

# SET ANOTHER PLACE AT THE TABLE: CHILD PARTICIPATION IN FAMILY SEPARATION CASES

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## I. INTRODUCTION

The issue of child participation in family separation cases divides judges, lawyers, child advocates, and mental health professionals. Broadly, the differing perspectives can be explained as follows: the anti-participation perspective is concerned about harming children by placing them in the middle of their parents' disputes, pressuring them to choose sides, and relying too much on children's unreliable opinions and sometimes whimsical positions; the pro-participation perspective is concerned about ensuring a just process in which children are provided the opportunity to be heard before decisions are made that will impact them directly and significantly, as children and beyond.

Both sides raise important points. This Article will contextualize the child inclusion debate in international guidance, state law, and real life practice; describe several methods of incorporating child voice and participation in family separation cases and discuss potential benefits and drawbacks of each; and, finally, suggest the careful facilitation, expansion, and study of child participation, particularly in family mediation.<sup>1</sup>

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<sup>1</sup> The information and opinions presented in this essay, except where citations appear, are based on the author's nearly twenty-five years representing children, and occasionally parents, in child protection and domestic relations proceedings, including extensive work with children and their families, parents' attorneys, and judges, as well as collaboration with mental health professionals and mediators in connection with case work, training, and best practice initiatives. Special thanks go out to the colleagues who read drafts of this article and provided sage guidance: Joan Colen, Kelly Browe Olson, Tiffany Koss, and Peter Salem.

## II. THE LEGAL BACKDROP

International law provides for child involvement in family dispute resolution. The United Nations Convention on the Rights of the Child, Article 12, provides that:

1. State 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.<sup>2</sup>

The United States is now the only country in the world that has failed to ratify the Convention. Nonetheless, the convention provides guidance, reflecting the internationally supported contention that children should have a say in the outcome of their own lives.

Despite the failure to ratify the Convention, the right of children to voice their wishes in family separation disputes is reflected in state laws across the United States. In Illinois, the best interest factors for determining decision-making and parenting time require the Court to consider the child's wishes, among other factors.<sup>3</sup> The same is required by way of case law in New York.<sup>4</sup> In Ohio, domestic relations judges are mandated to perform child interviews upon the request of a parent.<sup>5</sup>

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<sup>2</sup> Convention on the Rights of the Child art. 12, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, (entered into force Sept. 2, 1990).

<sup>3</sup> 750 ILL. COMP. STAT. ANN. 5/602.5(c) (West 2016): "In determining the child's best interests for purposes of allocating significant decision-making responsibilities, the court shall consider all relevant factors, including, without limitation, the following: . . . the child's wishes . . . ."; 750 ILL. COMP. STAT. ANN. 5/602.7(b) (West 2016): "In determining the child's best interests for purposes of allocating parenting time, the court shall consider all relevant factors, including, without limitation, the following . . . the child's wishes . . . ."

<sup>4</sup> *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1264 (N.Y. 1982); CAL. FAM. CODE § 3011 (West 2015).

<sup>5</sup> Ohio Revised Code Title XXXI, Domestic Relations, Children, Chapter 3109.04(B) (1): "When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children. In determining the child's best interest for purposes of making its allocation of the parental rights and responsibilities for the care of the child and for purposes

### III. METHODS OF INCORPORATING CHILD VOICE AND PARTICIPATION

State law, practice rules, and local practice provide for the child's wishes to be heard in family separation cases in a number of ways, including: Court Testimony; *In Camera* Interview; Expert Evaluation; Appointment of a Child Advocate; and Child-Inclusive Mediation.

#### A. *Court Testimony*

It is rare for children to testify in open court in family separation proceedings, although, they may be required to do so if brought in to present factual testimony requiring cross-examination, for example, when a child witnesses a parent committing a crime. Judges and advocates strenuously avoid open-court child testimony, and parents who seek to have children testify in court are typically judged quite negatively for attempting to bring their children in as witnesses. This can place parents and child advocates in a bind when attempting to raise safety concerns and violations of court orders arising out of parental behavior that is witnessed only by a child.

