Guidelines for Judicial Interviews and Meetings with Children in Custody & Access Cases in Ontario

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*Justice Parent was appointed to the Ontario Court of Justice on January 23, 2013. Prior to this date, Justice Parent was a committee member from Ottawa.

Although all members of the Committee participated in the development and drafting of this paper, and a majority of the committee supports all of the recommendations and positions, each member has his or her own perspective on the issues addressed, which are not necessarily reflected in the final version of the document.

The Committee also consulted with several members of the judiciary at both the Ontario Court of Justice, the Superior Court of Justice and the Superior Court of Justice Family Branch. The judges are noted herein as having been so consulted and not as Committee members. Each judge has his or her own view and does not necessarily endorse any particular conclusion in this report.

We are grateful to all the members of the committee for their time and efforts, to the judges who served as consultants to the committee, and to the members of the legal and mental health professional communities who attended the Town Hall consultation meetings, some of whom also contributed by way of written submissions.

We are, of course, very grateful to both the Association of Family and Conciliation Courts, Ontario Chapter, and to The Advocates' Society for co-sponsoring this project which we hope will assist judges, lawyers and mental health professionals to consider how judges might best approach interactions with children in certain high conflict custody and access cases in Ontario.

Dan Goldberg & Martha McCarthy
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Guidelines for Judicial Interviews and Meetings with Children in Custody & Access Cases

Background

In the spring of 2011, The Advocates' Society and Association of Family and Conciliation Courts - Ontario agreed to sponsor a joint committee to examine the issue of judicial interviews and meetings with children in custody and access cases and to create a set of considerations and guidelines about them. A multi-disciplinary committee was established with members from the legal and mental health fields in Ontario. Several judges served as consultants to the Committee. Town Hall consultations were held in eight locations in Ontario in November and December 2011, involving the same series of open-ended questions about whether, when and how judges should meet with children. The meetings were well-attended by lawyers, mental health professionals and judges, with over 225 professionals attending in total. The committee summarized and considered the feedback obtained, conducted research, held discussions, and divided into sub-committees to address psychological, legal and social issues, along with many practical considerations and concerns. This paper represents the general consensus of the committee and a summary of its recommendations. It begins with a brief summary of the academic research, provides suggested Guidelines and concludes with a list of suggested resources. It is hoped that the Guidelines will help judges, counsel, children's lawyers, mental health professionals, and families to make informed, child-focused decisions about judicial interactions with children.

Overview of the Academic Research

The following is a brief overview of the academic research on judicial interviews with children post-separation.

Views of Professionals

Few studies have considered the professional views of judicial interviews, and therefore guidance on the topic is somewhat limited. Felner (1985) interviewed 74 attorneys and 43 judges in order to solicit information about their attitudes and practices relevant to the role of children in the custody litigation process. A number of factors (e.g., age, emotional and intellectual maturity) were found to be related to the extent to which the child's wishes were considered in the litigation process. However, results indicated a lack of widespread support for routine representation of children in the custody process. In Cashmore and Bussey (1996), 50 judges were asked via interview or questionnaire about their beliefs, concerns, and practices related to child witnesses. There was considerable variability in their views about the competence of child witnesses and the need for special protective measures in court for these witnesses. Children were perceived as highly suggestible, susceptible to the influence of others and prone to fantasy. Crosby-Currie (1996) investigated the experiences and practices of 160 family law attorneys, 105 trial judges, and 157 mental health professionals, regarding the involvement of children in contested custody cases using a hypothetical case description. The level and manner of children's involvement were linearly related to a child's age. Depending on the court district and the judicial preferences, differences were found in whether children's wishes were sought and in what manner. In addition, characteristics of interviews conducted by mental health professionals and judges, such as length, making of records, and the presence of other individuals, differed significantly.

Views of Children

In a recent qualitative synthesis, Birnbaum and Saini (2012a) reviewed qualitative studies of methods for hearing children's views and preferences. Based on 35 qualitative studies involving 1,325 children from 11 countries, findings reveal that children generally want to be engaged in the decision-making process regarding custody and access, though they generally do not want to make the final decisions. Methods of "hearing children's voices" include sharing their views and experiences through a lawyer, mental health professional or in a judicial interview

(Birnbaum et al., 2011; Douglas et al., 2006; Graham et al., 2009; Hill et al., 2002; Morag et al., 2012; Reeves, 2008). Birnbaum and Saini (2012b) point out that there are many assumptions about who is best to speak to children during custody and access disputes and that the empirical evidence to date demonstrates that there is no one preferred method for children being heard (Birnbaum et al., 2011; Morag et al., 2012).

