice.<sup>21</sup>

This is not intended to be in any way an exhaustive review of statutory provisions concerning children's wishes and preferences in custody/access matters. It is merely a sampling. Some observations can, however, be made from even this brief review:

- a. Statutes structure or guide judicial discretion in a variety of ways:
- C very generally (e.g. Divorce Act);
  - C directing that children's wishes, preferences be

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<sup>20</sup>Ga. Code Ann. (Supp. 1990) sec. 19-9-1 (2971).

<sup>21</sup>Ohio Rev. Code Ann., sec 3109.04 (A.) (Page Supp. 1980)

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considered if they can be reasonably ascertained<sup>22</sup>. This type of statute does not tell us, as Judges either when a wish can be reasonably ascertained or how to consider the child's wishes with other evidence;

- C requiring the child's consent to (adoption) placement unless it would cause the child emotional harm or cannot be obtained.<sup>23</sup> This (in Ontario) structures the decision-making to the extent that an adoption cannot take place unless there is consent or one of two specific evidentiary findings, leading to the dispensing of the consent;
- C asking the Court to consider the child's age and maturity level;<sup>24</sup>
- C requiring the Court to make inquiries as to the child's capacity and "where practical" give the child the right to be heard<sup>25</sup>;
- C setting an age at which a child can make a choice and making the choice controlling - unless evidence and findings demonstrate the choice not to be in the child's best interests<sup>26</sup> - in effect creating an evidentiary

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<sup>22</sup>Supra footnote 15, 16, 17.

<sup>23</sup>Supra footnote 18.

<sup>24</sup>Supra footnote 14.

<sup>25</sup>Supra footnote 19.

<sup>26</sup>Supra footnotes 20, 21.

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burden.

The result is a not very profound observation - that a first step for a Judge or counsel is to check the statute. That check, however, is likely to give a Judge or counsel only limited guidance.

Clearly, in Canada, legislatures have chosen to extend the wishes or preferences of children a greater element of control in adoption matters than in custody/access proceedings. At least one American author has been critical of such distinctions, arguing that:

From a child's perspective, a custody proceeding has practical implications of finality not present from the parent's perspective, and which for the child make it very similar to a parental rights termination proceeding. When one parent is awarded sole or primary custody, and the other lives in a different place or loses interest, the child will neither have the money nor the wherewithal to initiate phone conversations and long visits, to move to or select a school close to the other parent, or make other efforts to keep the parent involved. By contrast, a non-custodial parent who wants greater involvement with the child can choose to live close by, call frequently, or bring a motion for custody..."<sup>27</sup>

Kandel argues for a "rule" or statute that would make children's choices dispositive in custody and access cases.

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<sup>27</sup>Kandel, R. F., "Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations" (1994) 49 U. of Miami L. R., 299 at p. 358.

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If custody decisions are made on the basis of the view that “one parent needs to be or is in control”, the other parent is virtually excluded from decision-making, there may well be some merit to Kandel’s observations from the view of the child.

One example of this view of custody is found in MacGyver v. Richards<sup>28</sup>:

Custody is an enormous undertaking which ought to be pre-eminently recognized by the courts in deciding disputed issues incidental to that custody. The right or wish to see a child every weekend or two may be of genuine benefit to the child, but it cannot begin to approach the benefit to a child who takes care of him or her every day. The scales used to weigh a child’s best interests are not evenly balanced between two parents when one is an occasional and the other a constant presence...

When is one just an occasional presence? This view of custody, and it is a widely held view, is at least somewhat inconsistent with the messages we send parents through the encouragement of parenting plans, or the idea that “parenting is forever” so common in parent education programs. As one Court observed:

The children have made a simple request - they want a father and mother.<sup>29</sup>

In any event, there is little, if any, discussion in the literature as to

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<sup>28</sup>(1995) 11 R. F. L. (4<sup>th</sup>) 432 (Ont. C . A .) at p. 445.

<sup>29</sup>Smith v. Smith (1997) Carswell Sask. 735 (Sask. Q. B.) at p. 3.

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why, from a policy point of view, we would differentiate between adoption and custody cases in our legislative treatment of the wishes and preferences of children.

## 2. Case Law

Case law provides Judges with a second source of guidance. In a federal system, with a multiplicity of statutes and jurisdictions, it is difficult to generalize.

My review of case law leads me to some observations, however:

- a. Where legislation does not expressly deal with the factors to be considered under the best interests test, or the role of the child's wishes and preferences, there is case law which includes child preferences as a factor in the determination of a child's best interests. For example, in Foley v. Foley<sup>30</sup>, Goodfellow, J. S. C ., gave a non-exhaustive list of factors to be taken into account in determining the best interests of the child. His list included "the wishes of the child, if at the time of the hearing such are ascertainable and, to the extent they are ascertainable".
- b. Trial Judges are directed, then, by statute and case law to consider children's wishes and preferences in making custody and access decisions. Not surprisingly it can be an error of law to not consider a child's wishes, preferences:

The children's preferences should have been considered and weighed. Youngsters of this age are often capable of more reasoned and mature choices than may be supposed.

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<sup>30</sup>(1993) 124 N. S . R . (2d) 198 at p. 201.

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These were...children whose preferences were reasoned ones...<sup>31</sup>

- c. Conversely, it can be an error of law to rely on a child's wishes or preferences in circumstances where the process of securing of wish or preference as evidence is questionable.<sup>32</sup>
- d. Suggestions that a Judge must, shall, should, may consider a child's wishes or preferences do not generally direct the "how" or manner in which the wishes or preferences may come to the Court. Put another way, the preferences should be considered but there is limited direction on how you get the preference before the Court. There are a variety of ways of doing so<sup>33</sup>.

## F. RECEIVING THE WISHES/PREFERENCES OF CHILDREN

There are a number of ways in which children's wishes or preferences with

<sup>31</sup>Burgmaier v. Bergmaier (1986) 50 R. F. L. (2d) 1 (Sask. C. A.) at p. 14.