Take, for example, a case in which a parent violates a court's order prohibiting drinking and driving with a child. The child, age nine, tells his father that his mother took him to a bar and left him standing outside while she went in for forty-five minutes. When the mother came out, she smelled "bad," like medicine, and drove home the wrong way, going really fast and then really slow. The child was frightened and did not know what to do. Thankfully, they made it home safely.

In some jurisdictions, the child's statement to his father might be admissible via the father's testimony, by way of a hearsay exception. In others, the child might be permitted to tell the judge what happened somewhat privately, in chambers. In some jurisdictions, however, the only way the evidence could come in would be via the child's direct testimony. But, many parents would forgo bringing

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of resolving any issues related to the making of that allocation, the court, in its discretion, may and, upon the request of either party, shall interview in chambers any or all of the involved children regarding their wishes and concerns with respect to the allocation."

the child to court, rather than risk emotional harm to the child from the court experience, not to mention the ire of the court.

### 1. Advantages of Court Testimony

A clear advantage of child testimony is the ability of the child witness to protect him or herself from future endangerment by exposing court order violations and dangerous parental activity that the child has witnessed directly. Too often, absent the child's testimony, a parent alleging a violation of a court order or a dangerous activity by the other parent has no witness to support his or her allegations. Child testimony may at times be the only way for a court to enforce its orders and protect children from future harm.

### 2. Disadvantages of Court Testimony

Child testimony in family separation cases runs the risk of pitting children against one or even both of their parents. In open-court testimony, children may be required to resolve factual disputes against one of their parents. Children may even be cross examined by a parent or parent's counsel, a potentially traumatic experience. Often, the parental alignments expressed and the facts alleged by children in open-court testimony are dramatic and permanent: once stated on the record, they are hard for parents and children to forget, and hard to forgive. They may have life-long impact on family relationships. Moreover, the younger the child is, the more likely the child will be less developmentally prepared to testify. The child may not have the emotional resources to understand and manage the court room process itself, let alone the aftermath of the testimony.

## B. *In Camera* Interview

Most jurisdictions provide for children to be interviewed regarding their wishes in judicial chambers, outside the presence of their parents and, often, their parents' counsel.<sup>6</sup> These interviews are discretionary in most states, meaning it is entirely up to a judge whether or not to meet with the child. During the *in camera* inter-

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<sup>6</sup> While in some case, parents or counsel may be present, many judges will refuse to interview children in the presence of a parent or a parents' counsel, and forgo an interview altogether, rather than place the child in the position of describing the child's wishes in the presence of a parent or a parent's agent. In some states, like Ohio, the court has the authority to limit the participants allowed in the child interview. OHIO REV. CODE § 3109.04(C) (2011).

view, a child's advocate, if there is one, will usually be present, as will a court reporter. Transcripts of the interviews are often required, but may be withheld until after the conclusion of the case at trial. In Illinois, for example, the court must provide a transcript for appellate purposes.<sup>7</sup>

While the purpose of the *in camera* interview is for the child to express the child's wishes regarding parenting time and decision-making, interviews quite naturally move from what children want to why they want it—this frequently involves factual bases that may or may not be aired in the courtroom. A child may explain, for example, that she prefers to reside with her mother because her father spends all of his evenings out and does not help her with homework. Clearly, the child has gone beyond expressing wishes to alleging relevant facts about parental involvement.

### 1. Advantages of the *In Camera* Interview

Some facts raised by the child during the *in camera* may be addressed by the other witnesses or evidence presented at trial; some may not. Whether the child is raising new facts or resolving factual disputes raised previously—one parent says the other parent frequently leaves the child alone, the other parent denies it, and the child in chambers affirms it, for example—a child's factual presentation can pack a wallop with a court, impacting the court's opinions about the parties and its decisions in the case.