Results of the qualitative synthesis regarding the children's experiences of speaking with a judge are mixed. Reeves (2008) found that children were split regarding their perspectives on having an interview with the judge. Likewise, Parkinson et al. (2007) found that children and parents had mixed views but most children said that it should be an option, even if they did not want it for themselves. Parkinson et al. (2007) found that children particularly wanted to speak with a judge in contested cases, where children expressed that the judge would be the best person to talk to if the parents were in severe conflict.

A recent qualitative study by Birnbaum et al. (2011), the only empirical study in Ontario, found that many children and young adults who had been involved in litigation regretted that they were not given the option of speaking to the judge, and all felt that children should have this option.

Table: Pros and cons of children speaking with a judge

Reasons for speaking with the judge	**Reasons for not speaking with the judge**
To allow for children's views to be heard by the individual who is responsible for decision making	Children's feeling that it is inappropriate or unnecessary (especially in uncontested cases)
To facilitate better decision making	Children's preference to deal with family matters within the family outside the court process
For children to benefit from sharing their views in private and in confidence	Children's feelings that being interviewed by a judge would be too scary or too formal
To make sure judges do not misinterpret children's wishes	Being interviewed by a judge should be a last resort
The importance of providing input and being acknowledged	To avoid having to choose between parents who are in conflict

Summary

Until recently, judicial interviews with children in contested parenting proceedings have been an uncommon practice in most common law jurisdictions. However, interest and experience in the practice is increasing in a number of jurisdictions, including New Zealand and England (Caldwell, 2011). Several other countries also have some experience with judicial interviews.

While there has been some debate about the merits and risks of such a practice among professionals and academic commentators, there is limited empirical evidence regarding the views of children and parents on judicial interviews. The majority of the studies are based on qualitative designs, which provide a rich description of views but cannot be generalized beyond the sample of children included in these studies. The included studies suggest that there is a need to consider a variety of contextual factors both at the child's level (age, maturity, development, involvement in the conflict) and at the family law level (whether the case is contested, the degree of conflict between the parents, the type of interview by the judge), and the resources available.

Guidelines for Judicial Interviews and Meetings with Children

I. Preamble

There are a variety of methods that can be used to inform children about, and give them a voice in, the custody and access proceedings. In many cases, the child's voice will be heard through a custody assessment by a mental health professional or through representation by child's counsel. In certain circumstances, judicial interviews and judicial meetings with children should be considered as another valuable method of involvement.

The following Guidelines set out factors and circumstances that should inform decision-making about judicial interviews and meetings.

II. General Considerations

1. The Guidelines divide judicial interaction with children into two categories: "judicial interviews" and "judicial meetings:"

    a. **Interviews**: intended to gather information regarding the views and preferences of a child to be considered in the determination of a legal issue.

    b. **Meetings**: intended for a purpose other than eliciting the views and preferences of a child, including but not limited to explaining a court order, the legal process, an assessment or the role of child's counsel.

These categories of judicial interaction with children – meetings and interviews – are not always discrete. A judge's interaction with a child may involve both practices; one type of interaction may, intentionally or unintentionally, evolve into another. However, the categories are useful in the dialogue about judicial interactions with children and, in some circumstances, different considerations and practices are engaged depending on whether the Court is conducting an interview or a meeting.

2. The primary purpose of a meeting or interview should <u>not</u> be to gather *evidence*. However, as noted in Paragraph 1(a) above, gathering *information* about a child's views and preferences is one of the functions of an interview. It is important for judges conducting interviews to be aware of this distinction.

3. Children counsel and assessors should exercise their professional judgment in considering whether or not to offer the child the possibility of meeting with a judge. If a child wishes to speak with a judge, it must be explained to the child that regardless of his or her wishes, a meeting or interview may not occur. It must further be explained that if a judge does meet with or

interview the child, any views and preferences they express, while important, will not be determinative.