<sup>32</sup>Jandrisch v. Jandrisch (1980), 16 R. F. L. (2d) 239 (Man. C. A.).

<sup>33</sup>Uldian v. Uldian (1988) 14 R. F. L. (3d) 26 (Ont. C. A.), Reddin v. Reddin (1992) 32 R. F. L. (3d) 151 (P. E. I. S. C.); Boukema v. Boukema (1997) Carswell Ont. 3115 (Ont. Gen. Div.).

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respect to custody/access issues may come before a Court. They include, but are not limited to:

1. evidence of the child;
2. a lawyer for the child;
3. through the parties;
4. expert report or assessment;
5. interview with the Judge.

Often the Court will have evidence of a child's wishes or preferences available or potentially available from more than one of these sources.<sup>34</sup>

1. Evidence of the Child

Should a child, the subject of a custody/access case testify?

A Judge can allow or even call a child as a witness in proceedings, though this is rarely done<sup>35</sup>. There are examples of situations where children have testified<sup>36</sup>. Justice Huddart and J. C. Ensminger are of the view:

...that a child who agrees to give evidence should be restrained from testifying only where it is established on a preliminary motion or *voir dire* that the potential for psychological harm to the child is such that another method of eliciting the child's

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<sup>34</sup>Ibid.

<sup>35</sup>See Weisman, Norris, "On Access After Parental Separation" (1992) 36 R. F. L. (3d) 35.

<sup>36</sup>St. Don v. Gregg (1997) Vancouver Docket F970284 (B. C. S. C.) (13 yr.old); Beck v. Beck (1993) 48 R. F. L. (3d) 303 (P. E. I. S. C.); Fairchild (Ashe) v. Ashe (1991) 103 N. S. R. (2d) 231 (N. S. T. D.).

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views must be found. If the child's views are not relevant, or the child is not competent to give evidence, the question of exclusion on policy grounds will not arise.<sup>37</sup>

There is a difference, I would suggest, between calling a child to testify as to their preference or wish and calling the child to testify to events or circumstances<sup>38</sup> at issue in the trial.

If a judge feels it necessary to go behind a child's expression of desire as to custody and determine why a child prefers one parent over the other, and into the subject of parental imperfections and frailties, the proper course is to call the child so the evidence is in the open and is subject to testing through cross-examination<sup>39</sup>

While there seems to be some conventional wisdom to the effect that Courts should discourage the calling of children as witnesses to testify as to their wishes or preferences, there are commentaries that question that premise:

The idea of harm to the child from testifying is largely a reflection of ancient adversarial practices in which hard-nosed bullying was allowed to take place as part of the gamesmanship of Courtroom battles. The Courtroom can be more sophisticated and can be modified to reduce the child's trauma or discomfort.<sup>40</sup>

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<sup>37</sup>Huddart, Justice C. and Ensminger, J. C.; "Hearing the Voice of Children" (1991-1992) 8 C. F. L. Q. 95 at p. 101.

<sup>38</sup>For e.g., "Dad or Mom was drunk, is asleep at breakfast, inappropriately touched me", etc.

<sup>39</sup>Jandrich v. Jandrich (1980) 16 R. F. L. (2d) 239 (Man. C. A.), at p. 250.

<sup>40</sup>Naismith, Judge R. P., "The Inchoate Voice" (1991-1992) 8 C. F. L. Q., 43 at p. 62.

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Shouldn't our Family Court be the place where children are seen and heard? Aren't the Family Courts more capable, through exclusion orders and a variety of other accommodations, of making children feel comfortable and taking part in the process? Shouldn't a Family Court be better equipped to hear children directly and assess the credibility of their evidence? Isn't the Family Court better able to distinguish between those children

who could testify and those who would suffer significant harm from testifying?<sup>41</sup>

In the child protection field there is, in many provinces, statutory authority allowing the Court to exclude parties (including parents) during the testimony of children<sup>42</sup>. Most such provisions provide that counsel for the parties shall not be excluded and in practice counsel have been allowed to consult with their clients outside the Courtroom prior or during the examination of a child witness - by shuttling out of the Courtroom to the client<sup>43</sup>. This practice breaks down, however, if one of the parties is unrepresented.

I am not aware of such statutory authority in private custody proceedings. The practice has been referred to:

The father wanted to have the son testify at the

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<sup>41</sup>Thompson, D. A. Rollie, "Children Should Be Heard But Not Seen: Children's Evidence in Protection Hearings" (1991-1992) 8 C. F. L. Q. 1, at p. 40.

<sup>42</sup>For e.g., s. 22(1) Child Welfare Act, S. A. 1984, c. C-8.1, s. 96(3)(a) Children and Family Services Act, S. N. S. 1990 c. 5; s. 85.4 Youth Protection Act, S. Q. 1989, c. 53, s. 8.

<sup>43</sup>See Thompson, supra footnote 41, at p. 26.

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hearing in the absence of the other parties as the son did not wish to give evidence in the presence of the wife. The wife objected and the Judge refused to exclude her. The trial Judge committed no error in

law in that the parties had a right to hear all of the evidence.<sup>44</sup>

Fairness is a fundamental tenant of any trial process. It influences the manner in which Courts deal with an attempt to call a child witness. In Fairchild (Ashe) v. Ashe<sup>45</sup>, Saunders, J. heard an appeal from Family Court. Counsel for the father proposed to call a 15-year old as a witness. Saunders, J. commented on the Trial Judge having discouraged the calling of the witness:

Where I think (the Trial Judge) erred was when she appeared to say she wouldn't believe the testimony or give it any consideration at all if it were given:

'I find this to be very distasteful. I, in no means, give it any continuance or approval of the Court...I'm not one bit convinced that her evidence is going to be helpful.'

This could have been interpreted by Mr. Ashe that the Judge was rejecting the evidence before ever hearing it. In the face of such a rebuke it's only natural that his counsel refrained.

For that reason I was disposed to hear the testimony. I permitted Mr. Corkum to call Shannon on the hearing before me. Having done so I am satisfied it added nothing to the case...