The *in camera* interview is a powerful way for children to influence family separation cases. Even where factual issues are not at stake, during the *in camera*, the child transitions from an abstract possession of the child's parents to someone the judge gets to know a little bit and care for in a deeper way after hearing the child express the child's desires, needs, and fears. This experience can be transformative for the judge and for the child.

### 2. Disadvantages of the *In Camera* Interview

For parent advocates, the child interview presents a potential violation of parental due process because parents are not given the opportunity to cross examine the child on facts alleged, nor told what the child said, preventing them from refuting or even commenting on the child's points. To address this concern, some courts provide a summary of the child's statements and allow argument

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<sup>7</sup> 750 ILL. COMP. STAT. ANN. 5/604.10 (a) (West 2016): "The entire interview shall be recorded by a court reporter. The transcript of the interview shall be filed under seal and released only upon order of the court."

thereon. Others limit their inquiries to questions presented by the parties and shared among all counsel, so that the parties have a sense of what may be covered in the interview. Many judges, while noting child wishes in their findings, will avoid overtly relying upon a child's factual allegations made in chambers. Nonetheless, the balance drawn by the *in camera* process—an attempt at reconciling parental due process against the need to hear from children in a less threatening environment—is wholly unacceptable to many parent advocates.

Many child advocates and other professionals working with children decry the *in camera* process too, concerned about the promotion of parental manipulation and pressure, inappropriate empowerment of a child in the family dynamic, the burden on the child if the child's wishes are "followed," and the child's profound disappointment and frustration if the child's wishes are not "followed." Some of these concerns can be addressed via judicial training on interviewing children, better sequencing of the child interview to avoid the child having the ultimate word, and education and preparation of the family and the child for the interview process. Still, the *in camera* interview remains a controversial tool for eliciting child wishes.

### C. *Expert Evaluation*

A significantly less direct way to incorporate a child's voice at the litigation stage in family disputes is through the involvement of court-appointed expert evaluators who assist in determining the allocation of decision making and parenting time, otherwise known as custody. In some cases, the evaluator is a neutral mental health professional selected by the court; in others, the evaluator may be hired by one of the parents. In some cases, three evaluations or even more are done, commissioned by the court and the parents.

While practices vary, court-appointed evaluators typically meet with each of the parents, the children, and significant collaterals, such as new partners and involved family members. Sometimes multiple meetings occur. Evaluators also review significant medical, educational, and mental health records. Depending upon professional licensing, they may conduct psychological testing or mental status examinations. They may visit the children in each of the parents' homes. They almost always observe parent-child interaction. After these activities and case review, evaluators draft

reports for the courts incorporating recommendations on the allocation of parental decision-making and parenting time with children. The reports often include children's reported wishes and concerns, as well as any allegations the children may make regarding parental behavior. As with parents, children are told by the expert that the evaluation is not confidential and that their statements may be included in the expert's report.<sup>8</sup>

### 1. Advantages of the Expert Evaluation

Many mental health professionals, child advocates, attorneys for parents, and judges believe that the expert evaluation is the least detrimental way to incorporate the child's voice into the contested family separation case. The evaluator may well have significant training in understanding and interviewing children and families, helping children to feel comfortable and safe, drawing their feelings out without making them feel responsible for family outcomes, getting beyond shallow expressions of wishes to gain a deeper understanding of children's relationships and place in the family, determining the reliability of child statements, and detecting parental manipulation.<sup>9</sup>

### 2. Disadvantages of the Expert Evaluation

The main drawbacks to expert evaluation are time and money. An in-depth evaluation may take months to complete. In the meantime, the court may need to make decisions regarding children's schedules and living arrangements. When a parent is displeased with an evaluation, many more months may go by while additional experts are hired and depositions are taken before cases can go to trial. In those situations, a child may be required to have lengthy meetings with several experts. Trials with dueling experts may go on for months, exacting a toll on the family, the judge, and the court system. During the delay, children suffer from uncertainty about their family arrangements and the ongoing high tension between their parents. Even where a single evaluation might be the agreed best method for resolving a case, many families cannot afford to pay for evaluations that can cost between five and twenty-five thousand dollars to complete. While some families

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<sup>8</sup> *Practice Guidelines and Standards*, ASS'N FAM. & CONCILIATION CTS., <http://www.afccenet.org/Resource-Center/Practice-Guidelines-and-Standards> (last visited Jan. 15, 2016).