A minority of the committee holds the view that there should be a rebuttable presumption that children's counsel and assessors should offer the child the possibility of meeting with a judge.

4. Judges should be aware that:

   a. Many children will feel loyalty binds or a sense of guilt or responsibility about being asked to express their preferences between their parents;

   b. A single interview with a child may not yield accurate views and preferences; and

   c. Judicial interviews and meetings with children are not a substitute for children's counsel and assessors.

5. Judges need to be vigilant of their role as an impartial trier of fact in the adversarial system and avoid becoming a "participant" in the litigation.

II. Guidelines for the Decision to Conduct an Interview or Meeting

6. Factors that may suggest that an **interview** is appropriate include:

   a. The dispute involves a single issue, other than the determination of custody or access, such as the selection of a particular school a child may wish to attend;

   b. The child's age or level of development suggests that he or she possesses a sufficient level of maturity;

c. The child's views and preferences will likely play a significant role in the court's determination of the issues before it;

d. There is no independent evidence of the child's views and preferences;

e. The court has balanced the expected benefits of the interview against the risk that the child may be adversely affected and is satisfied, on balance, that the interview is appropriate;

f. A child has requested an interview by a judge;

g. Both parties consent to the child being interviewed by the judge;

h. There has been an assessment report or Children's Lawyer Report (CLR) which is over one year old or is otherwise outdated due to a material change in circumstances since the completion of the report.

7. Factors that may suggest that an **interview** is **not** appropriate include:

a. There has been an assessment report or CLR which has been completed within the past year, unless that report requests a judicial interview and there is no conflicting professional recommendation against such an interaction;

b. The child has independent legal representation obtained through the OCL or otherwise privately retained by the parties;

c. There is independent and reliable evidence available through an independent third party regarding a child's views and preferences;

d. The child's age or level of development suggests that he or she does not possess a sufficient level of maturity;

e. The court has balanced the expected benefits of the interview against the risk that the child may be adversely affected and is satisfied, on balance, that conducting the interview would be inappropriate;

f. One or both parties do not consent to a judicial interview of the child taking place;

g. There is evidence before the court that the child does not wish to be interviewed by a judge.

8. Factors that may suggest that a **meeting** is appropriate include:

a. The child would benefit from a judge describing or explaining court and /or ancillary processes;

b. The child would benefit from a judge describing or explaining a particular court order(s);

c. The child would benefit from a judge describing or explaining the court's expectation of compliance with court orders by the parties and/or the child;

d. A child has asked to meet the judge for purposes other than conveying his or her views and preferences regarding custody and access;

e. The Court has balanced the expected benefits of the meeting against the risk that the child may be adversely affected and is satisfied on balance that the meeting is appropriate;

f. Both parties consent to the child meeting with the judge;

g. A judge believes that meeting with the child for purposes other than ascertaining views and preferences will be of significant assistance towards the resolution of the case.

9. Factors that may suggest that a **meeting** is **not** appropriate include:

a. The Court has balanced the expected benefits of the meeting against the risk that the child may be adversely affected and is satisfied on balance that the meeting is inappropriate;

b. One or both parties do not consent to a judicial meeting with the child taking place;

c. There is evidence before the court that the child does not wish to meet with a judge.

10. An allegation of alienation, in and of itself, should not be a reason for a judge to agree to or decline an interview or meeting. Alienation may be a reason to discount the child's stated views and preferences. Both interviews and meetings can be effective in achieving compliance with Court orders. However, significant caution is recommended regarding the form and format of the interaction if alienation is alleged. Judicial interviews and meetings can exacerbate this already unstable environment if they are not well-timed and well-executed.

IV. Guidelines for the Execution of Judicial Interviews and Meetings

11. The Court should receive submissions from the parties about any proposed meeting or interview with a judge, including whether the parties believe it is appropriate, the proposed place of the meeting or interview, and any other considerations set out in these Guidelines about the details of the meeting or interview.

12. The Court should consider which location is optimal for the particular meeting or interview with the child, given the specific circumstances, with a focus on the comfort of the child. Interviewing or meeting with a child in open court is not normally recommended.