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<sup>44</sup>Reddin v. Reddin (1990) 249 A. P. R. 181 (P. E. I. T. D. ), aff'd (1992) 39 R. F. L. (3d) 151 (P. E. I. C. A.).

<sup>45</sup>(1991) 103 N. S. R. (2d) 231 (N. S. T. D.) at p. 245.

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It is always open to the parties to agree on the manner or fashion in which a child witness should be dealt with. For example:

It was the position of both parties that Jamie and Joanna ought not to be called as witnesses to give evidence in the presence of both parties in this bitter struggle over custody.<sup>46</sup>

Finally, the direct evidence of children can come to the Court via affidavit<sup>47</sup> or letter<sup>48</sup>, subject, of course, to rights of cross-examination. The circumstances of the creation of the document may, however, become a consideration when the Court considers its content. An affidavit should, in my view, be created independent of the parties and their counsel.

I would suggest that the following would be appropriate considerations for a Trial Judge dealing with the potential of a child or youth being called as a witness on the issue of their wishes or preferences:

- (a) Identify at a pre-trial stage whether there is an intent or desire to call a child who is the subject of the hearing as a witness on the wishes/preference issue.
  
- (b) Ask if there is agreement or acknowledgment that the child

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<sup>46</sup>Demeter v. Demeter (1996) 21 R. F. L. (4<sup>th</sup>) (Ont. Gen. Div.) 54 at p. 56.

<sup>47</sup>Boukema v. Boukema (1997) Carswell Ont. 3115 (Ont. Gen. Div.) ; LeBlue v. LeBlue (1997) 33 R. F. L. (4<sup>th</sup>) 118 (Ont. Gen. Div.).

<sup>48</sup>Thuricke v. Moerike (1996) 150 Sask. R. 38 (Sask. Q. B.).

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- wants to testify;
  - is competent;
  - will not be psychologically harmed by testifying.
- (c) Ask, if the child is to testify, if there is agreement on measures to make the child more comfortable - for e.g., Courtroom visit, set-up, presence or absence of parties.
- (d) Ask if there are alternative methods of securing the child's wishes/preferences. If so identify them.
- (e) If you decline to allow the testimony of a child do so after a hearing and make findings (based on evidence) for declining to hear the child. For e.g. that testifying would be psychologically/emotionally harmful, that the evidence is available from other sources and/or not in dispute, etc.

## 2. A Lawyer for the Child

In some provinces legal counsel for the child is uncommon; in others, such as Ontario, an office such as the Official Guardian's is available and provides such services. In other provinces such services are not readily available in all provinces. The Court's authority to appoint counsel in such provinces is not clear. At times counsel are coaxed out of legal aid services or, where the parent's pockets are deep enough, through them. I do not, in the confines of this paper, intend to address the question of whether the Court has authority to appoint counsel for the child<sup>49</sup>, the issue of how counsel secures instructions

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<sup>49</sup>As mentioned earlier, the Senate/House Committee Report Recommendation 4 reads: "This Committee recommends that where, in the opinion of the Court, the proper protection of the best interests of the child requires it, Judges have the power to appoint legal counsel for the child. Where such counsel is appointed, it must be provided to the child."

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from an immature child, the issue of what counsel for a child shares with the child by way of documentation or the issue of whether the child has party status.

Some child welfare legislation gives Courts authority in those proceedings to appoint a litigation guardian and/or counsel for children. Again legislation dealing with private custody/access issues gives Courts limited guidance or authority.

Ideally a child's lawyer should be retained in a manner that is independent and even-handed - through an agency such as an Official Guardian's office, the Court or agreement of the parties. To do otherwise risks tainting the role:

The mother's decision to take Amanda to a consultation with Jeffrey Wilson is illustrative of the mother's single-mindedness in achieving her objectives. From the perspective of Amanda's best interests, the act of consulting Jeffrey Wilson was wrong.<sup>50</sup> (The father did not know of the consultation.)

The extent to which counsel for a child can communicate the child's wishes to the Court has been the subject of judicial comment:

It is inappropriate in an adversarial system for counsel to simply stand and articulate the child's wishes or if the child is unable to express those wishes, to articulate what is, in counsel's view, in the best interests of the child.

In my opinion, the basic rules of natural justice should have governed the adversarial trial process in

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<sup>50</sup>Boukema v. Boukema (1997) Carswell Ont. 3115 (Ont. Gen. Div.), at p. 13.

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this country since before Confederation should not be cast aside in custody...cases. ...The fact that counsel purports to advise the Court of the wishes of the child without adducing any evidence to support such a statement, is an indication that counsel has not properly prepared his case.

...There are many ways that such evidence can be adduced in Court and be tested by cross-examination

...in cases where it can be established that testifying will not psychologically harm the child, call the child as a witness;

...adduce evidence of wishes through

...evidence of friends, neighbors, and relatives

...expert

...assessment<sup>51</sup>

Strobridge was upheld by the Ontario Court of Appeal<sup>52</sup>, counsel for the Official Guardian was not entitled to orally advise the Court of the wishes of children over the objections of one of the parties, though Osborne, J. A. observed:

...in many, if not most cases, the parties will agree that counsel representing the children may advise the Court of the children's preferences...<sup>53</sup>

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<sup>51</sup>Strobridge v. Strobridge (1992) 42 R. F. L. (3d) 154 (Ont. Gen. Div.), at p. 176.

<sup>52</sup>Strobridge v. Strobridge (1994) 18 O. R. (3d) 753 (Ont. C. A.).

<sup>53</sup>Ibid at p. 764.

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If there is no objection is there agreement? In Punzo v. Punzo<sup>54</sup> the Ontario Court of Appeal suggested that if no objection was made counsel for the child could express the child's wishes. They stated that, in that case:

...based on the record in this case, the learned motions Judge was entitled to assume that the parties including the husband had agreed that counsel for the official Guardian could advise the Court of the views of the children in his submissions...<sup>55</sup>

The more subtle issue here is the source of information. If there is evidence of a child's wishes on the record, counsel, any counsel, are entitled to refer to it. If there is not, my own view would be that it would take the express consent of the parties, (not imputed consent) to allow counsel for the child (or other counsel) to refer to a wish or preference (that was not part of the record) and I, as a Judge, to rely on it.<sup>56</sup>

Further, it is

...not the function of the Office of the Children's Lawyer to simply parrot a child's stated wishes. This is particularly so, when it is apparent that the child's stated wish has been influenced by one or

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<sup>54</sup>(1996) 21 R. F. L. (4<sup>th</sup>) 7 (Ont. C. A.).