<sup>9</sup> *Id.* at Part 1.

may qualify for lower cost or even free evaluations, these resources are few and far between.<sup>10</sup>

Finally, some advocates warn that even neutral expert evaluations simply reflect the personal opinions of evaluators, backed up by supporting data and exchanged for judicial discretion. If the evaluator is highly trained, current in his or her knowledge, and unbiased, the evaluation should have a positive impact on the family. Nonetheless, the weight of a child's wishes in an expert evaluation will be decided by the evaluator, and may or may not be fully considered or explained, depending upon the evaluator's perspective and practice.

#### D. *Appointment of Child's Counsel*

Some say that the appointment of counsel for children in a family separation proceeding elevates the child's standing in the case, giving the child the benefits of party status. While it may be true that the child is genuinely empowered by the appointment of a child advocate in some situations, it may also be true that the appointment of a child advocate simply adds one more adult's opinion into the mix.

It is impossible to consider the benefits and drawbacks of appointing counsel for children in family separation cases without examining the many models of child advocacy. In some jurisdictions, such as New York, the child is given a lawyer who is generally required to advocate for the child's objectives in the litigation.<sup>11</sup> In

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<sup>10</sup> Some jurisdictions have allocated resources to provide for family evaluations. In Cook County, Illinois, for example, families whose combined yearly incomes fall below \$50,000 per year, qualify for free forensic evaluations provided by county-employed professionals. All families, regardless of income, may be referred for free home studies conducted by county-employed caseworkers. Cook County also has a program of Emergency Intervention, otherwise known as a Brief Focused Assessment. In Emergency Intervention, families, regardless of income, are referred for meetings with county-employed mediators, who speak with all family members and provide guidance to the court on emergency matters of child safety. All of these programs incorporate child interviews.

<sup>11</sup> "This part establishes a system of attorneys for children who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court." Merrill Sobie *Supplementary Practice Commentaries: The Role of the Attorney for the Child*, in N.Y. Fam. Ct. Act § 241 (McKinney 2015).

The attorney for the child ("AFC") is, by definition, an advocate whose position is determined by the client's interests. When the client possesses the requisite capacity to guide counsel, the AFC assumes the traditional attorney-client role in determining and advocating the child's interests. When the child client lacks the needed capacity, the AFC must determine her client's interests (or "best interests") independently and advocate accordingly. However, the determina-



others, the child is given a guardian *ad litem*, whose job is to seek the child's best interest as determined by the guardian *ad litem* herself. A guardian *ad litem* should consider the child's wishes, and advise the court of the child's wishes, but need not follow the child's wishes. A guardian *ad litem* in many jurisdictions is an investigator and a witness, and does not act formally as counsel for the child. In Illinois and several other states, an amalgamated role, often known as the best interest lawyer, provides for the advocate to have a confidential relationship with his or her client and to advocate formally for best interests rather than client wishes.<sup>12</sup> Thus, a child advocate may empower his or her own client or fight against the wishes of his or her own client.

Given the wide variety of child advocacy models, it cannot be said fairly that the appointment of a child advocate always gives the child a voice in the litigation. Sometimes it does, and sometimes it forcefully does not.

Since *In re Gault* established the right of counsel for children in delinquency proceedings,<sup>13</sup> the child advocacy community has struggled to define the role of child counsel. Are we to advocate for children's best interests or their expressed wishes? If we follow best interests, rather than client wishes, then how do we determine best interests, and where does the child's own perspective fit in the best interest determination?

While there is wide agreement favoring client-directed advocacy in delinquency proceedings, which pit youth directly against the state, there is no such consensus on the role of counsel for children in child protection and family separation matters. This indecision reflects the larger policy struggle over the propriety of

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tion to depart from the standard attorney-client relationship should not be cavalier or based on only partial information and analysis.