13. The Court should consider who will be present at the interview or meeting. Generally, only the child and the child's lawyer (if one has been appointed) or representative should be present. In some cases, the Court may wish to have a mental health professional present or another person who is supportive of the child. Save for extraordinary circumstances, the parties and their counsel should not be present.

14. Except in special circumstances, a judge should not meet with a child alone, but should have court staff or a court reporter present.

15. In matters involving siblings, different considerations may apply depending on whether an interview or meeting is proposed, and depending on the purpose of the interview or meeting. If an interview is proposed, siblings may first be met together, but thereafter they should normally be interviewed individually. If a meeting is proposed, a judge should consider whether meeting with the siblings separately or together will be most beneficial.

16. When considered appropriate, judicial interviews and meetings may take place at any time during a proceeding, including Case Conferences, Settlement Conferences, Motions and at the trial stage. However, the judge should give considerable weight to concerns about due process if the meeting or interview is occurring during a trial. While this factor may not result in a judge declining to conduct an interview or a meeting in appropriate circumstances, it may inform the procedural steps and safeguards, such as the availability of the transcript, the location and the format of the interview or meeting.

17. Both meetings and interviews should be recorded, except in special circumstances [see C.L.R.A. s. 64(3)]. The Court has the discretion to determine, and should consider in each case, how the recording will be used, and whether or when it will be released to the parties. However, except for special circumstances, the parties should normally be provided with a summary of what transpired at the interview or meeting, and, if appropriate, given an opportunity to make submissions or present evidence related to what transpired. At the beginning of the interview or meeting, the judge should explain to the child that their conversation will be recorded and advise who may have access to the recording or transcript, and whether parents will be provided with a summary of the information.

18. The judge should consider whether or not to wear robes. Both options may be effective choices depending on the level of maturity of the child and the purpose of the interaction.

19. The Court should plan the interview or meeting, including the development of a clear purpose for the interaction. If the judge is meeting siblings separately, this may favour the use of the same questions or discussion, modified for age-appropriateness, if necessary, in order to promote uniformity of results.

20. One of the concerns expressed by mental health professionals and children's counsel is that it may take more than one meeting or interview to sufficiently understand and obtain reliable information from a child. A related concern is that a child may say different things, depending on which parent brings him or her to the meeting or interview. A judge conducting an interview should be particularly alive to this concern. Having regard to Paragraph 5 above, judges conducting interviews and meetings should consider whether it would be advisable to see the child more than once and to provide directions about which parent should bring the child to each meeting.

21. If a child makes a disclosure about abuse or neglect during a judicial interview or meeting, the Court must ensure that a report of this disclosure is made to the relevant Children's Aid Society, pursuant to section 72 of the *Child and Family Services Act*.

22. Significant judicial education on the topics of both child development and interviewing skills specifically for children is of critical importance. A judge who has insufficient or no training, or is uncomfortable with the prospect of conducting a meeting or interview, should decline to do so.

V. Guidelines for Legislative Reform

23. The *Children's Law Reform Act* provides**:**

> **Child entitled to be heard**
> **64.** (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them. R.S.O. 1990, c. C.12, s. 64 (1).
>
> **Interview by court**
> (2) The court may interview the child to determine the views and preferences of the child. R.S.O. 1990, c. C.12, s. 64 (2).
>
> **Recording**
> (3) The interview shall be recorded. R.S.O. 1990, c. C.12, s. 64 (3).
>
> **Counsel**
> (4) The child is entitled to be advised by and to have his or her counsel, if any, present during the interview. R.S.O. 1990, c. C.12, s. 64 (4).

24. Consideration should be given to amending the legislation to explicitly provide for meetings – interaction by a judge with child/ren for a purpose other than "to determine the views and preferences of the child." However, with or without an amendment, the court has inherent jurisdiction to conduct meetings, as an aspect of maintaining control over the court process and making a determination about the best interests of the child.

25. In the absence of the desired amendment, proposed in paragraph 24 above, it is recommended that the same procedural safeguards be applied for both interviews and meetings, including the presence of child's counsel and a recording of the judicial interaction.

26. The *Family Law Rules* should also be amended to include a provision for a tick off box for meetings and interviews with children on some Court forms, such as the Case Conference Memorandum.

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