<sup>55</sup>Ibid, at p. 14.

<sup>56</sup>This would be the same for almost any issue not on the record, yet agreed to by counsel.

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the other parent.<sup>57</sup>

It is unfortunately easier to say what a child's lawyer should not do than what he/she should do.

### 3. Through the Parties (or Others)

It is a common and acknowledged practice<sup>58</sup> for Courts to allow parties to speak of their perception of children's wishes - at times repeating children's out of Court statements, at times describing their behaviour or actions as being indicative of their custody/access wishes/preferences.

If mom or dad is giving evidence about a child's wishes or preferences and it is objected to as being hearsay, is it admissible? Most often each parent will repeat their version of the child(ren)'s wishes or preference and the matter is resolved either implicitly or explicitly through consent, each speaking of the child's statements to them.

If one party objects, then the admission of the statements should be rationalized. Can it be?

If the mental state of the declarant is directly in issue at trial, then statements of his mental state are generally admissible in proof of the fact.<sup>59</sup>

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<sup>57</sup>Boukema v. Boukema (1997) Carswell Ont. 3115 (Ont. Gen. Div.), at p. 15 .

<sup>58</sup>See Granger, J. S. C., Strobridge v. Strobridge (1992) 42 R. F. L. (3d) 154; Punzo v. Punzo, (1996) 21 R. F. L. (4<sup>th</sup>) 7 (Ont. C. A.).

<sup>59</sup>Sopinka, J.; Lederman, S. N.; and Bryant, A. W.; The Law of Evidence in Canada, Butterworths, Toronto (1992), p. 242 .

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The wishes or preferences of children in custody/access cases is an issue before the Court. The child's statements are, then, in my view admissible, going to the proof of that issue. They are relevant.<sup>60</sup>

They can, then, be referred to by parties or other witnesses. The weight to be given them is, of course, another matter.

Given this one might wonder whether it is open to the parties (ideally by agreement) or the Court to arrange for someone independent, but not an "expert" to speak to a child or youth to secure their wishes or preferences. Do we need an "expert" (see *infra*) to do this?

#### 4. Expert Report or Assessment

An expert used to secure information on children's wishes and preferences should be independent of the parties, and retained in a fashion that is consistent with that. They should prepare a report along time lines consistent with local rules. They should be available for examination.

A number of Courts have commented favorably on this method of securing evidence of children's wishes and preferences:

A procedure involving a trained and competent third party, independent of the parents charged with the responsibility of ascertaining the child's opinions and preferences using such techniques which are most likely to yield genuine feelings and wishes, and be least harmful of the child, over such period of time as may be necessary, and thereafter reporting to the Court, by giving testimony or otherwise, is the procedure to be looked upon with the most

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<sup>60</sup>See for e.g. Punzo v. Punzo (1996) 21 R. F. L . (4<sup>th</sup>) 7 (Ont. C. A.).

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favour.<sup>61</sup>

(Counsel for the father) did not take any steps to have some independent third party such as a social worker retained by the Official Guardian, make an assessment of the wishes of the children...<sup>62</sup> (and hence the evidence of the children's wishes contained in the mother's affidavit stood).

In Linton v. Clarke the Ontario Court of Appeal discussed the Trial Judge's discretion in ordering assessments. The cost of the assessment and length of time required to complete it are relevant factors in determining whether an assessment is appropriate. The Court felt assessments should be ordered where there are "clinical issues" and not as simply a vehicle to promote settlement.

The determination of a child's wishes or preferences in a contested custody/access proceeding can be rationalized as a clinical issue in most circumstances, I would suggest, with relative ease. If the wishes or preferences of a child are an issue identified at an early state of a proceeding there is no reason why a Court cannot order a limited assessment to determine "to the degree it is possible, a

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<sup>61</sup>Wakaluk v. Wakaluk (1976) 25 R. F. L. 292 (Sask. C. A.), at p. 304.

<sup>62</sup>Punzo v. Punzo (1996) 21 R. F. L. (4<sup>th</sup>) 7 (Ont. C. A.) at p. 13.

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child's wishes and preferences"<sup>63</sup>. There is ample authority for Courts to provide directions or limits on assessors.<sup>64</sup>

## 5. Interview with the Judge

The practice of a Judge interviewing children in custody/access cases to gain insight into their wishes and preferences is common and controversial. It is authorized both by statute (in some jurisdictions) and case law.<sup>65</sup>

The goal of such an interview is obvious:

The Judge who conducts such interview, by consent of counsel, without the presence of either parent, does so in the hope of obtaining a very frank statement by the child which will not cause embarrassment to the parent.<sup>66</sup>

It is a matter of discretion whether a Judge interviews a child or not.<sup>67</sup>

In exercising a discretion as to interview a child (or not), a Court may

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<sup>63</sup>Paul v. Paul (1998) Carswell N. B. 84 (Q. B.); Harnish v. Harnish (1998) Carswell N. B. 381 (Q. B.).

<sup>64</sup>Weaver v. Tate (1989) 24 R. F. L. (3d) 266 (Ont. H. C.), aff'd (1990) 28 R. f. L. (3d) 188 (Ont. C. A.).

<sup>65</sup>For e.g., s. 8 Custody Jurisdiction and Enforcement Act, R. S. P. E. I., 1988, c. E-11; s. 64, Children's Law Reform Act, R. S. O. 1990, c. C-12 as amended; Jespersion v. Jespersen (1985) 48 R. F. L. (2d) 193 (B. C. C. A.).