<sup>12</sup> 750 ILL. COMP. STAT. ANN. 5/506(3) (West 2016): "The child representative shall advocate what the child representative finds to be in the best interests of the child after reviewing the facts and circumstances of the case . . . . The child representative shall have the same authority and obligation to participate in the litigation as does an attorney for a party and shall possess all the powers of investigation as does a guardian ad litem. The child representative shall consider, but not be bound by, the expressed wishes of the child . . . . The child representative shall not disclose confidential communications made by the child, except as required by law or by the Rules of Professional Conduct. The child representative shall not render an opinion, recommendation, or report to the court and shall not be called as a witness, but shall offer evidence-based legal arguments."

<sup>13</sup> Application of *Gault*, 387 U.S. 1, 1 (1967): "Juvenile charged with delinquency needs assistance of counsel to cope with problems of law, to make skilled inquiry into facts, and to insist upon regularity of proceedings, and to ascertain whether he has defense and to prepare and submit it." "There is no material difference, with respect to right to counsel, between adult and juvenile proceedings in which adjudication of delinquency is sought." *Id.* at 35.

involving and empowering children in cases that directly concern their care and welfare but also involve—sometimes exclusively—sensitive adult issues, such as drug and alcohol addiction, sexual and physical abuse, and significant illness. Many child advocates want to protect children from finding out upsetting things about their parents.

An added concern, particularly in the family separation realm, is that children may be pressured by parents to assert false or manipulated allegiances, or even to allege untrue parental misconduct. Some child advocates work to keep children apart from the proceedings in order to decrease the likelihood of parental pressure. These advocates may prefer the best interest standard because it permits them to veer away from client “wishes” believed to be the result of parental pressure rather than genuine child feelings. Others believe the best interest standard provides an important buffer, protecting the child from involvement in the family dispute: “I, the child advocate, have investigated and determined best interests myself, therefore the positions that I take in the case cannot be blamed on the child. Blame me alone if you’re upset about it.” This rationale for the best interest standard is an important tool where the child tells the child advocate what the child wishes and why, but asks the child advocate to keep the child’s wishes confidential.

On the other hand, if the proceeding is at some point all about the child’s disposition and care plan—where the child is going to live and with whom, and how the child’s schedule will be organized—then how can we refuse to include the child in determining some of the most important aspects of the child’s life? Many child advocates focus on fairness to the child, respecting the child’s right to express the life the child wants and needs, even if the child is not the final decision-maker. These advocates, acknowledging that they may or may not know what is best for a child, and that the child may well know better, prefer advocating for client wishes. Others may prefer the express wishes model even when they strenuously believe the child’s wishes may not be in the child’s best interests, knowing that the judge will make decisions after hearing from the parents and the child, and the judge will consider the child’s wishes in the larger context of the case.<sup>14</sup>

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<sup>14</sup> Exacerbating the debate over child voice in family separation cases are the conflicting cries of parents. Invariably, the parent who trusts that the child will take up his or her side wants the child’s direct voice to be heard and stands up for the child’s right to participate, insisting that the child has a right to a say in the outcome. The parent, on the other hand, who fears that the

### 1. Advantages of the Appointment of Child's Counsel

There are several advantages to having counsel for children in family disputes. Children may benefit from having their own advocates to explain the court proceedings to them, including possible case outcomes. Child's counsel may share the child's perspective with parents, counsel, and/or the court if the child wants those views shared. Child's counsel may informally help warring parents settle disputes and refocus attention on the child's needs, and may refer the family for much-needed mental health and educational services. Finally, child's counsel may push the case forward in accordance with the child's sense of time and advocate for the child's wishes and/or the child's best interests in settlement processes and litigation.

### 2. Disadvantages of the Appointment of Child Counsel

The appointment of child counsel carries the risk of over-empowering and overwhelming children. Some children prefer not to participate in family disputes. When child advocates do not sensitively ascertain a child's capacity and desire to be involved in a family separation case, and respect the child's desire not to participate, they may harm the child by promoting the child's involvement in family disputes or sharing sensitive legal or family information with the child that the child is not prepared to hear.