<sup>66</sup>Jespersion v. Jespersen (1985) 48 R. F. L. (2d) 193 (B. C. C. A.).

<sup>67</sup>Reddin v. Reddin (1992) 39 R. F. L. (3d) 151 (P. E. I. C. A.); Uldrian v. Uldrian (1988) 14 r. F. L. (3d) 26 (Ont. C. A.).

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consider whether the evidence is available from other sources. It, most often, will be.<sup>68</sup> The Court will also consider the effect of such an interview on the child.

It is suggested by the father that I talk to the child herself to determine her wishes. This was opposed by the mother. [The court-appointed assessor] expressed the opinion that it would not be good for the child as it might make her feel responsible for the ultimate decision. I have decided not to see the child. I am strongly of the opinion that children at this age want and expect these decisions to be made for them. ...There was evidence that Angela feels a responsibility for the decision. This burden should never be with a child. It must be assumed by adults and in this case the court must made the decision.<sup>69</sup>

The Court will also consider the age and maturation level of the child.<sup>70</sup>

There are a number of concerns with the practice. The concerns include<sup>71</sup> the following:

- a. the lack of expertise by Judges<sup>72</sup>.

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<sup>68</sup>Demeter v. Demeter (1996) 21 R. F. L. (4<sup>th</sup>) 54 (Ont. Gen. Div.), Reddin v. Reddin, supra.

<sup>69</sup>McCartney v. McCartney (1985) 49 R. F. L. (2d) 69 (Man. Q. B.), at p. 71; see also Mamchur v. Mamchur (1987) 11 R. F. L. (3d) 66 (B. C. S. C.).

<sup>70</sup>Mamchur v. Mamchur, *ibid.*

<sup>71</sup>It is not my intention to discuss the psychological, emotional issues that arise for a child put in this position. Suffice to say there is danger of a child feeling that they are making the decision.

<sup>72</sup>I will not discuss this issue in terms of specialization of judges, though it is capable of analysis

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Do we know enough to do this? Are we, as Judges, sensitive to language and linguistic development? Jones<sup>73</sup> provides an example of an interview between a Judge and a nine year old girl that illustrates the potential for inadvertent misunderstanding:

**Judge:** Is there anything you like-  
what do you like about your  
stepmother?

**Julie:** She loves us, and she cares for  
us. She...she's overprotective.

**Judge:** What's that mean? That's a  
big word.

**Julie:** She protects us overly. Like,  
she protects us more than usually.  
She does protect us that way.

**Judge:** What's she protect you  
from?

**Julie:** From falling out of trees.

**Judge:** How about your stepmother?

**Julie:** I like a lot of things about her.

**Judge:** Like what?

**Julie:** She...loves us. She's  
overprotective. I told you.

**Judge:** Well, that's one thing you  
don't like about her?

**Julie:** That's the thing I like about  
her.

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in that context.

<sup>73</sup>Jones, J. C., "Judicial Questioning of Children in Custody and Visitation Proceedings" (1984) 18 Fam. L. Q., 43.

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Jones provides other examples of difficulties arising from the practice of judicial interviews of children, including the use of suggestive and leading questions (from the Judges) and compound sentences which are clearly too difficult for young children to understand. For example, one Judge posed the following question(s) of a 7 year old:

I want to talk a little with you about visiting your dad. Your dad wants to have you with him...would you like to go to visit him from time to time? Do you know Ms. Mack at all? Do you know who I'm talking about? She used to be one of Mommy's friends and you used to call her Aunt Betty, didn't you?

The child simply responded 'Yes'.

In the end, each Judge must decide for himself/herself whether they will undertake such interviews. That decision is perhaps inevitably taken on a case by case basis.

Judge Norris Weisman has observed:

While a Judge may interview the child in Court or in Chambers, his or her qualifications...are questionable.<sup>74</sup>

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<sup>74</sup>“On Access After Parental Separation” (1992) 36 R. F. L. (3d) 35, at p. 65.

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b. due process concerns.

A number of Courts have commented critically on this issue:

...counsel for the mother strongly urged that if the children were to be interviewed it ought to be in the presence of someone, be it a Court reporter or Court clerk. Hewak, J. overruled these objections and decided to interview these four children in his private chambers with no one present. The interview lasted more than 1 ½ hours. This Court, which has the duty to review the record, has nothing with respect to this long interview...

...I am not prepared to condemn all interviews in camera by a trial Judge. I honestly do not think that it is a wise or sound practice and this case seems to prove it. Such a conduct leaves the trier of fact with information, evidence or call it what you wish, that the parties, counsel and members of the appellate tribunal have no knowledge of and absolutely no possibility of finding out...It may be of use in exceptional circumstances but not in hotly contested matter...<sup>75</sup>

The propriety of these practices was considered by the British Columbia Court of Appeal in *Re Allan & Allan*.<sup>76</sup> The case involved a dispute

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<sup>75</sup>*Jandrisch v. Jandrisch* (1980) 16 R. F. L. (2d) 239 (Man. C. A.), per Monnin, J. A. at p. 5.

<sup>76</sup>(1958), 16 D. L. R. (2d) 172 (B. C. C. A.).

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over the custody of two boys of 14 and 11 years respectively. The trial Judge interviewed the boys in his private chambers in the presence of a Court clerk. Initially, both counsel agreed to this procedure but the father subsequently instructed his counsel to arrange the interview in the presence of counsel. The father's counsel was unable to arrange an interview in the presence of counsel. The reasons why he was unable to make these arrangements do not appear in the report; however, counsel informed the Judge of his client's instructions after the interviews had taken place. Sheppard, J. A., with whom Sidney Smith J. A. concurred, considered the trial Judge's practice to be an error which, along with other errors, made it necessary to allow the father's appeal and award custody of the children to the father. Sheppard, J. A. made it clear that parties have a right to have the evidence taken in the presence of the parties and their counsel and the right to examine and cross-examine witnesses.<sup>77</sup> In the *Allan* case, the parties, by their counsel had waived these rights, but nevertheless the information obtained by the Judge during the interview, upon which he proposed to rely should, in the opinion of the Court of Appeal, have been disclosed to the parties so that they could have had

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<sup>77</sup>Ibid, at p. 182.

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the opportunity of contraverting it. In coming to this conclusion, Sheppard J. A. implies that the parties could waive even their right to contravert the information obtained by the trial Judge but that the waiver in the *Allan* case did not extend that far.<sup>78</sup>

The Ontario Children's Law Reform Act<sup>79</sup> allows a Judge to interview a child but provides that such an interview must be recorded and that the child's lawyer has a right to be present. These sections:

...do not impose a duty on a trial Judge to interview the child. This is a matter for discretion. The statute does obligate the trial judge to consider the views and preferences of the child. In this case there was ample evidence of such views and preferences...<sup>80</sup>

from other sources.

- c. what does the Trial Judge reveal about the interview to the parties?

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<sup>78</sup>Robinson, L. R., "Custody and Access", Mendes da Costa, D. (Ed.) Studies in Canadian Family Law, Chap. 8, Butterworths: Toronto (1972), at p. 603.

<sup>79</sup>S. 64 (2)(3)(4), R. S. O. 1990, c. C-12, as amended..

<sup>80</sup>Uldrian v. Uldrian (1988) 14 R. F. L. (3d) 26 (Ont. C. A.) at p. 28.

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The options vary - a transcript, a summary, but the due process concerns suggest that whatever is done must in the end be reviewable. The problem was discussed in Demeter v. Demeter<sup>81</sup>. Two children, ages 13 and 8, were interviewed having previously expressed a preference to live with dad. In the interview they preferred mom. The Court referred to Jespersion<sup>82</sup> and concluded the Court had a discretion to decide what if anything should be disclosed to counsel and the parties so that issues could be addressed in argument in an informed fashion.

I think it inappropriate to disclose the full contents of my interview. I do not wish to embarrass the children and potentially damage their future relationship with either parent. However, I do find it appropriate to advise the parties at this stage, prior to argument, in general terms of the children's stated 'wishes'.<sup>83</sup>

My view would be that ultimately an interview must be capable of complete review on appeal. It will then be available to the parties if there is an appeal.

- d. there are a number of other issues related to this practice - some of which are related to the issues I have mentioned. For e.g.:

Are siblings interviewed together? separately?  
Who is present? What if a parent is unrepresented?

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<sup>81</sup>(1996) 21 R. F. L. (4<sup>th</sup>) 54 (Ont. Gen. Div.).

<sup>82</sup>(1985) 48 R. F. L. (2<sup>nd</sup>) 193 (B. C. C. A.).

<sup>83</sup>Demeter v. Demeter (1996) 21 R. F. L. (4<sup>th</sup>) 54 (Ont. Gen. Div.), at p. 59.

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Where is the interview done?

When is it done? At what point of the trial?<sup>84</sup>

As with other issues, it would be prudent to identify and deal with these at the pre-trial stage of the proceeding.

#### G. NOW THAT YOU'VE GOT IT, WHAT DO YOU DO WITH IT?

Even if the wishes of a child are obtained there remains to decide what significance should be attached to those wishes, it must be remembered that the purpose of obtaining those wishes is not to give effect to them but to put the Judge in a better position to decide what is in the child's best interests.<sup>85</sup>

...the wishes or preferences of a child are not to be confused with the best interests of the child and it is the duty of the Court to decide what is in the best interests of the child even though the child expresses a strong preference for one of the parents.<sup>86</sup>

What considerations go into weighing the preference in relation to the other evidence before the Court? There can be no exhaustive list, nor one that is made

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<sup>84</sup>One might argue the end of the trial - when the trial Judge is most familiar with the circumstances before him/her [see Taylor v. Taylor (1989) Can. Rep. Ont. 1344 (Ont. H. C.)] or early in the trial or even before the trial so the parties can react to the results of the interview in giving their evidence.

<sup>85</sup>Wakaluk v. Wakaluk (1976) 25 R. F. L. 292 (Sask. C. A.), at pp. 304-305.

<sup>86</sup>Taylor v. Taylor (1989) Can. Rep. Ont. 1344 (Ont. Gen. Div.), at p. 3; Farden v. Farden (1973) 8 R. F. L., 183 (Sask. C. A.).

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up of mutually exclusive factors, but some of the factors include:

1. Are both parents able to provide adequate care for the child? If not, a preference for the parent lacking an ability is not likely to be viewed positively, irregardless of the child's preference.

...it is clear that the preference of the child should only be accepted where the Court is satisfied that either parent is capable of providing for the health and emotional well-being of the child and that both parents have demonstrated capabilities of

adequately exercising the rights and duties that flow from custody or access...<sup>87</sup>

2. Is the expression of the wish clear, unambivalent,<sup>88</sup> uncontradicted - especially if it is expressed from a variety of evidentiary sources? Is the preference unchallenged on the evidence?

Is the wish or preference disputed in any way? If it is not cross-examined on (as reported in a parent's affidavit), not objected to, and no alternative source (such as an independent professional) is proposed to secure evidence of the preference it will be difficult for a parent to then challenge the preference.<sup>89</sup>

3. How informed is the expression of the wish? We talk a good deal

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<sup>87</sup>C. (R. L.) v. C. (W. J.) (1997) B. C. J. No. 1447 (Quesnel - B. C. S. C.), Loewen v. Loewen (1982) 29 R. F. L. (2d) 25 (B. C. S. C.).

<sup>88</sup>Andrew v. Bossé (1993) 142 N. S. r. (2d) 353 (N. B. Q. B.).

<sup>89</sup>Punzo v. Punzo (1996) 21 R. F. L. (4<sup>th</sup>) 7 (Ont. C. A.).

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about the wish or preference, but little about how informed it is. The word “prefer”, the root of “preference”, relates to choice - but choice between what? Parent education programs are becoming

commonplace<sup>90</sup>. There are divorce and separation education programs developing for children<sup>91</sup>.