The appointment of child counsel also fails when it squelches child participation. Unfortunately, our collective ambivalence about child participation in family separation cases has led to many systems that require child representation while simultaneously declining to clarify the role and duties of the child advocate. Vague systems of child advocacy ring with the righteousness of children's centrality and their protection, while quietly permitting adults to silence children's voices, leaving us with the mere tokenism of child voice.<sup>15</sup>

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child will favor the other, stands up for the child's protection against involvement in the proceeding, even labeling the participation "abusive."

<sup>15</sup> Special Issue, *Ethical Issues in the Legal Representation of Children*, 64 *FORDHAM L. REV.* 1301, 1302 (1996); *Special Issue on Legal Representation of Children*, 6 *NEV. L.J.* 571 (2006).

E. *Child-Inclusive Mediation*

Child-inclusive mediation brings the child into the process of family dispute resolution, if in indirect fashion. Models for including children in the mediation process, unlike family therapy, do not place the child in the room with the child's mediating parents. In one model, for example, a child specialist is engaged in the process to interview the child and gain an understanding of the child's developmental level, emotional needs, and expressed wishes. The child specialist then participates in the mediation with the parents, bringing the child's perspective on child-related issues to bear upon the mediation session without subjecting the child to the adult session or requiring the parents to modify the session due to the child's presence.<sup>16</sup>

In Cook County, Illinois, which covers the City of Chicago and surrounding suburbs, mediation is mandatory for parents who do not agree on arrangements for decision making and parenting time.<sup>17</sup> In the free mediation program utilized by thousands of litigants annually, parents are required to bring children in to be interviewed, separate from their parents. The same mediator who works with the parents meets with the child. While practice varies to a degree, in general the mediator's role with respect to the child is similar to the role of the child specialist described above. The mediator meets with the child to learn about the child's development, knowledge of the proceeding, needs and wishes. If the child is aware of the family separation and the disputed issues and has wishes or needs that the child wants the parents to take into consideration, or statements the child wishes to make, the mediator will bring those points back to the parents during their mediation session. The mediator may also raise concerns with parents about the child's developmental needs or management of the family separ-

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<sup>16</sup> Jennifer McIntosh et al., *Child-Focused and Child-Inclusive Mediation: A Comparative Study of Outcomes*, 10 J. FAM. STUD. 87 (2004).

<sup>17</sup> 13.4 Pre-Trial Phase, STATE OF ILLINOIS CIR. CT. COOK COUNTY, <http://www.cookcountycourt.org/Manage/RuleoftheCourt/ReadRule/tabid/73/ArticleId/2277/-13-4-Pre-Trial-Phase.aspx> (last visited Jan. 17, 2016). Mediation is required pursuant to Illinois Supreme Court Rule for parents who are in conflict over allocation of parental responsibilities, relocation, and other non-child support issues related to their children. *Id.* at (e). In Cook County, the parents will be referred to Family Mediation Services for mediation if they cannot agree to a mediator. *Mediation for Domestic Violence Relations Cases in Cook County Illinois*, STATE OF ILLINOIS CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUTTHECOURT/CountyDepartment/DomesticRelationsDivision/Mediation.aspx> (last visited Jan. 17, 2016); ILCS S. Ct. Rule 905 (2015).

ration. For example, if the child shows significant signs of depression during the interview, the mediator may raise a concern about depression during the parents' mediation session and suggest that they consider the need for evaluation and/or treatment.

### 1. Advantages of Child-Inclusive Mediation

Child-inclusive mediation provides the children of separating families an opportunity to be heard in an environment much less threatening than a courtroom. It is, moreover, an essential opportunity for disputing parents to focus on child needs and wishes. The financial and emotional savings to families from successful mediation, obviating the need for costly, lengthy, and profoundly negative trials may well merit the additional cost of including children in the mediation process. Similarly, government resources might be better spent on these processes, freeing judicial officers to hear and determine only the most intractable cases. Even in cases that do not settle, children benefit from child-inclusive mediation process, knowing that their parents cared about how they felt and tried to settle matters peacefully.

Carefully designed child-inclusive dispute resolution programs, carried out by well-trained professionals, provide children the chance to participate constructively and gain answers to their questions about what is going on with the family. In child-inclusive mediation, moreover, adults have the opportunity to model positive and constructive dispute resolution for their children. They may explain:

We have different ideas about what will be best for you, and we are trying to work them out. We want to hear from you, if you want to share your feelings. We care about what you have to say. We also respect your decision not to participate if you choose. Either way, we as adults take responsibility for the final decisions regarding our family.

### 2. Disadvantages of Child-Inclusive Mediation

Clearly, where government or research funding is not provided, child-inclusive mediation adds an extra cost for mediating parents when a child specialist participates. Even in low-cost or free programs where it is typical to limit the number of mediation sessions per family, the addition of a single child interview into the process takes up mediator time, pulls parents from work an addi-

tional day, and slows down the process, delaying mediation assignment for other families.<sup>18</sup>

#### IV. DISCUSSION

Those opposing child participation in family separation cases raise legitimate concerns about the risks to children of involving them too much in parental disputes. But, in addition to running afoul of international guidance, state law, and local rule, we run the risk of poorer case outcomes when children's voices are quieted. In some cases, the child is the only person who can testify to an event that is highly relevant to the child's safety and wellbeing. Without the child's voice, the child may be left unprotected. In other cases, the child's unique perspective may shift the detailed outcomes of a close case to better meet the child's needs. Finally, it is arguably unjust for a system of family justice to determine the most important aspects of a child's life without getting hearing from the child. The child will have to live with the decisions made by the child's parents or the court. The child should be a necessary party.

Those opposed to child inclusion argue that the child's parents are in the best position to consider the child's input and take up the

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<sup>18</sup> Two additional processes that may be inclusive of child voice and participation are family counseling and parenting coordination. While these processes are beyond the author's expertise, they bear mention.

Family counseling, while most often begun voluntarily by families, may also be ordered or "highly recommended" in family separation cases. While a variety of treatment methodologies are utilized, children may benefit in family counseling from the opportunity to express their concerns in a safe environment under the guidance of a neutral professional. In counseling, children may raise a number of issues arising in the family separation, from schedules and parenting time, to managing transitions from one home to another, to reconciling different rules from home to home, to feelings about parents' new partners. While family counseling is not a dispute resolution process *per se*, it can be a meaningful way for children to express their wishes and feelings and participate in ongoing family decisions, large and small.

Parenting coordination, a process in which a mental health or legal professional assists parents in resolving ongoing disputes after the broad rules governing decision-making and parenting time have been resolved by the parties or the court. By agreement of the parties in advance, parenting coordinators may even be given the authority to break parental ties over issues such as scheduling changes and medical care. Many parenting coordinators involve the child in their processes, indirectly by getting to know the child and understand the child's needs, wishes, and perspective about the family situation, or even directly, by incorporating discussions with the child into the decision-making process. The benefit of having a professional to assist the family while keeping the child's interest central is generally only available to families with the means to pay for parenting coordination, sometimes for many years.

child's best interests. The parents should make the decisions, just as they would in an intact family, without the infringement on their parental rights by judges, experts, and child advocates. This argument ignores the fact that parents who agree in family separation cases almost always receive the court's stamp of approval and are not required to go through mediation or evaluation. Their children are not typically provided counsel. Only when parents do not agree are the courts required to finalize decision making and parenting time arrangements. The issue, thus, is whether courts, evaluators, child advocates, and mediators should include child participation and voice in family separation proceedings that only exist because parents are at odds.