4. the age of the child:

It is accepted as a general rule that the wishes of young children under the age of ten usually will not be given any significant weight in a custody or access case, while the wishes of teenage children are usually determinative.<sup>92</sup>

For custody orders relating to children in their teens to be practical, they must reasonably conform with the wishes of the child.<sup>93</sup>

5. the maturation level of the child, the child’s understanding of the nature of the decision, the preference:

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<sup>90</sup>Families in Transition, Health Canada, 1998 (survey of parent education programs in Canada, prepared by Family Mediation Canada; Blaisure, K. R. and Geasler, M. J., “Results of a Survey of Court-Connected Parent Education Programs in U. S. Counties” (1996) 34 Family and Conciliation Courts Review, 23.

<sup>91</sup>Three examples are discussed in DiBias, T., “Some Programs for Children” (1996) 34 Family and Conciliation Courts Review, 23.

<sup>92</sup>L. (G.) v. L. (S.) (1997) Can. Rep. P. E. I. 38 (P. E. I. S. C. T. D.), at p. 7.

<sup>93</sup>O’Connell v. McIndoe (1998) Carswell B. C. 2223 (B. C. C. A.), at p. 3. See also Swift v. Swift (1981) 46 N. S. R. (2d) 562 (N. S. Fam. Ct.).

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Although Peter has expressed his wish to move forcefully, I am of the view that he is not yet old enough to have sufficient insight and appreciation of such a decision. Peter's experience in visiting his father has been on weekends and for holidays, times when, generally, the family is not as caught up in daily routine, but rather can take some time to relax together doing pleasurable things...his father, by his actions, has influenced Peter's choice to some extent. Peter has a glamorized...view of what it would be like to live with his father. Also I am not sure Peter can appreciate...consequences of move to his father.<sup>94</sup>

6. the strength of the wish:

Where children express extremely strong, firm, rigid views, Courts will be reluctant to create an order that is enforceable.<sup>95</sup>

7. the length of time the preference has been expressed:

What the child wishes is not necessarily best for the child, but there does come a point when at near adult years a child capable of responsible thought must now be deemed to be able to settle his own future in this important matter. Concomitant with that he must take responsibility for his own actions. I think that point has now been reached. For three years or more he has been unswerving in his wishes

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<sup>94</sup>Johnson v. O'Conner (1995) Can. Rep. Ont. 2074 (Ont. Gen. Div.), at p. 11.

<sup>95</sup>O'Connell v. McIndoe (1998), Carswell B. C. 2223 (B. C. C. A.); Casement v. Casement (1988) 9 R. F. L. (3d) 169.

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and no change is to be expected. It is not fair to push this boy to the point of rebellion...<sup>96</sup>

8. what is practical:

At a certain point, Courts do what is practical. The child who runs from one home to another is stating a preference.<sup>97</sup>

9. the influence of a parent.

There are predictably a variety of judicial responses to circumstances where a child forms an unfavourable view of one parent as a result of the influence of the other:

Some Courts have concluded that the creation of hostility in a child cannot be used as a basis for denying access<sup>98</sup>. In Davy v. Davy<sup>99</sup>, McDermid, J. considered this in the context of fairness:

‘She has systematically programmed them to hate him’ (Dad). As a result of her persistent course of conduct, they now wish to have nothing to do with him. If I were to disregard the question of what is in the best interests of the children, it would be patently unfair to deny access to the father on the ground that the children do not wish to see him,

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<sup>96</sup>Alexander v. Alexander (1988) 15 R. F. L . 93d) 363 (B. C. C. A.), at p. 365 (boy aged 14 at time of appeal).

<sup>97</sup>L. (G.) v. L. (S.) 1997, Can. Rep. P. E. I., Feb. 19, 1997.

<sup>98</sup>Curry v. Curry (1998) Can. Rep. N. S. 44 (N. S. S. C.).

<sup>99</sup>1993 Carswell Ont. 1630 (Ont. Gen. Div.), at p. 8.

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when their negative feelings toward him are the product of the mother's persistent programming. The mother's position that the wishes of the children should prevail a self-serving and intellectually dishonest, given my conclusion that she deliberately moulded their feelings and wilfully turned them against their father.

...The issue in this case is whether it is in their best interests to order access in the face of their unequivocal and firmly entrenched opposition to it.

Although these boys are said to be quite intelligent, a distinction must be drawn between intelligence and wisdom. Even intelligent adults are not always wise enough to ascertain or choose what is in their best interests, although they may believe they are doing so. Even intelligent boys can be influenced by a parent who sets out to do so.

...while I take into account the reality of their position, I discount the weight that should be given to it, due to its illegitimate genesis. I am satisfied that granting the proposed access will not cause any physical or emotional harm to the boys...

In Boukema v. Boukema, MacDonald, J. concluded:

The mother's strategy to have Amanda move with her to New Jersey included a deliberate decision not to support the idea of Amanda's residing in Toronto, thus undermining Amanda's father in establishing Amanda's residence in his home. The act of undermining the agreement and the resulting chaos for Amanda does not constitute good parenting.

Amanda's views were not arrived at independently and it is for this reason that the Children's Lawyer declined to advocate Amanda's views without putting before the Court detailed evidence of all of the factors that may have

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influenced these views.

I find that there has been no material change in circumstances which justifies changing Amanda's primary residence as agreed upon by the parents in April 1996. In coming to this conclusion, I have considered Amanda's wishes but inasmuch as they have been greatly influenced by the mother, I have attached less weight to them than I otherwise would.<sup>100</sup>

Some Judges detail explicitly the influence wielded by a parent, influence that is sometimes subtle, sometimes not so subtle. For e.g.:

In my view the father has done much more to influence, encourage and prompt the children's choices than the mother has - First I accept the mother's testimony that approximately three to four years ago, on about six occasions, Peter called from his father's about the time he was to be returned home from an access visit. He would cry and create a scene and ask to remain at his father's. Rather than nipping the matter in the bud by explaining to Peter the effect of the custody order, assisting him in understanding and accepting it and telling him that he could not stay, the father apparently let this behaviour continue over several weeks.