Moreover, excluding children from participation in family dispute resolution is inconsistent with their life experience. Intact family decisions are rarely made by parents in a vacuum, absent the consideration of child voice and child wishes. On one far end of the spectrum, an authoritarian parent or parents make all major decisions for the child, from study hours to permissible activities to bed times to screen time to selection of friends and foods the child may eat. In many more families, a parent or parents make the ultimate decisions after considering the child's views. In these families, children have the freedom to express their wishes and negotiate their liberties, while parents set boundaries and limit available options. On the other end of the spectrum, children are empowered to make most of the choices in their lives, with more or less parental guidance.

While the benefits and drawbacks of parenting along the spectrum of highly directive to wholly permissive are debatable, it is unreasonable to support practices that ignore children's regular exposure to family problems and their agency in resolving them. Children in most families know what is going on when family separation is happening: if nothing else, their living arrangements are changing. Their parents may be discussing the case with them, either in answer to their questions or because they seek a child's understanding or support. Their parents may be discussing the case with others; children regularly listen in and successfully overhear these adult discussions. Children read their parents' legal documents. Children open their parents' email accounts, reading everything from nasty parental exchanges to lawyer-client communication to settlement proposals.<sup>19</sup> Given children's interest

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<sup>19</sup> Before judging children too harshly, adults must acknowledge that it is human nature to seek out all relevant information when life arrangements are at stake. Parents too read their

and exposure, it is pretense to justify children's exclusion from family separation cases in furtherance of their protection from conflict that they already know about and live through on a daily basis at home.

In intact families, children regularly assert their wishes, negotiate their care, push parental boundaries, and argue on their own behalf. Younger children may kick and scream, children in the middle years may plead for justice, and older children may vote with their feet, simply refusing to follow parental directives. But at almost every age, and in almost every family, children are seated at the family negotiation table in one way or another. Even infants expressing attachment preferences will often get their way, to calm the baby down. In this context, excluding children from family separation conflict resolution disempowers them, taking away from them a participatory role they once had. This is a loss, a frustration, and an injustice for many children, exacerbating the pain and alienation of family separation: my family has broken apart and suddenly no one will listen to me anymore. My parents are so angry that I've become invisible to them.<sup>20</sup> We need to consider children's day-to-day reality when considering the risks and harms of participation, as well as the risks and harms of exclusion.

## V. CONCLUSION

All methods of including child voice in family separation dispute resolution require careful case-by-case planning. All, when utilized, must be carried out with great care by trained mental health specialists, lawyers, child advocates, and judges. Children must be prepared for participation. They must be helped to understand that while their views genuinely matter, they are not making the family decisions, and they are not responsible for family outcomes. After being oriented, children who wish to be heard should be provided that opportunity in some form, while making sure that they not be overwhelmed by involvement at every stage—children

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children's emails and social media posts. Moreover, given the ability of children to manipulate technology, which far surpasses that of their parents, much of the material children find, while perhaps inappropriate for their eyes, can be viewed as an attractive nuisance.

<sup>20</sup> Often children do not know that their parents have in fact been ordered by the courts not to speak with them about family separation issues. While courts may not intend to bar appropriate responsiveness to children's questions and concerns, parents may fear and avoid any discussion whatsoever, lest they be held in violation of a court order or viewed negatively for dragging the child in the middle.



do not need to have counsel, participate in evaluations, speak with judges, and participate in family mediation. Each child's participation should be carefully determined with the goal of meaningful participation. Finally, children who do not wish to participate should not be forced to do so—their desire to stay out of family disputes should be respected.

With great care, the inclusion of child voice in family separation cases can be a positive experience for children and parents, leading to family outcomes that better incorporate children's wishes and needs. Child-inclusive mediation, in particular, holds great promise for children and their families. It should be expanded and its various models comparatively studied. Consideration should also be given to models in which older children directly participate with parents, carefully and skillfully guided by trained professionals, on issues directly impacting them.

Children learn most about how to resolve the challenges and disputes they face in life by watching the adults around them. In order to best help children and their families, adults must take hold of the opportunity to teach children positive dispute resolution and to listen to what children have learned.