...Considered in the overall context, I conclude that the actions of the father have influenced to some extent the children's wishes. Further, rather than supporting the existing custodial arrangement, the father has sought to undermine it by encouragement of the children to keep pressuring their mother, thereby causing problems in the relationship between the mother and the children. Such

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<sup>100</sup>(1997) Carswell Ont. 3115 (Ont. C. + J.), at p. 15.

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behaviour on the part of the father was inappropriate.<sup>101</sup>

Other Courts have concluded that:

It would appear, however, that at least in relation to older children, it probably does not matter whether the child was improperly influenced or not if the child is fixed and settled in her wishes and preferences.<sup>102</sup>

Sometimes Courts are simply forced to conclude that it is not in the best interests of children to force them<sup>103</sup> into parenting arrangements they are firmly against even if the genesis of the preference is a parent who has inappropriately influenced the child.

10. the overall context of the preference.

This factor is illustrated in the comment of Deschenes, J. in Andrew v. Bossé<sup>104</sup>:

The child's views and preferences as expressed to this Court...are unambiguous: she does not want to be in the custody of her father but would like to stay in Kedgewick, in the custody of her mother and with her pets, namely two dogs and rabbits, with her grandparents and surrounded by her friends.

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<sup>101</sup>Johnson v. O'Conner, supra footnote 94.

<sup>102</sup>L. (G.) v. L. (S.) (1997) Can. Rep. P. E. I. 38 (P. E. I. S. C. T. D.), at p. 9.

<sup>103</sup>Strobridge v. Strobridge (1994) 4 R. F. L. (4<sup>th</sup>) 169 (Ont. C. A.) (there to see their father); O'Connell v. McIndoe (1998) Carswell B. C. 2223 (B. C. C. A.).

<sup>104</sup>(1993) 142 N. B. R. (2d) 353 (N. B. Q. B.).

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11. There should be some attempt to understand the circumstances the preference has been expressed it from the child's point of view.<sup>105</sup>

It is difficult to comment on the weighing of evidence - it is in the end an individual judicial process. The requirement that we give reasons for our decisions makes that process at least somewhat visible, however. It is important that our decisions be reviewable - by the parties and other Courts. The weight of individual factors is for individual Judges in individual circumstances. It is reasonable to expect that Judges will canvass a variety of factors, including obviously the evidence as a whole, in coming to a decision and weighing the significance to attach to a child's wishes in any decision concerning the best interests of that child.

## H. CONCLUSION

My review of law concerning children's preferences and wishes has proven more extensive than I first envisioned. It is also less thorough than I would prefer - ignoring or skimming by issues such as the standing of children, their psychological and emotional state and risks to it in times of parental conflict, the effect of sibling groups, and numerous policy issues. Undoubtedly readers will identify other issues I have missed.

My review leaves me with some observations, however. These are issues that deserve more attention. The Joint Senate/House Committee has done us a favour in red-flagging issues which are easy to let slide.

I think I could do a better job as a Trial Judge in dealing with the trial and pre-trial process that frames these issues. It would be helpful at pre-trials to:

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<sup>105</sup>Stanley v. Stanley (1988) 84 N. S. R. (2d) 411 (N. S. Fam. Ct.).

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1. Identify the child's wishes or preference as an issue.
2. Review the applicable statute.
3. Ask counsel, or the parties, at the pre-trial stage how evidence of the child(ren)'s wishes is proposed to be put before the Court and deal with ancillary issues; i.e. can the child's wishes be ascertained?
  - (a) will the child testify?
    - (i) *viva voce* - are there reasons not to have the child testify (including the agreement of the parties, desire of child); should any special arrangements be made?
    - (ii) affidavit - how secured? Examination waived?
    - (iii) letter - context of preparation, consent to filing?
  - (b) will the child have a lawyer?
    - (i) how retained?
    - (ii) is there consent to the lawyer referring to the child's wishes?
  - (c) through the parties (or others)? - provide for disclosure
  - (d) expert report or assessment?
    - (i) independently retained?
  - (e) interview by Judge?
    - (i) when - end of trial? during? - where?
    - (ii) can due process concerns be addressed and agreed on?
    - (iii) what should be revealed to the parties of the interview?
    - (iv) what of siblings?

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4. Ask that there be an evidentiary basis to allow the Court to weigh the wishes or preference. This may include but not be limited to consideration of:
  - (a) are both parents able to provide adequate care?
  - (b) how clear, unambivalent is the wish?
  - (c) how informed is the expression?
  - (d) the age of the child;
  - (e) the maturation level;
  - (f) the strength of the wish;
  - (g) the length of time the preference has been expressed for;
  - (h) what is practical?
  - (i) the influence of the parent(s) on the expressed wish or preference;
  - (j) the overall context;
  - (k) the circumstances of the preference from the child's point of view.

Planning the way these issues are dealt with will inevitably improve the way we as Courts (and counsel and the parties) deal with them. I(we) can undoubtedly improve our practice and process. We can improve upon the visibility and predictability of the legal process(es) that we use in dealing with children's wishes and preferences.

There are signs that this issue will receive attention in the future. There may be changes in the future - creating evidentiary burdens, conditional presumptions, enhancing resources, or creating other ways in which a child's preference may come to a Court.

A review of the case law illustrates in a rather compelling way, that each case, family and child is different. Each wish or preference has a context and element of subjectivity. There needs to be flexibility to respond to diverse

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circumstances. There will always be work for tinkers and judges.

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### ABSTRACT

The role of the child's wishes or preferences in custody and access proceedings is an issue. Like so much of law, and especially, it seems, family law, there is some distance between the theory and its execution. It would be, from a Judge's point of view, easier to deal with children's wishes and preferences if there was a rule or statute that simply stated that a child's wish or preference was dispositive of custody/access cases. There is no such rule or statute in Canada - the child's wishes and preferences being one of many considerations in determining the best interests of the child. Questions abound - how does/can this information come to the Court, what should the Court do with it, what of the child's maturity level, the influences on the child? This paper will examine some of these issues, not answer them.